

RECENT ENGLISH PRACTICE CASES.

mechanically in the registry or in the office of the Court—to vary them in such a way as to carry out its own meaning, and where language has been used which is doubtful, to make it plain. I think that power is inherent in every Court. * * * Moreover, having regard to the orders made under the Judicature Act, I should myself have thought that it would very well have come under those orders. I recommend your Lordships not to make any variation of this order, but to affirm it as it stands, without prejudice to any such application to the Court below.”

TOKE v. ANDREWS.

Imp. Jud. Act, 1873, s. 24, sub-s. 3, 7; O. 19, r. 3, 19; O. 20, r. 1.—Ont. Jud. Act, s. 16, sub-s. 4, 8.—Rule Nos. 127, 149, 152.

Pleading—Counter-claim and set-off in reply.

Defendant having set-up in his defence by way of counter-claim matter arising since the commencement of the action, plaintiff may in his reply set up by way of counter-claim other matter arising since the commencement of the action, (but at the same time and out of the same transaction as the counter-claim of the defendant), although said matter arose before the delivery of the statement of defence.

[Feb. 23—L. R. 8 Q. B. D. 428.

The plaintiff in the above action issued a writ on August 26th to recover rent in arrear at midsummer, 1881, in respect of a tenancy about to determine on September 29th following. He did not, however, deliver any statement of claim until November 29th. Meanwhile the last quarter's rent became due, and the tenancy being determined, pursuant to notice to quit, the defendant became entitled to an out-going valuation, which he claimed by a counter-claim in his statement of defence. In answer to this counter-claim the plaintiff, “by way of set-off and counter claim,” claimed for his last quarter's rent and also a sum for title rentcharge left unpaid by the defendant on his quitting and necessarily paid by the plaintiff.

This was a motion to rescind an order of Williams, J., dismissing an application to strike out these matters alleged by the plaintiff in his reply, as embarrassing to the fair trial of the action within *Imp. O. 27, r. 1, (Ont. Rule No. 178).*

G. Denman, for the defendant.

R. V. Williams, for the plaintiff.

FIELD, J., delivered the judgment of the Court, which is lengthy, but divides itself conveniently into three parts.

The plaintiff did not take any objection to the defendant's pleadings, and therefore the Court observed that the only question for it to decide was whether the plaintiff was to be defeated in his action by matter of defence arising subsequently to the commencement of it, without the opportunity of setting up any defence he might have. As to this the Court said :—

(i.) As was clearly pointed out by Mr. Denman in his argument for the defendant, a counter-claim by a plaintiff in answer to a defendant's counter-claim is not mentioned or referred to in terms either in the *Jud. Act* or in *O. 20, r. 1, (Ont. Rule 152)*, or any other order framed under them. * * * But if there be no rule or order either in terms or by necessary implication prohibiting the bringing forward of the matter alleged by way of counter-claim, and the right to raise it is given to the party pleading by the *Jud. Act*, it will be impossible for us to hold that the plaintiff is not entitled on setting up such matter to claim relief within *s. 24, sub-s. 3, (Ont. s. 16, sub-s. 4)*; and if relief can be given upon it the pleading cannot be held to be embarrassing within the meaning of *O. 27, r. 1, (Ont. Rule 178)*. In order to see how this is we must look to the *Jud. Acts*. * * * Looking at this most beneficial provision (*Imp. s. 24, sub-s. 3 and 7, Ont. s. 16, sub-s. 4 and 8*), how is it possible to say that a matter upon which, if well founded, the plaintiff is clearly entitled to relief as against the defendant's counter-claim, is not within the very words and still more within the spirit of this large enactment, or to hold that such a matter is not properly brought forward at the only stage and in the only manner in which it can be raised.

(ii.) Further it is not, perhaps, altogether clear that the right to plead as the plaintiff has done is not within a fair construction of *O. 19, r. 3 (Ont. Rule 127)* by which alone the defendant has acquired the right he has exercised.

(iii.) There is another way of looking at it, pointed out by Mr. Vaughan Williams. The defendant's counter-claim in the present case, over-topping as it does the amount of the plaintiff's claim, is in substance a cross-action in which the defendant is the plaintiff, and there is no great violence in construction in holding that