

Div. Ct.]

BUILDING AND LOAN ASSOCIATION V. HEIMROD.

[Div. Ct.]

The first objection taken by the defendant to the plaintiffs right to recover is, that the plaintiffs had been nonsuited in a former action brought against him by the same plaintiffs, in this Court, for the same cause of action. The ground of nonsuit, it appears, was that the plaintiffs had been premature in beginning their first action, the statutory period mentioned in the extended form of covenant to insure, not having expired.

The defendant contends that under the present rules and practice of the Courts, introduced by the Judicature Act, such judgment of nonsuit is final, and is equivalent to a judgment upon the merits for the defendant, citing Marginal Rule 330 of the Judicature Act.

This contention involves the consideration of the very important question as to how far the rules and practice of the Superior Courts, as altered by the Judicature Act, affect the practice heretofore observed in the Division Court.

The only express provisions I find in the Judicature Act affecting Division Courts are sects. 77, 78 and 80 of the Act, and Marginal Rule 489 of the Rules of Court in the schedule attached to the Act. For the purpose of this enquiry, however, we must look also at certain other rules and sections affecting the County Courts with a view to discover the intention of the legislature, and so form a conclusion as to how much, if any, of the practice laid down in the Act and rules, can, by implication, be imported into the inferior Courts. Rule 490 extends the "pleadings, practice, and procedure of the High Court of Justice to the County Courts wherever the present pleadings, practice, and procedure of the County Courts correspond with those of the Superior Courts of law."

The Division Court is a Court created by statute, (4 & 5, Vict. cap. 53; 13 and 14 Vict. cap. 53; R. S. O. cap. 47; 43 Vict. cap. 8). It is not a Court of Record, (R. S. O. cap. 47, sect. 7), but its judgments have the same force and effect as the judgments of Courts of Record. The Court, therefore, is simply the creature of the statutes constituting it, and to these statutes and the rules subsequently enacted, under powers granted by sects. 237, 238, 239, 240 and 241 of the Revised Statutes, and to any other enactments passed from time to time by the legislature, expressly made applicable in whole or in part to Division Courts, we must look to ascer-

tain the practice and procedure which shall govern. There is this qualification, however, to the foregoing statement; sect. 244 of the D. C. Act enacts that "in any case not expressly provided for by this Act, or by existing rules, or by rules made under this Act, the County Judges may, in their discretion, adopt and apply the general principles of practice in the Superior Courts of Common Law, to actions and proceedings in the Division Courts." What this discretion may mean exactly it is perhaps difficult to determine in any particular case, but where a County Judge attempted to exercise it, by making an order for the examination of a defendant under sect. 24 of the A. J. Act of 1873, Chief Justice Wilson (then Mr. Justice Wilson) granted a writ of prohibition on the ground that the provisions for the examination of parties were *above* the jurisdiction of Division Courts, and on the ground that such a practice would unreasonably increase costs. The learned judge further added, "that he would not sanction a practice being introduced into these Courts in which the judge decides according to equity and good conscience, so unsuited to their constitution and purpose *without direct legislative authority*." *In re Willing v. Elliott*, 37 U. C. R. 320.

On the other hand it was held by Mr. Justice Cameron that it was a proper exercise of this discretion to make an order for security for costs in a Division Court case where the plaintiff resided out of the jurisdiction, on the express ground that it being a matter of practice (not a rule of law) within the principle of practice in the Superior Courts, it was competent for a Division Court Judge to resort, in his discretion, to the practice in those Courts: *Fletcher v. Noble*, 9 P. R. 256.

Section 77 of the Judicature Act enacts that "Every County and Division Court shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant, in any proceeding before such Court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall, in every such proceeding, give such and like effect to every ground of defence or counter claim, equitable or legal, (subject to the provision next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice."