

Div. Ct.]

BURK V. BRITAIN—NOTES OF CANADIAN CASES.

[Sup. Ct.]

I have come to the conclusion that the last clause (244) of the Division Court Act gives me authority for adopting and applying in my discretion the principle of Rule 80, of the Judicature Act, to Division Court cases.

It says: "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."

If this clause had been imperative, instead of permissive; if the language had been "shall," instead of "may, in their discretion;" then, it seems clear to me, that each time a new principle was introduced into the practice of the Superior Courts it would be the duty of a County Judge to adopt it, and apply it to Division Court cases, overcoming as best he could any obstacles in the details of practice necessary to carry it out. But in the present shape, a duty remains to the Judge, namely, to exercise a discretion, and to adopt the principle, if in his judgment it is proper to do so.

This clause relates not to the practice itself, but to the principles of practice.

It is manifest that the practice, that is, the manner of proceeding from step to step in the progress of a cause, could not be the same in Superior and Division Courts; the fact that for the latter there is generally no judge to be found in the locality where the officers of these Courts are established, makes impossible a practice similar to that of the superior Courts; and there are other innumerable details which would stand in the way of adopting in these small courts exactly the practice of the higher ones. But that is no reason why the same principles of practice should not prevail, as principles of law do in both—by principles of law I mean those rules by which when they come to be heard, the merits of the contest are to be finally decided—rules which, by section 80 of the Judicature Act, are declared, within the limits of the jurisdiction, to be in force in all Courts in Ontario. By principles of practice I mean those leading objects for the attainment of which the precise method of proceeding may be shaped as a subordinate matter. Preventing an untrue plea giving even temporarily an obstacle to the recovery of a just debt is an illustration of a principle. The method of making the application, the notice to be given of it, &c., are only details.

Adopting then, as I do, this principle, that a defence, though formally set up, shall not be allowed to delay the entry of judgment when the plaintiff satisfies the Court of his belief in the justice of his claim—the defendant not being able to satisfy the Court of the merits of his defence or of some other fact which would make a hearing expedient—it becomes my duty to order judgment in this case to be forthwith entered against the defendant. The manner of making the application for such an order on the one

side, and of resisting it on the other side, are details which each Court by virtue of its inherent powers may settle for itself, unless and until they be otherwise settled by higher authority. It is not necessary here to discuss the inconvenience of applications such as this being in Division Court cases disposed of only at a hearing before the Judge, involving, as that does, an attendance at the county town. If the principle can be adopted, the manner of giving effect to it may be left for future consideration.

I am fortified in the general view which I have expressed, by finding that my able coadjutor, Judge Benson, has, after consideration of the subject, arrived at the same conclusion.

The order will direct that judgment be forthwith entered for the debt and interest claimed by the endorsement on the summons, and for costs to be taxed to the plaintiff.

NOTES OF CANADIAN CASES.

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SUPREME COURT OF CANADA.

RUSSELL v. LEFRANCOIS.

Will, validity of—Insanity—Legacy to wife—Error—False cause—Question of fact on appeal—Duty of Appellate Court.

This was an appeal from the Court of Queen's Bench for Lower Canada. The action was originally brought in the Superior Court by Pierre LeFrancois' executor under the will of the late Wm. Russell, of Quebec, against William C. Austin, curator of the estate of Russell during the lunacy of the latter, to compel Austin to hand over the estate to the executor.

After preliminary proceedings had been taken, Elizabeth Russell, the present appellant, moved to intervene and have Russell's last will set aside, on the ground that it had been executed under pressure by Dame Julie Morni, Russell's wife, in whose favour the will was made, while the testator was of unsound mind. The intervening party claimed and proved that Morni was not the legal wife of Russell, having another husband living at the time the second marriage was contracted. Russell, who was a master pilot, died in 1881, having made a will two years previously. His estate was valued at about \$16,000. The evidence in the case was very voluminous and contradictory. On 4th October, 1878, Russell made a will by which he bequeath-