FIRST DIVISION COURT—NORTHUMBERLAND AND DURHAM.

BURK V. BRITTAIN.

Division Court—Power of Judge to make order striking out defence before trial.

This was an action brought for money lent by the plaintiff to the defendant. The defendant in proper time filed a notice of defence. The plaintiff applied for an order similiar to that provided for by Rule 80, O. J. A.

Held, that by clause 244 of the Division Court Act, the Judge has power, when the plaintiff satisfies the Court of his belief in the justice of his claim, and the defendant is unable to satisfy the Court of the merits of his defence, to make an order striking out the defence, and empowering the plaintiff to sign judgment without a formal trial of the action.

[Cobourg, Dec. 30, 1882.—CLARK, Co. J.

This was an action for money lent by the plaintiff to the defendant, and was commenced by a special summons. The defendant in proper time filed a notice of defence, and the case, in the ordinary course, stood for hearing at the next sitting of the court. An application was made by the plaintiff, similar to that provided for by Rule 80 of the Ontario Judicature Act, and upon material which the learned Judge, if he had felt he had the power to make the order asked for, considered sufficient to throw upon the defendant the onus of satisfying him that his defence ought to be further inquired into.

The counsel for the defendant contended that the Judge had no authority to grant the order. No other cause was shewn.

CLARK, Co. J.—Under the circumstances of this case, I cannot escape the responsibility of deciding whether the existing law empowers me to order immediate judgment against a defendant, though, according to the statutes and rules relating especially to Division Courts, he has done all that is prescribed as sufficient to entitle him to be heard at a formal trial of the rights of the parties, before judgment is given against him.

The spirit of the legislation on such subjects, has been for many years past in the direction of sweeping away dilatory defences, so that creditors may obtain as quickly as possible judgment and execution for debts really due.

For a long period the practice in Division Courts (except where confession was voluntarily given) did not permit any judgment to be entered up against a defendant before the day appointed for hearing, though he had no defence and urged none. Every unsettled case in which the defendant had been served with process was called in Court, and it was only when the defendant failed to appear on a trial that even an undefended case could be disposed of. The unreasonableness of this delay led to a statutory amendment of the practice about fourteen years ago, since which time judgments may be entered as a matter of course by the clerk (when the defendant omits, within a specified period after service, to give notice of a defence). Since this amendment there has been no practice especially established for Division Courts, either by statutes or by rules framed by the Board of County judges or otherwise, by which any method is given for disposing of a formal defence once put in, otherwise than at the time appointed for a trial of the merits of the case.

The legislature has from time to time acknowledged the injustice of permitting debtors, by making a sham defence, to delay their creditors in recovering the amount due.

One step in that direction, was permitting a plaintiff to examine a defendant under oath, and if his answers disclosed such facts as shewed him to have no defence, then, on application to the Court, the defence might be struck out, and proceedings had as if none had been raised.

This departure from the previous practice was not, in my opinion, a matter of detail; it involved a principle, namely, that a formal defence ought not to be allowed to hinder a plaintiff, if he could show, before the time of a regular hearing, that there was no real defence.

That principle, however, still left with the plaintiff the responsibility of procuring and showing to the Court such evidence concerning the facts as would expose the fallacy of the defence.

The Ontario Judicature Act has gone one step further and has, in Rule 80, established what I conceive to be another new principle in practice, namely, that, in a certain class of cases, and after particulars given in a specified manner, the plaintiff, in his effort to get judgment, notwithstanding a formal defence, need not elicit facts upon which any opinion may be formed concerning the validity of the defence; he need shew to the Court nothing more than the sincerity of his own belief in his own case, after which the defendant has to convince the Court that he ought to be allowed to defend, or judgment goes against him.

Bearing in mind that neither the public necessity for a prompt collection of the debts, nor the practice of the Superior Courts to that end, can of itself authorize me in ordering a judgment to be now entered against the defendant in the case, I have to say whether there is any sufficient ground for my doing so.