# POINTS ABOUT PLEADING.

## PRINCIPLES OF THE SYSTEM UNDER THE JUDICATURE ACT.

Second Part of the Lecture on the New Pleading by Mr. Thomas Hodgins, Q.C.

The English decisions affecting the new system of pleading show that marginal rule 128 sets forth the leading principle of the act. It provides that "every pleading shall contain as concisely as may be, a statement of the material facts on which the party pleading relies." This rule applies to the statement of claim, statement of defence, counter claim, reply or other pleading. It requires, in express terms, a specific statement of the material facts on which the party relies as founding his right of action or defence, and it requires that such a statement shall be divided into paragraphs numbered consecutively, and each paragraph shall contain as nearly as may be a separate allegation. The rule is evidently founded upon our chancery order 74, which prescribes that every bill of complaint shall contain "a statement of the plaintiffs case in clear and concise language," and chancery order 68, which requires that every bill answer and petition filed, and every affidavit to be used in any cause or matter, is to be divided into paragraphs, and every paragraph numbered consecutively, and as nearly as may be is to be confined to a distinct portion of the subject. It will be found that this rule sweeps away the old common indebitatus count which figured in so many common law declarations in assumpsit.

THE COMMON INDEBITATUS COUNT

for goods sold and delivered, was couched ed in the vaguest and most general terms, and gave the defendant no specific information as to the nature or material facts of the claim made against him, thus: "Money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant." Such a pleading would now be held to be inadmissable, for it discloses no material fact and gives no particulars. Further illustrations may be taken from pleadings in the cases of tort, such as assault, trespass to land, seduction, etc. A form of statement of claim, which apparently does not give as full information as is required by the rule just quoted, may be here referred to because it may be used in cases formerly dealt with by the old indebitatus count. Marginal rule 159 says that "When the writ is especially endorsed and the defendant has not dispensed with a statement of claim, it shall be sufficient for the plaintiff to file a copy of the writ with the copy of the special endorsement thereon, if not filed already, and deliver as his statement of claim a notice to the effect that his claim is that which appears by the endorsement upon the writ." And by marginal rule 15: "When the plaintiff's claim is for a debt or liquidation demand only the indorsement, beside stating the nature of the claim, shall state the amount claimed for debt, or in respect of such demand and for costs respectively." It may be found in practice that rule 159 applies only to cases which come within rule 15, for by a consideration of this latter rule and by a reference to the forms of special indorsement given in appendix A, it would appear that the particulars of demand given to the defendant, when the plaintiff specially indorses his writ, are generally quite sufficient to inform the defendant of the plaintiff's claim, and furnish more details than the common indebitatus count. As an illustration of what must be set forth in the indorsement of the writ of summons the following case be referred to: In Walker v. Hicks, L. R. 3, 2 B. D. 8, the indorsement on the writ was, the plaintiff's claim is £399 9s 7d; the defendant's share or contribution to the payment of certain bills of exchange and promissory notes on which he and the plaintiff were jointly liable, and which bills and notes have been taken up by the plaintiff. The court held that this indorsement did not constitute a good "special indorsement" within the rule, and set aside an interlocutory judgment entered thereon. In giving judgment, Cockburn, C. J., said: "The object of the special indorsement is this—On the one hand it is to have a very prompt and summary effect in favor of the plaintiff, by entitling him to apply to sign final judgment; and on the other hand it is intended that the defendant should have an opportunity of

AVOIDING FURTHER PROCEEDINGS

by payment of the debt. On looking to the forms of indorsements I find that in the examples of special indorsements in actions on promissory notes, &c., full particulars are given of the date and amount of the instrument and the parties thereto, and a portion where, as here, the claim is in respect of a share or contribution to the payment of bills and notes. It seems to me that a party is entitled before summary proceedings for judgment are taken against him to know specifically what is the claim against him. Reference may also be made to Macleman, p. 96-98; Taylor v. Ewart, p. 131-132. Holmstead, p. 46.

The effect of rule 159 is to make the special indorsement and notice a "pleading" and thus to bring it within the meaning of marginal rule 128, and as such to render liable to a demurrer if it does not disclose a good cause of action. This latter point was decided by Mr. Justice Lindley in the case of Robertson v. Howard, 3 C. P. D. 280, where, after a notice (Ont. 159), that the particulars of the plaintiff's complaint and of the relief and remedy to which he claimed to be entitled, appeared by the indorsement on the writ of summons, a

DEMURRER TO A SPECIAL ENDORSEMENT

was allowed; the learned judge holding that a specially endorsed writ, coupled with a notice under the order is to be treated as a statement of claim for all purposes, and may be demurred to; and that it was a "pleading" within the meaning of the order. (Ont. 189).

As already noticed the rule prescribes that every pleading shall contain a concise statement in numbered paragraphs of the material facts relied upon by pleading party. The extent to which this rule has modified pleading may be illustrated by cases where a plaintiff claims damages in respect of personal injuries caused by the negligence of the defendant. Formerly it was enough to allege that the defendant conducted himself carelessly and negligently; now the plaintiff must aver specifically the particular act or acts of negligence and carelessness upon which he relies. This may be illustrated by the case of Foulkes v. Metropolitan District railway company, C. P. D. 267, in which the plaintiff in an action for injuries received while travelling on the defendants' railway, pleaded "that the defendants, in breach of their duty, negligently provided an unsafe and improper carriage for the purpose of carrying the plaintiff, and omitted to provide him with a fit and proper carriage, that is to say, that the floor of the carriage which they provided was of so great a height above the platform at the Richmond station as to render it dangerous and unsafe for the plaintiff to get out of it, and no proper or sufficient step was provided to enable him to do so;" and further, "in addition to the breach of duty and negligence aforesaid, or in the alternative, the plaintiff alleges that the defendants, in breach of their duty in that behalf, negligently, carelessly and improperly provided an unsafe and improper platform and station at Richmond station, that is to say, that the platform at the Richmond station was at so great a distance below the floor of the carriage in which the plaintiff was a passenger as to render it unsafe and dangerous for the plaintiff to get out of the carriage;" and then the special injury was set out.

But while the parties must allege the facts which constitute their statement of claim or defence, they must only allege the

MATERIAL AND ESSENTIAL FACTS,

and those as concisely as possible. Marginal rule 126 prescribes that "such statements shall be as brief as the value of the case will admit, and the court in adjusting the costs of the action shall require at the instance of any party into any unnecessary prolixity, and order the costs occasioned by such prolixity to be borne by the party chargeable with the same. Two rules (126 and 128) impliedly strike at three defects in pleading: 1. Prolixity and irrelavency; 2. Pleading evidence; and 3. Pleading inferences of law.

1. As to the first, the sententious observation of Lord Justice Mellish in Watson v. Rodwell, 3 Ch., D. 380, may be quoted: "The facts must be to a certain extent stated, but there

SHOULD BE NO RHETORIC."

Prolixity and irrelavency may consist in (1) necessary facts being stated at undue length, and (2) statements of unnecessary facts. An instructive case on this head is Davey v. Garrett, 7 Ch., D. 473. In giving judgment, Lord Justice James said, with reference to the statement of claim, that "a number of facts, many of which appeared to have no connection with the defendants, were stated at great length, and it was impossible for the defendants, without knowing the inferences to be drawn from such facts, to know what they were to do with them. Were they to deny or admit them? If they admitted them, how were they to know that they might not be prejudiced in some way by such admission at the hearing of the action? This was an embarrassment to which no one had a right to expose his adversary in this court." And Lord Justice Thesiger added that, "Prolixity standing by itsely, when carried to an extreme degree, would be a sufficient ground for striking out the pleading." Nor are precedents from the long and tedious pleadings of the unreformed court of chancery to be allowed, for, says Lord Justice James in the same case: "The court ought to be strict even to severity in taking care to prevent pleadings from degenerating into the old oppressive pleadings of the court of chancery. If pleadings such as this are to be allowed, the gentlemen who took such preparation of the rules may say as Oliver Cromwell did with a sigh in reference to his attempt to reform the law and procedure of this country:

"THE SONS OF ZERUIAH ARE TOO HARD FOR US."

In Marshe v. Mayor of Pontefract. w. notes, 1876, p. 7. Mr. Baron Huddleston condemned the prolixity of the pleading in that case and said: "I would undertake to put this statement of claim which now occupies 50 folios into half a sheet, which would be four folios." The first principle of pleading under the Judicature act is to avoid prolixity.

As to the second point, the rule we are considering (128) expressly prohibits the pleading party setting forth in his statement the evidence by which the material facts on which he relies is to be proved. This is illustrated by the case of Blake v. Albion Life Ins. Co., 35 L. T. Rep. 269, where an application to strike out certain paragraphs of the statement of claim, which set forth the bankruptcy of certain parties in Russia and other irrelevant matters, was made on various grounds, one of which was "that they were merely evidence." Mr. Justice Brett in giving judgment said: "I am of opinion that the paragraphs objected to must be struck out. I take it that the legal formula under which they come is this, that they are irrelevant and also that they are mere evidence. In every case some facts must be proved. Others are merely evidence of facts which must be proved. Others again are within both descriptions. Those which are to be proved, or which are both to be proved and are also evidence of other facts may be pleaded, but if they are only evidence of facts to be proved they are merely evidence and cannot be pleaded." Another illustration will be found in the case of Evelyn v. Evelyn, W. notes, 1880, p 62, where in a statement of claim by a suppositious heir there was the allegation that A., the ancestor, died intestate, leaving B. his heir-at-law. The defendant took out a summons to compel the plaintiff to show in his statement of claim how B was the heir. Vice-chancellor Malins held that the allegation in the plaintiff's statement was sufficient; that

FACTS NOT EVIDENCE SHOULD BE STATED,

and that if the defendant wished to have the evidence of B's heirship, he could deliver interrogatories. This rule also excludes a statement of the admissions of a party which are relied upon; Askew v. North Eastern railway company. W. Notes 1875, p. 238, and statements as to certain documents which are relied upon as admissions of the opposite party and which are also in effect evidence. Davey v. Garrett, 7 Ch. D. 473.

3. The third point in the rule is that "A statement of claim or defence should not contain inferences and conclusions of law. To this it may be added that what were formerly "the charging parts" of a bill in equity, that is the statements which set forth the chancery pleader's view of the legal relation between the parties, are also to be omitted in pleadings under the judicature act. On this point reference may be had to the cases of Watson v. Rodwell, 45 L. J., Ch. 744, and Hammer v. Flight, 35 L.J., Rep. 127. In the latter case Mr. Justice Brett said, "This case is one which shows clearly some of the advantages which have been obtained by the passing of the judicature acts.

PLEADINGS ARE NO LONGER TECHNICAL

in the sense that they must show the precise legal form which the plaintiff's demand must take; they must show the facts, and then it is for the court from the facts to decide upon the legal result of these facts. As a corollary to these rules, 136 provides that "neither party need in any pleading allege any matter of fact which the law presumes in his favor."

It is impossible at this early stage of our new system of pleading to lay down with exactness the principles which should guide the pleader under the Ontario Judicature act. But we have the advantage of six years experience and practice of England to aid us in engrafting this great work of law reform on the jurisprudence of Ontario. Practitioners and litigants in England have borne the labor and expense of the early stages of the new system of pleading and practice, and have furnished us leading cases which render its introduction here simple and inexpensive.

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Certain gentry of this class are now making a bugbear of the fact that the Ætna's Insurance in Force and Income have decreased since 1872. [illegible] The Companies reporting to the New York Insurance Department, aggregate as follows:

In 1872—In Force [illegible] $2,116,742,656
In 1879—In Gold [illegible] 1,457,255,557
Contraction during 7 years hard times [illegible] 657,486,998

Showing a contraction of 25 per cent. in Income, and of 31 per cent. in Insurance. During the same period the ÆTNA LIFE'S ratio of contraction was but 27 and 22 per cent., while its

Assets increased during the 7 years, from $18,077,540 to [illegible]

showing an increase of a fraction under 50 per cent.

To say of a firm, or a bank, that its Debts had decreased and its Assets increased would be very strong testimony in favour of that firm's, or bank's, good management and present strength. The following statement shows Solid Progress in Assets and in Surplus over all Liabilities—that is, after making provision for the re-insurance of the first column, year by year:—

| Year. | Amount at Risk. | Assets. | Surplus. |
|---|---|---|---|
| 1872 | $100,617,373 | $18,077,540 | $2,152,962 |
| 1873 | 98,864,149 | 19,482,417 | 2,868,789 |
| 1874 | 94,306,992 | 20,657,659 | 3,248,060 |
| 1875 | 91,454,717 | 22,002,734 | 3,580,860 |
| 1876 | 87,936,914 | 22,237,648 | 3,878,908 |
| 1877 | 83,315,084 | 24,141,125 | 4,179,130 |
| 1878 | 79,568,066 | 25,120,804 | 4,764,026 |
| 1879 | 77,786,069 | 25,636,195 | 4,989,033 |
| 1880 | 77,951,819 | 26,405,440 | 6,367,773 |

In 1872, therefore, the ÆTNA had only $180 on hand to each $1,000 of Policy, to-day it has $335 46. In 1872 its Surplus, after laying aside enough to re-insure all its Policies on the New York or Canadian standard was $21.3-962. To-day its Surplus is $5,367,773, an increase of 150 per cent. The amount at Risk has now, with returning good times, increased in 1880 over 1879.

We have given sufficient to satisfy any one that the Ætna Life has all the elements that constitute a strong and reliable Company. But, the gentry above-mentioned say, its death rate "greatly exceeds the average of all the American companies." So it does, and it would be almost a miracle if it did not, for it is older than other companies. But in 1880 its deaths were only $15 per $1,000, while the rate of all the others was $14 50 per $1,000. Quite a sad but a very trifling difference. But the ÆTNA has the money in hand for all its Policies.

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