

*BAILABLE PROCEEDINGS AGAINST A DEFENDANT
BEFORE JUDGMENT.*

WHEN recently commenting on the Consolidated Rules, we took occasion to remark, that those relating to bailable proceedings appeared to be sadly defective and that this branch of practice was particularly in need of simplification and codification. It may be useful now to point out in a little more detail, how this should be done; but, before doing so, it may be well briefly to glance at the present condition of the law on this subject in Ontario.

In Ontario, the right to arrest a defendant before judgment depends upon three things: (1) The defendant must be a person liable to arrest; (2) The plaintiff, or his agent, must be able to swear that the plaintiff has a cause of action against the defendant to the amount of \$100 or upwards; and (3) Such facts and circumstances must be shown by affidavit as satisfy a judge that there is good and probable cause for believing that the defendant, unless he be forthwith apprehended, is about to quit Ontario with intent to defraud his creditors generally, or the plaintiff in particular.

The new Rules have varied the procedure to be observed in procuring the arrest of a defendant from that laid down by the statute, R. S. O. c. 67, s. 1. The statute provides that the judge shall make an order to hold the defendant to bail for such sum as he thinks fit, and, therefore, the plaintiff is to sue out a writ of *capias*. The writ of *capias ad respondendum* is abolished by the Consolidated Rule 1045, and the defendant is now to be arrested simply upon the judge's order.

In England a defendant is liable also to arrest before judgment, but then it depends on four things: (1) He must be a person liable to arrest; (2) The plaintiff must show a good cause of action against him for £50 or more; (3) It must be shown that the defendant is likely to quit England, unless he be apprehended; and (4) That the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action.

This fourth condition, it will be observed, does not prevail in this Province. In England, as in Ontario, the arrest is made on the judge's order, and the issue of a writ of *capias* is dispensed with.

After the arrest has been made, the procedure in England and Ontario materially differs. In Ontario the old procedure is continued; the defendant first goes through the form of giving bail to the sheriff, or "bail below," as it is called. This bail is given by bond to the sheriff by two sureties, and for double the amount for which the defendant is ordered to be held to bail. The condition of this bond is, that the defendant will, within ten days, put in special bail, or "bail to the action," or "bail above," as it is called. This bond must be taken by the sheriff before the time for putting in special bail has expired, or it will be void.

The defendant having given a bond to the sheriff that he will in due course put in special bail, has then, within the time limited for that purpose, to put