

*JUDICIAL DISCRETION AS TO SUMMARY JUDGMENT.*

- I. THE ENGLISH PRACTICE.
- II. THE ONTARIO PRACTICE.

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I. THE ENGLISH PRACTICE.

"Order XIV.," protested Lord Esher, in the course of a judgment delivered on behalf of the Court of Appeal (*a*) "was equivalent to an enactment by statute, and no practice however long, could alter the plain language of the rule." But as one studies the cases and dicta upon that Order for a definition of the general principles governing the exercise of the judicial discretion which it conferred, a topic rendered timely by a very important recent decision of the House of Lords, (*b*) he does not meet with such a consistent body of precise decisions as might be expected after reading Lord Esher's remarks, or Cavanagh's argument (*c*) that "the discretion which a judge is said to exercise in granting or refusing an application under Order XIV. does not, or should not, involve any arbitrary element; but means, or should mean, the conclusion to which a judge is led on applying the principles contained in Order XIV., to the facts submitted to his decision."

It is this arbitrary element involved in the discretion which seems to account for the wide variety of opinion expressed in the cases and dicta upon the Order; from which, as Cavanagh points out (*d*) the "principles contained in Order XIV. are to be collected rather than from its actual wording."

Of course, as already noted, it is a knowledge of general principles alone that is sought in reviewing those cases and dicta; for, in the words of Hall, V.C., (*e*) "the facts of each case being different, cases are only useful for the purpose of getting the general view of the judges as to the character and description of case in which the court ought not to allow a plaintiff to sign judgment."

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(*a*) *Shurmur v. Young*, 5 T.L.R. 155.

(*b*) *Jacobs v. Booth's Distillery Co.*, 85 L.T.R. 262.

(*c*) Cavanagh's Law of Summary Judgment, 118.

(*d*) Cavanagh's Law of Summary Judgment, 118.

(*e*) *Anglo-Italian Bank v. Wells*, 38 L.T.R. 197.