

ance upon an indorsement similarly defective might be amended, when challenged by defendant, as merely a curable irregularity. Osler, J.A., in *Clarkson v. Dwan*, 17 P. R. 208, said, at p. 215: "Had judgment for non-appearance been signed, it must have been set aside." . . .

[Reference to *McVicar v. McLaughlin*, 16 P. R. 450; *Rogers v. Hunt*, 10 Ex. 474; *Smurthwaite v. Hannay*, [1894] A. C. at p. 501.]

The default judgment depending upon an implied admission, and such admission not being presumed except upon a special indorsement strictly regular, the moment it was shewn that the indorsement relied upon was not warranted by some Rule of Court which authorized the special indorsement of writs of summons, the whole foundation on which the judgment rested was gone, and the judgment itself could not stand. An amendment of the indorsement cannot, without a fresh service of the writ, import an admission by defendant of plaintiff's claim. It clearly follows, I think, that a judgment signed for default of appearance to a writ, the indorsement upon which is not a special indorsement authorized by the Rules of Court, would be a nullity, and not merely irregular and susceptible of cure by amendment: *Hoffman v. Crerar*, 18 P. R. 473, 479; *Appleby v. Turner*, 19 P. R. 145, 149. I have not overlooked the language of Osler, J.A., in this latter case in dealing with a Chambers motion for leave to appeal, reported in 19 P. R. at p. 178, where he makes an allusion to the discretion of the Court to decline to set aside proceedings where the applicant is chargeable with laches, but it will be noted that his language is confined to "objections of irregularity," and affords no ground for questioning the proposition that a judgment by default "entirely unwarranted by the practice is a nullity not curable by delay or acquiescence," as enunciated by the Divisional Court: *ib.*, p. 148.

I have so far dealt with the argument presented at Bar in support of the proposition that the judgment here entered was merely an irregularity and not a nullity, which proceeded upon the assumption that a judgment for default of appearance was in the same position as a judgment upon motion under former Rule 739. But this ignores altogether the pro-