Canada Law Journal.

VOL. XXXIX. SEPTEMBER, 1903. NOS. 17 AND 18.

The seat in the Manitoba Bench vacated by the removal of Chief Justice Killam to Ottawa has been filled by the appointment of Mr. Justice Dubuc. William Egerton Perdue, Barrister-at-law, of Winnipeg, has been made a Puisne Judge of the Court of King's Bench in his room and stead. Mr. Perdue is a sound lawyer, holding a good position at the bar, and will, we believe, make an excellent judge.

The summer holiday has favored us with visits from two eminent English lawyers, Sir Frederick Pollock, Bart., D.C.L., L.L.D., and Sir Edward Clarke, K.C. The former is perhaps the most eminent jurist on either continent, as well as a legal journalist and text writer of the highest repute. He had been at the meeting of the American Bar Association in Hot Springs, Virginia, where he read a paper. He is to deliver a series of lectures by special request at the most eminent Law Schools in the United States, among them Harvard and Yale. The principal of the Ontario Law School is trying to arrange for an address to be given by Sir Frederick sometime during this month. Members of the Bar would, no doubt, greatly appreciate this. Sir Edward Clarke, one of the ablest advocates at the English Bar, was Solicitor-General during the Gladstone administration. He and his son, whilst in Toronto, were entertained at luncheon by the Benchers of the Law Society, on which occasion he expressed his surprise at what seemed to him the wonderful resources and the rapid development of this country. As he continues on his way westward to the Pacific, he will realize even more the immense possibilities and the great future in store for the Dominion.

Business at Osgoode Hall was actively resumed after vacation by the Divisional Court with a list of eighty-five cases. Notwithstanding all that has been said against the advisibility of composing such Courts of only two Judges, we regret to see that during the first week of the Court only two have been sitting.

According to the published list, we see that Mr. Justice Robertson, a judge who it was thought by everybody had retired from the bench, was assigned as the third judge; which would seem to indicate that his retirement was officially unknown to the judges who regulate the sittings of the Court. On the opening day of the sittings Mr. Justice Meredith is said to have been in Toronto, and it was expected that he would take the vacant place, but for some reason he returned to his residence in London. We presume the reason was a good one, for, of course, this learned and excellent judge is aware that the only permissible excuse for the Court sitting with only two judges is "illness or other unavoidable cause" (ante p. 217). Those who have the oversight of these matters are doubtless advised from time to time of the nature of the "causes" which too often attenuate the Court. The profession, however, are not, and they are beginning to evince some little (and not unnatural) curiosity on the subject.

The class of persons whose advertisements as conveyancers and whose eccentric work are sometimes noticed by legal periodicals is represented in Nova Scotia by the rural justices of the peace, who, in many cases, procure the appointment for the sake of the fees they get for work of this kind attracted to their offices. The late venerable Mr. Grantham, K.C., of Yarmouth, tells of a magistrate preparing a deed of some land of his own, in which his wife was to release her right of dower. He took her acknowledgment himself, and certified on the deed that she appeared before him, a J. P., etc., "separate and apart from her husband, and acknowledged, etc." This being related to a group of barristers during a recess of the court, one of them claimed to "go one better" with the following: The J. P., knowing that when the husband's property was conveyed the wife was required to make such an acknowledgment, took for granted the converse of the rule applied when the conveyance was of the wife's property, and so he required the husband to acknowledge "separate and apart from his wife that he executed the deed freely, and without any threat, fear or compulsion, of, from or by her." The registrar of deeds then contributed his story, which was that he had lately received for registration a deed conveying land to "the county of ———, her heirs and assigns." As the vendor was to pay the expense of the

conveyance of the land bought by the county council for municipal purposes, a spirit of economy sent him to a J. P. to "do the writing."

INDEPENDENCE OF THE BENCH.

It was once the time-honored custom in the Presbyterian Church, on the induction of a minister, for one of the older presbyters to preach to him a sermon of exhortation, advice and warning. Something similar, though *not* customary, occurred when Mr. Justice Perdue first appeared in Court as one of the Judges of the Court of King's Bench, Manitoba. Mr. J. S. Ewart, K.C., after congratulating the learned Judge upon his appointment, took the position of exhorter. He performed his self-imposed task with a courage, plainness of speech, and clear understanding of the fitness of things which was as admirable as the address was remarkable.

If it should be said by anyone (as might naturally be said), that the words were out of place on such an occasion, it may be remarked that the observations of the learned counsel were for the judiciary at large, and had no special application to Mr. Justice Perdue, who expressed his assent to all that was said, with one exception, viz., as to Mr. Justice Killam sitting on a Commission for the revision of the statutes, in which the learned Judge was we think in the right. The occasion, moreover, was designedly chosen so that the fullest prominence might be given to the opinions expressed.

Let it not be thought that there is no need for plain speaking on these subjects. The time has, unfortunately, come when just such observations should be made, and made on occasions which lend them force. It is well also that they should come, as was the case here, from one of the leaders of the Dominion Bar—one whose character and position add weight to his words.

It is unnecessary to enlarge upon the matters touched upon in this remarkable address. It speaks for itself, and the material parts are given at the conclusion of this article for the benefit of any reader who may not have seen them in the public press.

The views now expressed by Mr. Ewart, however, are not new to our readers, as our protest in relation to the main points under discussion are already on record. We are glad that so fearless a

champion of the right has followed in our lead. We are glad also to know that we have voiced the opinions of a large majority of the Bar of this Province.

As to judges engaging in extra judicial work it is well to know that we are but echoing the best thought of the English Bench on the subject, as evidenced by the observations of Lord Esher, also given below, as well as that of the leading statesmen of Canada as appears in the pages of *Hansard* during the debate on the Bill introduced by Hon. Mr. Ferguson in the Dominion Senate.

The main points touched upon have now been pretty well threshed out. They have been discussed in the legal and lay press; some of them came up for discussion in Parliament, and they have been the constant subject of discussion amongst professional men. It may safely be said that the consensus of opinion is largely in favor of the views expressed in Mr. Ewart's address, and these views are now on record, here and elsewhere. It remains to be seen what the result of this general expression of opinion may be on those concerned. All lovers of their country will hope that it may tend to prevent any further decadence from the past high tradition of the Bench and so serve the best interests of our country. It would indeed be deplorable if in these early days of this Dominion we should throw away the goodly heritage which came to us from those men who were scrupulously careful to avoid anything tending to lower the standing of the Bench, and who in doing so helped to give it its deservedl, high reputation.

Mr. Ewart, after extending to his Lordship the congratulations of the Bar of Manitoba, proceeded as follows:—

"I am firmly convinced that the recent Governmental practice of giving jobs to Judges is subversive of the usefulness of the Bench. It is destructive of the popular belief in its impartiality and its integrity.

"My Lord, courts of justice stand between society and anarchy. Their strength lies in the security which they give to property and rights and in the satisfaction felt by the people in their administration of justice. It is the duty therefore, of every good citizen, and, perhaps, especially the duty of members of the Bar, to endeavor to maintain the existence of such conditions as will protect the Bench from the approach of influences which are injurious to it. Who can contemplate with equanimity or patience the present position of the judicial office in Ontario? I do not

believe that it is well for the Bench that it should be shielded from all criticism, but I do think such criticism is a misfortune, and that the habit of mind which seeks explanation for decisions in personal bias of the Judges is one of the most deplorable mental attitudes which can take possession of society.

"The result of the Gamey investigation, if Mr. Stratton was to be acquitted, was easily forseen, namely, that two of the very best and purest minded of the Ontario Judges are believed by probably scores of thousands of people who have been influenced by circumstances not found in the evidence. Those who know these Judges, as I know them, have no such thought, or, if the language of the judgment is calculated for a moment to raise the idea we can easily put it aside. But we must not wonder that the general public, and particularly strong Conservatives, are not too generous, and that these Judges have been attacked and condemned not only in the press, but in the Legislature and upon public platforms. To a lover of his profession this is, I say, inauspicious and disquieting.

"In Dawson City, at the present moment, a Judge, who, till yesterday, was a strong political partisan, is enquiring into matters in controversy between the political parties. And can we be surprised that his rulings are being telegraphed to the Opposition at Ottawa to be there discussed and denounced? While Mr. Justice Britton's regular salary runs at the usual rate, he is presented by his political friends with the finest holiday trip that the continent can afford, and a bonus of $2,000. His judicial usefulness in every case of political complexion is forever gone. Henceforward every decision adverse to the Conservative party will evoke memories of the Treadgold Commission.

"The habit of attributing decisions to improper influences is easily acquired, and had already become so familiar that an attack upon Mr. Justice Maclennan (as righteous a Judge as ever sat upon a bench), because of his action in some interlocutory application, passes almost unnoticed. Mr. Justice Killam, too, has been traduced in unmeasured language by the press, and little more heed is given to the incident than if he were a politician. Process for contempt has lately become almost impossible, for the reason, unfortunately, that too many people would be involved.

"My Lord, now that you are Mr. Justice Perdue, you will be approached by the railway companies, and will be offered free transportation over their lines of railway. It is my belief that you will refuse all such degrading offers. If it be asked whether I think that Government jobs and railway passes influence Judges, I reply that human nature is weak; that motive and mental influence work subtly, and their operations are much more easily discerned by onlookers than by the one affected; that such things usually do produce a frame of mind favorable to the donors, and that I myself, with all my innate and trained respect

(reverence, I would almost say) for the Bench, cannot sometimes restrain the thought that elevation to the Bench is not equivalent to inoculation against the feelings of gratitude for past favors or pleasing anticipation of those to come.

"It is a fact of some sinister significance that the political parties, the Governments and their oppositions, have in these latter days become the most frequent of litigants and that the practice which I am venturing to condemn has grown up and expanded synchronously with the development of that condition. My Lord, I see no justification for the employment of Judges in matters outside their office, and not covered by their salaries, in the assertion that it is the Governments of the day that are the employers and the paymasters. The 'Government of the day' is but an euphemistic alternative for the name of some political party. If employment is accepted from Mr. Sifton and Mr. Roblin, why not from Mr. Borden and Mr. Greenway? If from the Government of the day whose members are deeply interested in much litigation, why not from the Canadian Pacific Railway, or the Hudson's Bay Company? Would it be sufficient reply to such employment to say that the Judges were too pure and too little human to be affected by such engagements, and if, my Lord, Judges may accept free transportation from the railway companies and be unaffected, why may they not also accept a cask of wine from Mr. Galt, a bale of silk from Mr. Stobart, or a bag of flour from the Ogilvie Milling Company?

"My Lord, I hesitated long before deciding to say publicly what I have now addressed to your Lordship, and I have awaited for its utterance some public opportunity which might possibly attract to my words that notice which my private position would not of itself insure. I am persuaded, too, that by the Judges, my words, although probably thought unnecessary, or even ill-judged, will be accepted as the true belief of one who, I can assure them, by no means stands alone in the apprehension with which he contemplates the present popular attitude towards the judiciary of his country. My Lord, the Bar and the public wish you every success in the discharge of those duties to which they believe you will bring not merely the advantages of long experience, and a conscientious desire to do justly, but, maintaining the high traditions of the British Bench, a determination to avoid those things which are tending toward its debasement."

Mr. Justice Perdue, in reply, after thanking Mr. Ewart and the Bar for their congratulations, and asking for their forbearance and assistance in his duties, went on to say:—

"I agree with much you have said, Mr. Ewart, as to the duties of the Judges. Of course, I am too newly-appointed to say much about these duties; remarks of that nature would come more properly from a more experienced Judge; but I think I might go this far and say that I agree that a Judge should avoid as far as possible being involved in an enquiry or any commission which would mix him up in any political controversy,

and that he should not accept from any party or from any person or corporation that may possibly at some time be a suitor before him any favour or consideration which might have the appearance of influencing his mind. In regard to what you have said with respect to Mr. Justice Killam presiding over a certain commission, I must say that I cannot agree with you in that. The commission to which you refer was for the revision of the statutes of Manitoba, a most important work, in which the Bar and the public were all interested, deeply interested, and I know no one who could preside over such a commission in a better manner than so able and so experienced a jurist. A Judge's leisure time belongs to himself, and if Mr. Justice Killam, in his leisure time, performed duties in presiding over that commission for revising the statutes, I do not see myself anything wrong in the Government remunerating him for giving up his leisure time to the public service. Besides, there are precedents for it in England. My recollection is that Judges have presided over these commissions there, and I have not heard of any objection being taken to that course. With regard to Judges being influenced by receiving any such work, I do not see that they are likely to be influenced by that as coming from any political party. We must bear in mind the fact that Judges are appointed by Government, and these bodies always belong to one particular politcal party or the other, and I think it would scarcely be said that a Judge appointed by the Government of the day must necessarily be bound by feelings of gratitude towards the party, so that his judgment will be biased; I trust that is not the case. I thank you very much again for your congratulations, and will promise you this, that I will give the subject matter of your remarks my most careful consideration, and always bear it in mind."

The English *Law Times*, in speaking of extra-judicial work of judges, refers to the remarks of Lord Esher, made over ten years ago, when responding to the toast of the Bench at a banquet at the Mansion House. His words, which are exceedingly appropriate at this juncture, were as follows: "Their education and training made them impartial and determined to do what was right in any question that came before them. This, indeed, was so well known and recognized, and when the judges of England acted within the scope of their ordinary duty, nobody ever attempted to suggest that they were not impartial. At the present time, however, they knew that one of the judges had been asked to go beyond the scope of his ordinary duty, and he, for one, was surprised and sorry that the judge in question had consented to do so. The result was inevitable. That judge had been fiercely accused already of partiality or of want of desire to do justice."

The same journal in referring to the commission of judges to enquire into the charges of bribery brought against a member of the Ontario Government, says:—"This procedure is no doubt grounded on

the precedent of the Parnell Commission Act, passed, despite strong opposition, by the Imperial Parliament in 1888. When in 1853 the late Sir Charles Gavan Duffy made from his place in the House of Commons a charge of corruption against Ministers, no question arose as to the tribunal by which such a charge if maintained and not withdrawn should be investigated—a Select Committee of the House of Commons. The investigation of charges made against members of a Legislative Assembly has been conducted almost invariably by a Select Committee of that Assembly, and the delegation of such investigation to an extraneous body must be regarded as a departure from well-established constitutional usage."

There are a few hopeful signs that there may be in time some diminution in the crime of lynching in the United States, in view of the facts that it is receiving the marked attention of the press and of the judiciary, and that the public are beginning to realize that these frightful atrocities are bringing disgrace upon the nation in the eyes of those whose good opinion it values. The trouble is, unfortunately, that lynch law is partly the result of a defective and often corrupt administration of criminal justice, (which, by the way, is also a crime of the first order). One legal journal has in a recent issue no less than four leading articles on the subject, under the headings of:—"Contagion of mob violence"; "Vengeance of the mob as a check upon crime," taking the ground that "the work of the mob not only brands the nation with indelible disgrace, but tends to multiply the crimes it would repress"; another article lays the blame largely on the delay of justice in the Courts; and the last, in speaking of the cure for mobs says that nothing is needed but the resolute enforcement of the law. The *Albany Law Journal*, in referring to the subject quotes Mr Justice Brewer of the United States Supreme Court as very properly saying, "Every man who takes part in the burning or lynching of negroes is a murderer, and should be so considered in the eyes of the law," but deplores the powerlessness of the Courts to act as no precautions are brought before them. The *New York Law Journal* after discussing the subject at some length takes comfort from the fact that in many places the negro population have been arming themselves and making systematic preparation to resist force by force, believing that "organized systematic, retaliatory violence by negroes would have a strong influence in ultimately compelling all classes to respect the law." This sounds oddly to the law abiding Britisher, but may nevertheless be a useful factor in helping to put an end to this bloody and pernicious pastime of the Southern States.

SUMMARY JUDGMENT AFTER APPEARANCE TO SPECIALLY INDORSED WRIT.

THE ENGLISH, IN CONTRAST WITH THE ONTARIO PRACTICE AS TO THE CONDITIONS PRECEDENT TO THE APPLICATION OF THIS SUMMARY REMEDY.

The Ontario Rules of Procedure which may be invoked by a plaintiff seeking summary judgment after, (603), and even before, (608), appearance to a specially indorsed writ of summons define widely, and, in part, entirely different courses from that open to a plaintiff under the English practice.

Thus, while the provisions contained in present Rule 603, evolved as they have been from provisions framed closely along the lines of the contemporary form of English Order XIV, in lesser degree resembles those of that Order in its present form, there is nothing in England corresponding to our Rule 608, enabling a plaintiff, by leave, to apply for judgment summarily "at any time after the writ (not stated to be a specially indorsed writ necessarily) has issued."

In tracing the historical development of that portion of the Ontario practice on this subject which has features in common with the English, by way of introduction to a comparative study of the two practices so related to one another, it is found that the Act of 1855, which, as noted in a previous article (*a*) embodied the same principle as was later, in more extended form, embodied in Order XIV, in terms applied to England alone (*b*); and that Act does not appear to have ever been in force here (*c*).

In our Common Law Procedure Act of 1856, however, is found the beginning of a practice which has been likened (*d*) to the one defined by the two lastly above-named English enactments. Sec. 101 of that Act of 1856 (taken from s. 52 of the English C.L.P. Act of 1852, which was (*e*) in turn, founded upon the First

(*a*) 39 C.L.J., 259.
(*b*) 18 & 19 Vict. c. 67, ss. 9 and 10.
(*c*) Strickland's Table of Public General Acts in Force 1235-1894, p. 36.
(*d*) Maclennan's Judicature Act (2nd Ed.) 216.
(*e*) Harrison's C.L.P. Acts (2nd Ed.) 156.

Report of the Common Law Commissioners, s. 37, provided that "if any pleading be so framed as to prejudice, embarass or delay the fair trial of the action, the opposite party may apply to the Court or a Judge to strike out or amend such pleading, and the Court or any Judge shall make such order respecting the same, and also respecting the costs of the application, as such Court or Judge shall see fit." There already was at Common Law, apart from any statute, a rule that the Court would strike out sham pleas (*f*), but the difficulty was in proving them to be sham, for pleadings were not required to be verified by affidavit (*g*), except in cases of abatement (*h*), and the Court would not try the truth of pleadings on Chamber applications (*i*). Then, too, as the late Mr. Dalton pointed out (*j*), it was in the Irish Courts alone that a plea proven to be plainly false was treated as necessarily a sham plea. Owing to the facts that the above-quoted section only gave power to strike out pleadings "so framed" as to embarrass or delay, and that the decisions under the section were to the effect that the truth of pleadings regular in form would not be decided before trial (*m*), s. 101 did not bring about much change in the practice.

The Ontario C. L. P. Amendment Act (34 Vict., c. 12) went further, and directed (s. 8) that an "opposite party shall be at liberty to apply to the Court or a Judge to strike out any plea upon the ground of embarrassment or delay." Thus, the power to strike out on summary application was extended so as to include both the form and the substance of a plea.

The effectiveness of the foregoing enactments in overcoming the difficulty of proving, before trial, the falsity of a sham plea, and then in summarily disposing of it, was greatly increased by our Administration of Justice Act of 1873, declaring (s. 24) that "any party to an action at law, whether plaintiff or defendant, . . . may, at any time after such action is at issue, obtain an order for the oral examination upon oath . . . of any party adverse in interest, or in the case of a body corporate, of any of the

(*f*) Ch. Arch. Prac., 292-297.

(*g*) *Smith* v. *Backwell*, 4 Bing. 512; *Nutt* v. *Rush*, 4 Ex. 490.

(*h*) *Levy* v. *Railton*, 14 Q.B., N.S. 418; *Rawstorne* v. *Gandell*, 15 M. & W. 304.

(*i*) *Phillips* v. *Clagett*, 11 M. & W. 84; Ch. Arch. Prac., supra, *Gibson* v. *Winter*, 2 N. & M., 739.

(*j*) *McMaster* v. *Beattie* 6 P.R. 163.

officers of such body corporate, touching the matters in question in the action."

Shortly after that A. J. Act, the first English Judicature Act was passed. In the Schedule of Rules appended to the latter (Rule 9) there was mapped out the summary mode of proceeding to judgment after appearance to a "specially" indorsed writ which afterwards came to be set out in Order III, Rule 6, and Order XIV of the Schedule of Rules and Orders incorporated into the English Judicature Act of 1875; a Schedule which was substituted for the repealed Schedule to the Act of 1873. As this new procedure, which came into force in England in 1875, was not adopted into Ontario until 1881, our practice under the Administration of Justice Act meantime had a development of its own.

Quite an insight into the way the foregoing Ontario provisions were interpreted and applied may be gained from the following case (*k*). There, the examination of a defendant, taken under the above-mentioned s. 24, was put forward in support of a summary application under s. 8 above-quoted, to strike out a plea which the defendant had on such examination admitted to be false in fact, and pleaded merely for time. Defendant's counsel contended that, as by s. 24, the power to examine was given only after issue joined, the section was clearly intended to refer to matters to come into question at the trial of an action alone, and that, therefore, the examination could not be used on the application In answer to this, amongst other arguments, and to the objection that if the examination were allowed to be used the effect would be to do away with defences for time, and thus, without the express direction of the Legislature, create a very great change in the practice, Mr. Dalton. said, in part: "The defendant Beattie alone instructed the defence; and, in his examination in this suit, he says, in effect, the defendants owe the plaintiff all he claims, that the plea is false to his knowledge, and was pleaded for delay. . . . Then, if I can look at this examination (and why should I not?) what is there left to try? There is nothing left to try; and to allow the defendant to force the plaintiff to the expense and delay of proving at a trial that which the defendant himself asserts, in this case, to be the truth, is to be passive where action is required . . . I therefore make the summons

(*k*) *McMaster v. Beattie*, supra.

absolute to set aside the plea, and for leave to the plaintiff to sign final judgment."

That old practice of our Common Law Courts was very strictly defined. When, for example, a plaintiff moved (*l*) to strike out defendant's plea, as proved to be false by the latter's examination, Mr. Dalton "declined to strike out the plea, although he thought there could be little doubt that it was false. It involved a point which required evidence for its establishment, in addition to defendant's admissions, and no matter how clear the case might be, he had not power to strike out a plea unless the defendant, in a proceeding of the Court, admitted it to be false."

Subsequent statements of Mr. Dalton are in wider terms. In a case (*m*), for example, where a plaintiff applied to strike out pleas, and for leave to sign judgment, on the grounds that the defendant had, in his examination, admitted all but one of his pleas to be false, and that such examination shewed that defendant had no ground upon which to support the remaining plea, Mr. Dalton granted the application, thinking that the examination did not disclose a sufficient ground of defence, and that the defendant was "evidently endeavoring to shirk his bond."

But this wider application of the summary remedy did not meet with approval in a higher Court. Where, for example, a defendant under examination in an action on a note (*n*) was unable to say, on his examination, whether the note sued on was stamped or not, as he was not present when it was signed, and a co-defendant swore that the note was stamped, and the note was produced duly stamped, Mr. Dalton struck out a plea that the note was not stamped. Hagarty, C.J., reversed this order, on appeal, however; and laid it down that "it was not proper to try the truth of the plea in Chambers, and an order striking out a plea under R.S.O., c. 50, s. 156 (virtually identical with above-mentioned s. 24 of A. J. Act) could only be made where the defendant admitted it to be untrue."

Further limitations of the same practice are exemplified in *Metropolitan* v. *Rodden* (*o*), an action of ejectment; wherein the defendant admitted, on examination: (1) That he had executed

(*l*) *Turner* v. *Neil*, 6 P.R. 295.
(*m*) *Johnson* v. *Johnson*, 7 P.R. 288.
(*n*) *Imperial Bank* v. *Summerfelt*, 7 P.R. 320.
(*o*) 6 P.R. 294.

the mortgage under which ejectment was sought: (2) That default had been made in payment: (3) That he had no bonâ fide defence against the plaintiffs—he having defended merely to gain time, and to enable others to realize their claim on the land. An application made to strike out the defendant's appearance and notice of defence in that action, on the ground that the same principle applied as in the above-cited case of *McMaster* v. *Beattie*, was dismissed by Mr. Dalton; who said: "I do not think I have power to grant anything which would assist the plaintiff in the present case. It is true that similar applications have been granted occasionally, and probably no injustice has as yet been done in this way, but my opinion is that I have no jurisdiction in this matter. An equitable defence in ejectment might be struck out if proved to be false or embarrassing, but a defendant who appears has a right to remain in possession until the plaintiff proves his title, and his admissions under examination do not deprive him of this right.'

Finally, under that practice, (as pointed out by counsel subsequently arguing before Mr. Dalton, (*p*), in the course of a lucid explanation of it, as well as of the principle on which the foregoing case was decided) the plaintiff could recover judgment upon admissions in an examination of the defendant, in case only where admission of no defence on the part of the defendant would of itself entitle the plaintiff to recover. In an action of ejectment such an admission would not have that effect, because in such an action it lay upon the plaintiff not only to prove the falsity of the defence, but also to establish his right to recover by proving his own title; and, by the above-considered practice as to making orders for the entry of judgment, plaintiff was restricted in his evidence to furnishing admission from the defendant that there was no defence to the action, and was not allowed to go further, and furnish evidence to prove his own case.

Comparing the practice above analyzed with that laid down in such of the heretofore collected (*q*) cases as define the contemporary (1881) practice under English Order XIV—an Order which we have already stated to have been adopted here in that year, (by Rule 80 of the Ontario Judicature Act)—it is evident that,

(*p*) *Trust & Loan Co.* v. *Hill*, 9 P.R. 8.

(*q*) 39 C.L.J., 259.

whatever the analogy between them, the two practices are very different. Obviously, the cases relating to the practice so analyzed had no application to the practice under Rule 80, or the later Rules 739 and 603, successively in force here upon the same subject.

In order to see how fully the English practice under Order XIV, up to 1881, has been judicially regarded as applicable here, it is but necessary to look at almost any of our early decisions under Rule 80. In the first one reported (*r*) for example, Cameron, J., after referring to "Order XIV, our Rule 80," and citing the leading contemporary authorities under that Order, quoted Coleridge, C.J.'s statement (*s*) that "this is the commencement of a new system, and of a practice hitherto only applicable to bills of exchange." On a later occasion, Cameron, C.J., in delivering the judgment of the C.P. Divisional Court, spoke (*t*) of "the English rule equivalent to Rule 80 of our Judicature Act,' and re-quoted Lord Coleridge's words; and the same passage has been rather recently chosen by our Chancery Divisional Court. (*u*)

But, although the practice under Rule 80 was, as above shown directly derived from that under English Order XIV, of 1875, there was a branch of the summary judgment practice in force in Ontario at the time Rule 80 was passed, and dating back here to the C. L. P. Act of 1856, namely, that enabling a plaintiff to sign final judgment in default of appearance to a "specially" indorsed writ of summons, which linked the old with the new, for it had this important feature in common with the practice introduced here in 1881, that the practices were alike applicable only in cases where the writ was "specially" indorsed. Indeed, as shall hereinafter appear, the above-mentioned practice as to summary judgment for non-appearance to a specially indorsed writ, and its English model, must be studied in order to get a proper understanding of the nature of a "special" indorsement.

"Before the C. L. P. Act, 1852" says Field, J., (*v*) there was no such thing "as the indorsement of the particulars of claim upon a writ." By s. 25 of that Act (as per the copied s. (15) of our later

(*r*) *Barber* v. *Russell*, 9 P.R. 433.
(*s*) *Runnacles* v. *Mesquinta*, 1 Q.B D., 418.
(*t*) *Dobie* v. *Lemon*, 12 P.R. at p. 73.
(*u*) *Munro* v. *Orr*, 17 P.R. at p. 56.
(*v*) *Knight* v. *Abbott*, 10 Q.B.D. 12

C. L. P. Act) it was provided that "in all actions where the defendant resides within the jurisdiction of the Court, and the claim is for a debt or liquidated demand in money, with or without interest, arising upon a contract express or implied, as for instance, on a Bill of Exchange, Promissory Note or Cheque, or other simple contract debt, or on a bond or contract under seal for payment of a liquidated amount of money, or on a statute where the sum sought to be recovered is a fixed sum of money or in the nature of a debt, or on a guarantee whether under seal or not, where the claim against the principal is in respect of such debt or liquidated demand, bill note or cheque, the plaintiff *may* make upon the writ of summons and copy thereof, a special indorsement of the particulars of his claim in the form A, No. 5, or to the like effect, and when the writ has been so indorsed, the indorsement shall be considered as particulars of demand, and no further or other particulars need be delivered, unless ordered by the Court or a Judge."

And s. 27, of the same Act, (as per, also, copied s. 55 of our later C. L. P. Act), allowed the plaintiff "in case of non-appearance by the defendant where the writ of summons has been indorsed in the special form hereinbefore (above quoted s. provided . . . to sign final judgment . . . for any sum not exceeding the sum indorsed on the writ, together with interest to the date of the judgment, and costs to be taxed in the ordinary way." . . .

The foregoing section, like s. 25, was entirely new. Parke, B., stated (*w*) that the words of the section had no connection whatever with any practice established before it was passed.

"The Judicature Acts"—to return to Field, J.'s words (*x*)—"retain the specially indorsed writ under the C. L. P. Act of 1852 and extend the remedies under it." To understand the foregoing remark, so far as is necessary for our purpose, one has but to look at Rule 7 of the Rules appended to the English Judicature Act of 1873.

That section reads: "In all actions where the plaintiff seeks merely to recover a debt (then follows an enumeration exactly the same as that in above-quoted s. 15, except that this one includes the case of a liquidated sum payable on a trust) the writ of

(*w*) *Rowberry* v. *Morgan*, 9 Ex. 736.
(*x*) *Knight* v. *Abbott*, supra.

summons *may* be specially indorsed with the particulars of the amount sought to be recovered, after giving credit for any payment or set-off."

It will be noted that the foregoing portion of Rule 7 differed importantly from the earlier section of the C. L. P. Act only in these two points: (1) There are no words in Rule 7 limiting its operation to cases where "the plaintiff resides within the jurisdiction of the Court," and, (2), the class of cases set out in Rule 7 is larger in the respect above pointed out. A marginal note printed opposite Rule 7 tells the reader to "see C.L.P. Act 1852, ss. 25, 27"; and, after the above-recited section of Rule 7, there immediately follow two sub-sections, describing the course the plaintiffs *may* take in the respective events of non-appearance and appearance to the writ "so specially indorsed." The first of such sub-sections is obviously framed upon that s. 27, to which the marginal note refers, though omitting detail; and the second sub-section provides: "Where the defendant appears on a writ of summons so specially indorsed, the plaintiff *may*, on affidavit verifying the cause of action, and swearing that in his belief there is no defence to the action, call on the defendant to show cause before the Court or a Judge why the plaintiff should not be at liberty to sign final judgment for the amount so indorsed, together with interest, if any, and costs; and the Court or Judge may, unless the defendant, by affidavit or otherwise, satisfy the Court or Judge that he has a good defence to the action on the merits, or disclose such facts as the Court or Judge may think sufficient to entitle him to be permitted to defend the action, make an order empowering the plaintiff to sign judgment accordingly." . . .

In the Rules appended to the English Judicature Act of 1875; which, as already stated, superseded the Rules in the schedule in which above-mentioned Rule 7 is found, the above-quoted first portion of Rule 7 appeared in the indentical Order III, Rule 6; and the second sub-section of the same Rule 7 appeared as Order XIV, Rule 1, with the slight difference that, instead of the words "so specially indorsed" there are the words "specially indorsed under Order III, Rule 6"—a mere verbal change rendered necessary by the separation of the parts of Rule 7 into different Rules.

The framers of the Ontario Rules of 1881 exactly duplicated above-mentioned Order III, Rule 6, in Rule 14; and, except in

some minor details of proceedure, they made Rule 80 the same as the Order XIV, Rule 1; of which we have been speaking.

It is apparent, then, that the special indorsement provided by Order III, Rule 6, is, as Pollock, B., remarked, (*y*) "not a new thing," and that, as that learned Judge also stated: "such an indorsement was provided for in the Common Law Procedure Act, 1852, s. 25." Further, it was held by the English Court of Appeal in 1879, (*z*) "that Order III, Rule 6, was not intended to alter the form of special indorsement which was given by the C. L. P. Act 1852 (15 & 16 Vict. c. 76, s. 25), and which enabled the plaintiff in default of appearance to sign judgment under s. 27." "In my opinion," said Bramwell, L.J., delivering the judgment for the Court in that case, "the same form of special indorsement will do now as before the Judicature Acts."

In s. 25, unlike Order III, Rule 6, of 1875, a provision was inserted that the special indorsement might be in the form contained in the schedule (A. No. 4) to the Act, "or to the like effect." Order III, Rule 6, was repealed in 1883, however, and the substituted Order III, Rule 6, provided that "such special indorsement *shall* be to the effect of such of the forms in appendix C., s. IV, as shall be applicable to the case." This alteration, and the alterations in certain of the other English Rules, (Order XX, Rule 1; Order XX, Rule 8), and the fact that most of the forms referred to (in appendix C, s. IV) were new, did not render the above-cited decision in *Aston* v. *Hurmitz* inapplicable, however, (*a*) and so break the continuity of English decisions on the question of form of a special indorsement. "I am of the opinion" said Coleridge, C.J., (*b*) "that the judgment of Bramwell, L.J., in *Aston* v. *Hurmitz*, lays down the true principle on which cases like the present depend, which is that what under the C. L. P. Act, 1852, would have been held to be a sufficient special indorsement to enable the plaintiff to sign judgment in default of appearance, is a sufficient special indorsement within the meaning of Order III, Rule 6, and Order XIV." Wills, J., too, thought (*c*) that "the principle laid down in *Aston* v. *Hurmitz* was still applicable."

(*y*) *Smith* v. *Wilson*, 4 C.P D. 395.
(*z*) *Aston* v. *Hurmitz*, 41 L.T. 521.
(*a*) *Bickers* v. *Speight*, 22 Q.B.D. 9.
(*b*) Ibid.
(*c*) Ibid.

Hence the need of some inquiry into the meaning of s. 25, and into the practice under that section. First, on the question of form generally, Pollock, C.B., stated that "the object of the enactment was to prevent the expense of a declaration" (*d*); and according to Pollock, B., (*e*) "the intention was, to put the indorsement in the place of particulars of demand; for it was expressly provided that when a writ of summons has been indorsed in the special form hereinbefore mentioned, the indorsement shall be considered as particulars of demand, and no further or other particulars of demand need be delivered unless ordered by the Court or a Judge."

In particular, it was held in practice under the section: (1) That it should appear *on the face of the indorsement* that the claim was for a liquidated demand (f): (2) That the rule then in force to the effect that payment need not be pleaded where credited in particulars of demand, did not apply where the plaintiff, seeking to recover a balance did not state the *particular sums* credited (*g*): (3) That it was irregular to deliver without the leave of a Judge, different particulars from those indorsed; but, if such unauthorized further particulars were delivered, and not set aside, they might be used by the plaintiff at trial (*h*).

To give jurisdiction under our before-quoted s. 15, copied from s. 25 of the English C. L. P. Act, 1852, the practice here did not require that so full particulars of claim be furnished as under s. 25. For instance, notwithstanding the prior decision under s. 25, to the effect that "it should appear on the face of the indorsement that the claim is for a liquidated demand," (*i*) John Wilson, J., refused, (j) in so far as the question of the indorsement containing sufficient particulars of demand was concerned, an application to set aside a final judgment signed in default of appearance to a writ indorsed as follows:

"The following are the particulars of the plaintiffs' claim:

(*d*) *Rodmay* v. *Lucas*, 10 Ex. 667.
(*e*) *Smith* v. *Wilson*, supra.
(*f*) *Per Parke, B. Rogers* v. *Hunt*, 10 Ex. 474.
(*g*) Day's Practice under C. L. P. Acts.
(*h*) *Fromont* v. *Ashley*, 1 El. & B. 724.
(*i*) *Rogers* v. *Hunt*, supra.
(*j*) *Northern Ry. Co.* v. *Lister*, 4 P.R. 120.

To amount of machines				$500 00
			Cr.	
1866—Aug.	By Cash		$11 00	
Oct.	"	"	21 00	
Dec.	"	"	25 00	
1867—Jan.	"	"	40 38	
Feb.	"	"	44 00	
March	"	"	33 00	
April	"	"	16 75	$191 13
	Balance due the Company			$308 87

The plaintiffs claim interest on $308.87, from the 16th day of May, A.D., 1867, until judgment."

But, when there came to be worked out the practice under Rule 80, referring as that rule did to cases "where the defendant appears to a writ of summons specially indorsed under Order III, Rule 6, (marginal Rule 14);" which later Rule was, as already seen, in terms identical with English Order III, Rule 6, of 1875, our judges looked rather to the English decisions under s. 25 than to those under s. 15 of our C. L. P. Act, when deciding what was a sufficient special indorsement, in point of form. Consequently, where a plaintiff's claim was thus expressed: "The plaintiff's claim is for $420.37, balance of work, etc., less credits and as agreed upon. The plaintiff claims interest on $420.37, until judgment, Dalton, M.C., allowed (*k*) the defendant's objection that the endorsement was not sufficient. This preference of the practice under English s. 25 is exemplified, too, in one of the latest decisions under old Rule 80, (*l*); where Street, J., in addition to citing the foregoing decision of Mr. Dalton, and other decisions of like tenor, cited that of the English Court of Appeal in *Aston* v. *Hurmitz*, supra.

The Ontario Rule, (245), which, in 1889, took the place of above-mentioned Rule 14, resembled English Order III, Rule 6, of 1883, in providing that the indorsement *should* be to the effect of such of the Appendix forms as should be applicable to any given case. MacMahon, J.'s, subsequent express reference, (*m*) to *Eickers* v. *Speight*, supra, "as to what is a sufficient special

(*k*) *Fitzsimmons* v. *Wilson*, 4 C.L.T. 91.
(*l*) *Villeneuve* v. *Wait*, 12 P.R. 505.
(*m*) *Nesbitt* v. *Armstrong*, 14 P.R. 368.

indorsement," shows that these and any other changes of 1889 in our Rules, like the English changes of 1883, did not prevent the continued application of the cases under s. 25 of the English C. L. P. Act, 1852. Neither have the changes make here in 1897, and since, nor the English changes since 1883, ended the usefulness of those cases, when considering what is and what is not a good formal special indorsement, although, as we shall hereafter see, the English tribunal deciding upon an application for summary judgment, after appearance, has now increased power to set right a *bona fide* mistake (*n*) made in drawing up a special indorsement, while in Ontario increased powers of amendment have also been conferred (*o*).

An indorsement purporting to be pursuant to s. 25 of the English Act of 1852, which had been weighed in the balance and found wanting, in respect of form, as requisites of same are above outlined—lacking the essentials of "special" indorsement—was treated as a nullity (*p*); and the plaintiff was forced to adopt a different mode of proceeding.

There was, too, another criterion by which to judge of the sufficiency of such an indorsement, that is, was the writ indorsed for such a claim as might properly be made the subject of a special indorsement?

Martin, B., thought (*q*) that s. 25 was intended to cover that "very great majority of cases for which actions are brought," i.e., actions for recovery of "debts or money demands to which there is no defence;" and Williams, J., (*r*) could not "see that the section does not include all cases where the claim is in the nature of a debt"; the field covered by s. 25 being taken to include "debts" *and* "liquidated demands, respectively." "It is clear" said Watson, B., "that the intention of the Legislature was to comprehend all cases except claims for unliquidated damages"(*s*).

Parke, B., was of opinion (*t*) that "the indorsement given by the statute applies solely to claims which are liquidated, and do

(*n*) R.S.C. 1893, Rule 3 (1) (b): *Roberts* v. *Plant*, 1895 (1 Q.B.) 597; *Arden* v. *Boyce*, (1894) 1 Q.B. 756.

(*o*) Rule 603 (3).

(*p*) *Rogers* v. *Hunt*, 10 Ex. 474.

(*q*) *Rodway* v. *Lucas*, 10 Ex. 667.

(*r*) *Hodsoll* v. *Baxter*, E.B. & E. 884.

(*s*) *Hodsoll* v. *Baxter*, supra.

(*t*) *Rodway* v. *Lucas*, supra.

not depend on the finding of a jury." . . . "The latter part of the 25th s. says that the indorsement shall be considered as particulars of demand," observed the last-named learned Judge, (*t*); "and, therefore, if the defendant resists the claim, the plaintiff cannot recover for anything but what is interest by contract express or implied, and he cannot ask the jury for interest under the 3 & 4 Will. 4 c. 42." A claim for interest not depending on the finding of the jury, however, but based on a statute, or some express or implied contract, was considered, under s. 25, (*u*) to be payable as a liquidated demand.

Remarks of Watson, B., (*v*) and of Pollock, C.B., (*w*) will serve to illustrate the way in which s. 25 was interpreted, and the spirit in which the remedy it provided was applied. "I think the judgment must be affirmed," said the first-named learned Judge, (in an action where the plaintiff sued upon a judgment—the action on a judgment not being included in the list in s. 25—and had signed final judgment in default of appearance) "the claim is within the *spirit* of the enactment." "We wish that it should be distinctly understood by the profession," Pollock, C.B., observes, "that in all cases except bills of exchange and promissory notes (as to which it is the usual practice of the Court to allow interest as a matter of course when the jury give a verdict for the plaintiff), if we find that any party not entitled to interest under an express or implied contract shall, nevertheless, claim it by a special indorsement on a writ, in order to gain an improper advantage, and in default of appearance sign judgment for a larger sum than he is really entitled to, we will not only set aside such judgment, but visit the attorney with the consequences of his abuse of the law, by making him pay the costs."

The difference between the practice under s. 15 of our C. L. P. Act, of 1856, and the practice under the corresponding English s. 25, (supra), in regard to the form of a special indorsement has already been noted. The two practices also differed on the question as to what claims might properly be made the subject of a special indorsement. Thus, notwithstanding Robinson, C.J.'s

(*t*) Ibid.
(*u*) Ibid.
(*v*) *Hodsoll* v. *Baxter*, supra.
(*w*) *Rodway* v. *Lucas*, supra.

decision, (*x*) in conformity with the English practice, that accounts delivered, but not liquidated by admission of the defendant, were not such debts as intended by s. 15, Richards, J., decided (*y*) that the following was a good special indorsement, entitling the plaintiff to sign final judgment in default of appearance: "1861, Dec. 31. To balance of account due and owing by the within-named defendants at this date for work and labor done and performed by the plaintiff for the defendants, and at their request, and for moneys paid by the plaintiff for the defendants at their like request, $5950.47. The plaintiff claims interest on £1487, 12 s., 4 d., from the 31st day of December, 1861, until judgment. N.B. Take notice etc., and the sum of £5 for costs."

"I agree with the view taken by my brother, Richards," said Draper, C.J., in the course of the judgment of the Common Pleas Division, dismissing an appeal from the Judge in Chambers, "of the right of the plaintiff to sign judgment for want of an appearance, the writ having been specially indorsed with a claim for a balance of an account for work and labor. This, as expressed, appears to me a liquidated demand. There might be more question as to the claim for interest, but it has become so settled a practice to allow interest on all accounts after the proper time of payment has gone by, and particularly upon the balance of an account which imports that the accounts on each side are made up and only the difference claimed, that I do not think we should treat the claim for interest as vitiating the special indorsement."

On this branch of the subject of special indorsement, also, it is the cases under the English s. 25, rather than those under our corresponding s. 15, that are found (*z*) to have been applied to, and cited in the discussion of, the Ontario practice since 1881; and, as shall hereinafter appear, some of the last above-cited cases under that section 25 of the English C.L.P. Act, 1852, have had a very important bearing on all the subsequent English practice respecting special indorsement.

So much for the form and substance of the special indorsement under the English and Upper Canadian C.L.P. Acts, respectively,

(*x*) *McKinstry* v. *Arnold*, 4 U.C.L.J. 68.

(*y*) *Smart* v. *Niagara & D. R. Ry. Co.*, 12 U.C.C.P. 404.

(*z*) *Dobie* v. *Lemon*, 12 P.R 75; *Mackenzie* v. *Ross*, 14 P.R. 299; *McVicar* v. *McLaughlin*, 16 P.R. 450; *Clarkson* v. *Dwan*, 17 P.R. 92, 206.

and for the general relation which the practices defining same have borne to the practices as to summary judgment *after* appearance to a specially indorsed writ of summons introduced into England in 1875, and into Ontario in 1881.

The first object of a special indorsement for the purposes of the last-named practice has in England (*a*), and here (*b*), been stated to be to confine the power to give speedy judgment to simple cases, to such claims as may be the subject of special indorsement, and are so indorsed. Allowing somewhat for the equity (*c*) or common law (*d*) predilections of the learned Judges, the spirit in which that object has been carried out may, perhaps, be best inferred from Cockburn, C.J.'s reference (*e*) to the practice under Order XIV as the result of a very strong piece of legislation, invading a defendant's common law right to appear in Court and defend himself against the plaintiff's claim, or from Wills, J.'s insistence (*f*), on its being remembered that "the right to obtain final judgment in a summary manner is one of purely statutory creation; it is no part of the common law jurisdiction of the Court, but is given by rules which have the force of an Act of Parliament, and it is only exercisable in the cases provided for in, and subject to, the conditions imposed by those rules."

On inquiring as to what claims may properly be made the subject of special indorsement since the Judicature Acts, and amendments thereto, it is, in the first place, to be noted that the enumeration contained in the English rule (Order III, Rule 6), which was framed upon the one in s. 25 of the C.L.P. Act, differed from its model only by including the case of a liquidated sum payable on a trust. Further, Order III, Rule 6, unlike s. 25, contained no words limiting its operation to cases where the defendant resided within the jurisdiction of the Court.

The same extension of the scope of the special indorsement procedure, and consequently, of the right to obtain judgment

(*a*) *Hill* v. *Sidebottom*, 47 L.T. 224.

(*b*) Per Meredith, J., *Clarkson* v. *Dwan*, 17 P.R. 92.

(*c*) Per Lord Hatherly, *Wallingford* v. *Mutual L.R.*, 5 A.C. 699; per Boyd, C., *Huffman* v. *Dover*, 12 P.R. 492; per Meredith, J., *MacKenzie* v. *Ross*, 14 P.R. 299.

(*d*) Per Cameron, J., *Barber* v. *Russell*, 9 P.R. 440; per Armour, C.J., *Lowden* v. *Martin*, 12 P.R. 496; per Osler, J.A., *Solmes* v. *Stafford*; per Wills, J. (quoted).

(*e*) *West Central W. Co.* v. *North Wales W. Co.*, 39 L.T. 628.

(*f*) *Gurney* v. *Small*, (1891) 2 Q.B. 585.

summarily in default of appearance, was effected in Ontario in 1881; for, as already pointed out, the framers of our Rule 14 of that year exactly copied English Order III, Rule 6, of 1875. In view of this, is it not difficult to understand Cameron, J.'s statement, as thus reported (*g*): "The cases in which resort may be had to a Judge or the Court under Rule 80 (referring, of course, to cases where the defendant appears to a writ of summons specially endorsed under that Rule 14) are such cases only as under the old practice the plaintiff could properly sign judgment in default of appearance to a specially indorsed writ?"

Conspicious among the later decisions defining the classes of claims which are within Order III, Rule 6, are those relating to claims for interest. We have already seen that, under s. 25 of the C.L.P. Act, the words "where the claim is for a debt . . . *with or without interest, arising upon a contract express or implied*" . . . were thus construed (*h*): "where the claim is for a debt . . . with or without *interest arising upon a contract express or implied*," and not as applying to a claim for interest, which under 3 & 4 William IV, c. 42 s. 28, a jury is free to allow or disallow in its discretion.

It has been sought to have this claim for interest recoverable pursuant to the statute of William declared to be a claim within Order III, Rule 6, on the plea that a claim for interest in a writ operated as a demand of a liquidated sum under said s. 28; which provides that upon all debts or sums certain the jury may allow interest from the time when the debt was due, or from the time when a demand giving notice that interest would be claimed was made. But this "erroneous idea" was rejected in the Court of Appeal (*i*) and elsewhere (*j*); so that, under Order III, Rule 6, as under s. 25 of the C. L. P. Act, the English practice is (*k*) that "where a plaintiff has to resort to the provisions of 3 & 4 Wm. IV, c. 42, s. 28, in order to make a claim for interest by way of damages, he cannot make a good specially indorsed writ" (*l*).

(*g*) *Barber* v. *Russell*, 9 P.R. at p. 440.
(*h*) Harrison's C.L.P. Acts (2nd ed.) p. 15.
(*i*) Per Lopes, L.J., *Wilks* v. *Wood* (1892), 1 Q.B. 687.
(*j*) *Rymney Ry. Co.* v. *Rymney I. Co.*, 25 Q.B.D., 146.
(*k*) *Sheba Gold Mining Co.* v. *Trubshawe* (1892), 1 Q.B., 674.
(*l*) *London & Universal Bank* v. *Clancarty* (1892), 1 Q.B., 694.

But the rule under s. 25 of the C. L. P. Act, to the effect that no interest but that due by express or implied contract might be specially indorsed for and recovered by way of judgment in default of appearance, was, as evidenced by the above-quoted remarks of Pollock, C.B. (*m*), relaxed in favor of claims for interest on bills of exchange and promissory notes, even though such interest was, in the strict view of the law, unliquidated damages (*mm*). This line of practice has since received the sanction of positive enactment; for, by s. 57 of the Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), it is provided that, where a bill is dishonored, the measure of damages which shall be deemed to be liquidated damages shall be: (1) The amount of the bill; (2) Interest thereon from the time of presentment for payment, if the bill is payable on demand, and from the maturity of the bill in any other case; (3) The expenses of noting, or when protest is necessary and the protest has been extended, the expenses of protest. Sub-s. 3 provides that, where by the Act interest may by recovered as damages, such interest may, if justice requires it, be withheld wholly or in part; and, where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper. Promissory notes are equivalent to bills of exchange under the provisions of the same Act (*n*).

"It is admitted," says Denman, J. (*o*), "that the object of the (foregoing s. 57) is to enable actions on bills of exchange to be easily dealt with under Order XIV;" and, according to A. L. Smith, J. (*p*), "the whole intention of the Act" is "that the holder should get his interest down to judgment in one action, and should not be driven to a second action to recover the interest between writ and judgment." "As to the meaning of sub-s. 3," observes the same learned Judge; . . . though the plaintiff may recover damages down to judgment, yet the tribunal (that is to say, the Judge at Chambers in cases under Order XIV) need not give the amount of interest stipulated for or claimed." Lord Esher conceived (*q*) the general effect of s. 57 to be that "the measure of

(*m*) *Rodway* v. *Lucas*, supra.

(*mm*) Per Bayley, J., *Cameron* v. *Smith* 2 B. & A., 305.

(*n*) *London & Universal Bank* v. *Earl of Clancarty* (1892), 1 Q.B., per Denman, J., at p. 692.

(*o*) *London & Universal Bank* v. *Earl of Clancarty*, supra.

(*p*) Ibid.

(*q*) *Lawrence* v. *Willcocks*, 1892, 1 Q.B., 696.

damages is to be all those things mentioned, all of which are to be deemed to be liquidated damages. That means that they are to be deemed to be so, whether they are so or not. Therefore, in applying Order XIV, Rule 1, to such a case, the Court is to deem that all those things when demanded are liquidated damages. If so, the demand for them is a liquidated demand." "It follows," added the same learned Judge, "that this writ (in an action on a bill of exchange with an indorsement containing a claim for 7s., 8d., for noting and interest on the bill to date of the writ, and a claim for interest thus stated: 'The plaintiffs also claim interest on £20, 10s., of the above sum at £5 per cent. from the date hereof until judgment)' "is specially indorsed within the meaning of Order III, Rule 6, and Order XIV is applicable."

In passing from this consideration of s. 57, there might be noted the Court of Appeal's treatment and explanation of a Divisional Court decision (*r*) which A. L. Smith, J., understood (*s*) as deciding that "a writ was not specially indorsed because the interest claimed was abnormal." While Lord Esher doubted (*t*) whether the report of that case was "quite accurate," Fry, L.J., said (*u*), "I do not think that the Court can have meant to decide in that case, (*Elliott* v. *Roberts*), that the demand for interest was not a liquidated demand, because, in the subsequent case of *Blood* v. *Robinson*, (*v*) decided shortly afterwards, the Lord Chief Justice seems to have agreed in a decision the other way. I think the decision in *Elliott* v. *Roberts* must really have turned on the fact that the demand for interest was exhorbitant, and, therefore, the Court did not think that the plaintiffs ought to have leave to sign judgment."

It is thus evident that the answer to the question: Is the rate of interest on the bill or note claimed in the writ normal or abnormal?, decides not whether or not the indorsement be "special," but the success or failure of the application for summary judgment under Order XIV; for, as Lopes, L.J., has expressed it, (*w*), "when the Master or Judge sees that the claim is exhorbitant, he has a discretion, and will say that the interest is such as ought not to

(*r*) *Elliott* v. *Roberts*, 36 Sol. J., 92.
(*s*) *London & Universal Bank* v. *Earl of Clancarty*, supra.
(*t*) *Lawrence* v. *Willcocks*, supra.
(*u*) Ibid.
(*v*) 36 Sol. J., 203.
(*w*) *Lawrence* v. *Willcocks*, supra.

be given, and, therefore, leave to sign judgment ought not to be granted, and the case must go for trial."

Finally, the English Courts have been careful to permit s. 57 of the Bills of Exchange Act, 1882, to be invoked in behalf of such a plaintiff only as answers the personal description (*x*) contained in the section, and otherwise brings himself within the section (*y*).

The present practice in England on the subject of special indorsement of interest claims in general is even more closely parallel with that of the past than is the practice on the two leading branches of the subject above discussed. "We think it clear," says Lord Coleridge, in the course of a judgment delivered on behalf of a Court of five judges, (*z*), called upon to decide whether or not there had been wrong decisions under Order XIV at Chambers, (*a*) "that Order III, Rule 6, applies only to cases in which the demand which the plaintiff seeks to recover, whether or not it be made up in part of interest, is a liquidated demand—in other words, to cases in which the interest is payable under a contract, and not by way of liquidated damages. It was so held under words almost identical with those now (1892) under consideration, contained in the C. L. P. Act, 1852: *Rodway* v. *Lucas*, 10 Ex. 667. If any distinction can be drawn between the two enactments, it is that the words of Order III, Rule 6, are rather more clearly in favor of such a construction than those of the C.L.P. Act."

If we read into the foregoing a reference to that other species of interest which is within Order III, Rule 6 (*b*), namely, that arising under claims carrying a statutory right to interest, we have a full general statement.

At the time the present Ontario rule respecting special indorsement, (R. 138), came into effect, (1st September, 1897), the portion of our practice defining what interest claims might or might not be properly made the subject of special indorsement had come to

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(*x*) Cavanagh's Law of Summary Judgment, 31 per Denman, J., *London* v. *Clancarty*, supra.

(*y*) *Fruhauf* v. *Grosvenor*, 67 L.J., 350: *May* v. *Chidley* (1894), 1 Q.B., 451: *Roberts* v. *Plant* (1895), 1 Q.B., 597.

(*z*) *Sheba Gold Mining Co.* v. *Trubshawe*, supra.

(*a*) *London & Universal Bank* v. *Earl of Clancarty*, supra, per A. L. Smith, J., at p. 694.

(*b*) Vide Order III, Rule 6.

be similar (*c*) to the English practice on the same topic. That rule, however, effected a great change, by providing that "the writ of summons may, at the option of the plaintiff, be specially indorsed with a statement of his claim, or of the remedy or relief to which he claims to be entitled, where the plaintiff seeks to recover a debt or liquidated demand in money (with or without interest, and *whether the interest be payable by way of damages or otherwise*).

We have seen that the scope of the special indorsement procedure was extended by Order III, Rule 6, of 1875. In 1883, that rule was repealed; and, by the new Order III, Rule 6, the extent of the special indorsement procedure's application was in one respect, narrowed, while in another it was extended. Thereafter, the statutory claims which might under sub.-s. (C) be specially indorsed for, were to be debts or liquidated demands arising "on a statute where the sum sought to be recovered is a fixed sum of money, or in the nature of a debt *other than a penalty*;" and the following class of cases was included in Order III, Rule 6, namely: (F) "Actions for the recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired, or has been duly determined by a notice to quit, or against persons claiming under such tenant."

To understand this new sub-section (F), also, one must look to prior enactments; for, as Lord Esher pointed out (*d*), "words very similar to, though not exactly identical with those contained in Order III, Rule 6, first appear in 1 Geo. IV, c. 87, s. 1, and subsequently in the Common Law Procedure Act, 1852, s. 213." "It appears to me," said the last-named learned Judge, "that the Legislature in the latter Act intended to follow the language of the previous Act, and that the framers of Order III, Rule 6, obviously intended to follow the language of the Common Law Procedure Act. Therefore, I think that any decision (*e*) upon the language of the previous Acts ought to be regarded as applicable to the provisions of this rule." Lopes, L.J., (*f*) considered "the words

(*c*) Vide *Hollender* v. *Ffoukes*, 16 P.R., 175; *Munro* v. *Pike*, 15 P.R., 164; *Solmes* v. *Stafford*, 16 P.R., 264; *McVicar* v. *McLaughlin*, 16 P.R., 453; *Clarkson* v. *Dwan*, 17 P.R., 94.

(*d*) *Arden* v. *Boyce* (1894), 1 Q.B., 796.

(*e*) Vide *Doe d. Tindal* v. *Roe*, 2 B. & Ad., 922; *Doe d. Carter* v. *Roe*, 10 M. & W., 670; Doe d. *Cundey* v. *Sharpley*, 15 M. & W., 558.

(*f*) *Arden* v. *Boyce*, supra.

contained in 1 Geo. IV, c. 87, and reproduced in the C. L. P. Act, 1852," "practically the same" as those "which appear in Order III, Rule 6 (F)," and that "the similarity of the phraseology of those Acts to that of Order III, Rule 6, gives the decisions on those statutes a material bearing" . . .

"Having regard to those decisions," continues Lopes, L.J., "and the practice which we have ascertained to have long existed at Chambers, I have come to the conclusion that the procedure for summary judgment in actions for the recovery of land only applies to cases where a tenancy is determined in the ordinary course by effluxion of time, or by the ordinary notice to quit which may be given either by the landlord or the tenant; that is, to practically undefended cases, where a tenant holds over after the expiration of his lease, or after the expiration of a notice to quit in the case of a tenancy from year to year."

Sub-sec. (F) was, on a previous occasion (*g*), held to apply only to cases "where the plaintiff has himself demised the property, and has been party to the lease or agreement under which it has been held, or where there has been a payment of rent by the defendant to the plaintiff, or where the defendant is otherwise estopped from denying the plaintiff's title."

It has been held (*h*), however, that sub-s. (F) applies to the case of a mortgagee suing a mortgagor to recover possession of the mortgaged land where the mortgage deed contains an attornment clause. For example, where a mortgage deed contained a clause by which the mortgagor attorned tenant from year to year to the mortgagee at a yearly rental payable half yearly, and a further clause by which the mortgagee might at any time, without giving any previous notice of his intention so to do, enter upon and take possession of the premises and determine the tenancy created by the attornment; and, the rent being in arrear, the mortgagee sued to recover possession, and applied for an order for recovery of the premises under Order XIV, it was held that the claim to recover possession was founded on the determination of a tenancy at will, and not on forfeiture, and that the writ could be specially indorsed under Order III, Rule 6, (F).

(*g*) *Casey* v. *Hedyer*, 17 Q.B.D., 97.

(*h*) *Danbuz* v. *Lavington*, 13 Q.B.D. 347, overruling *Hobson* v. *Monk* W.N. (1884), 31; *Hall* v. *Comfort*, 18 Q.B.D. 11; *Kemp* v. *Lester* (1896), 2 Q.B. 162.

But, if it was a case of forfeiture, (*i*) substantially, though the plaintiff might be able to bring himself literally within the words of the sub-s. (F), that is, indorse his writ "for the recovery of land by a landlord against a tenant whose term has been duly determined by a notice to quit," it was held, (*j*), in conformity with the practice laid down under the practically similar words of 1 George IV, c. 87 s. 1, (*k*), and later, (*l*), that the case did not come within the words of Order III, Rule 6; (F); and, therefore, the writ could not be specially indorsed thereunder.

In 1902, however, sub-s. (F) was amended, so as to make it read as follows (*m*): "Actions for the recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, *or has become liable to forfeiture for non-payment of rent*, or against persons claiming under such tenant."

Sub-s. (F) of Ontario Rule 245, of 1889, was, word for word, the same as sub-s. (F) of English Order III, Rule 6, 1883, and the English cases under the latter rule were taken as defining the practice which should be followed here under that sub-section. On this topic, also, though, the Ontario practice is now wider than the English. Sub-s. (F) thus appears in our present rule, (138), as to special indorsement, with all the limiting words swept away: (F) "In actions for the recovery of land (with or without a claim for rent or mesne profits)."

As to the classes of claims within above provision of rule 138 for the recovery of land, it has recently been successively held by a Divisional Court, and the Court of Appeal (*n*), that Rule 138 (F) must not be taken, as Rose, J., took it, to be "broad enough to cover both claims for the recovery of possession of land and claims where the title is determined between the parties for all time," but that, where the only indorsement upon a writ is in the form appropriate to a foreclosure action under Rule 141, such writ cannot be said to be specially indorsed under Rule 138 (F), as in an action for the recovery of land, so as to entitle the plaintiff to

(*i*) *Burns* v. *Walford* W.N. (1884), 31; *Mansergh* v. *Rimell* W.N. (1884), 34.
(*j*) *Arden* v. *Boyce*, supra.
(*k*) e.g. *Doe d. Cudney* v. *Sharpley*, supra.
(*l*) *Burns* v. *Walford* and *Mansergh* v. *Rimell*, supra.
(*m*) R.S.C., January, 1902.
(*n*) *Independent Order of Foresters* v. *Pegg*, 19 P.R. 80.

move for summary judgment under Rule 603. "It cannot . . . be affirmed," says Osler, J. A., "that the action for the recovery of land under Rule 138 (F) is the same kind of action as one under Rule 141 for the foreclosure of a mortgage and the immediate delivery of possession as incident thereto. In one sense no doubt, the latter is an action for the recovery of land, by extinguishing the mortgagor's title, but there is no recovery as such until the final order of foreclosure. The immediate delivery of possession in such an action is not really upon a judgment for the recovery of land, but a special relief granted to the plaintiff pendente lite, different in character from the judgment which the plaintiff seeks when he indorses his writ with a claim under Rule 138 (F)."

Except as to pointing out that new sub-section, (G), of present Ontario Rule 138, referring to "actions for the recovery of chattels," a sub-section to which there is nothing in English Order III, Rule 6 corresponding, the writer hopes he has traced such lines of the English and Ontario practices respectively defining the claims which may properly be made the subject of a special indorsement as present important differences. It is hoped, too, that the extent of the application to our practice of the English cases on those topics where the practices so diverge, is now apparent.

The other sub-sections of the present English Order III, Rule 6, and Ontario Rule 138, respectively, which, carefully, (*o*) but not exhaustively (*p*), enumerate the rights of action under one of which the particular claim must be brought before it can properly be made the subject of a special indorsement are, almost word for word, the same, for the words excepting penalties contained in English Order III, Rule 6, of 1883, were copied into our Rule 245, of 1889, and thence into present Rule 138. Consequently, unless there be some statutory provision affecting the practice here to prevent it, the English cases under those similar sub-sections are, as a rule, followed here.

Take, for example, the case of claims on foreign judgments. Following the English cases, (*q*), including that one under s. 25 of the C.L.P. Act, 1852, already cited, our Courts have held (*r*) that

(*o*) Per Boyd, C., *Davidson* v. *Gurd*, 15 P.R. 35.
(*p*) Annual Practice (1903), p. 18.
(*q*) *Grant* v. *Easton*, 13 Q.B.D. 302; *Hodsoll* v. *Baxter*, supra.
(*r*) *Solmes* v. *Stafford*, 16 P.R. 78, 264.

the amount due under a final and conclusive (*s*) foreign judgment is a liquidated demand which may be made the subject of a special indorsement, and that interest included in the amount of such a judgment is an integral part thereof (*t*). On this branch of practice, however, there is to be noted s. 11 c. 8, 3 Edw. VII, amending s. 118 of our Judicature Act by adding the following:

"118 a. In any action brought in Ontario on a judgment obtained in Quebec, the costs incurred in obtaining the judgment shall not be recoverable without a Judge's order directing their allowance; and such order shall not be granted unless, in the opinion of the Judge, the costs were properly incurred, nor if it would have been a saving of expenses and costs to have first instituted proceedings in Ontario on the original claim."

By reason of that provision in Ontario Rule 138 permitting the special indorsement of claims for interest due "by way of damages or otherwise," a plaintiff may now (*u*) specially indorse a claim to recover the amount of a foreign judgment, together with interest from the date thereof until judgment.

According to Cavanagh, (*v*), "it may be laid down in general that a judgment debt which admits of being made the subject of an action in the High Court of Justice, admits also of being made the subject of a special indorsement. On the other hand, a judgment which cannot be made the subject of such action, is not the subject of a special indorsement. . . . The principles which may be stated on this matter are—that a judgment debt due upon a judgment that is both final, and for the enforcement of which no special remedy is provided by statute, may be sued upon in the High Court of Justice; and, conversely—that a judgment debt due upon a judgment which is either interlocutory, or for the enforcement of which some special remedy is provided by statute, cannot be sued upon in the High Court of Justice."

By the application of the principles above stated, a claim for arrears of alimony due under an order in a divorce suit for weekly

(*s*) *Bank of Australasia* v. *Nias*, 16 Q.B.D. 717; *Nouvion* v. *Freeman*, 15 App. Cas. 1; *Re Henderson*, 37 Ch.D. 244; *Huncinadon* v. *Attrill*, 20 Ont. App. (Appx ii; *Dohn* v. *Gillespie*, 33 C.L.J. 394; *McLean* v. *Shields*, 6 O.R. 699; *Woodruff* v. *McLennan*, 14 A.R. pp. 254, 256, et al.

(*t*) *Solmes* v. *Stafford*, supra.

(*u*) *Vide Solmes* v. *Stafford*, supra; *Hollender* v. *Ffoulkes*, supra, as to former practice.

(*v*) Law of Summary Judgment under Order XIV, p. 6.

payment of alimony, pendente lite, was held (*w*) not to be the subject of a special indorsement; nor (*x*) was a claim founded on a County Court order for costs; nor (*y*) a claim for the enforcement of a balance order for calls, during the course of winding up proceedings; although a claim for calls due on shares may properly be specially indorsed for; and, although a balance order for the same calls be made in a subsequent winding up, the right to sue by specially indorsed writ for the original debt remains with the the company (*z*).

So much as to the class of *judgment* debts which is included within the expression "debt or liquidated demand in money." It has already been pointed out that those terms "debt," "liquidated demand in money," were construed disjunctively, when interpreting them for the purposes of the practice under s. 25 of the C.L.P. Act, 1852. Cavanagh, however, argues in favor of a different construction, for the purposes of the practice under Order III, Rule 6. "The language of the Rule," says (*a*) that learned writer, "admits, per se, of either of two interpretations according as the terms 'debt,' and 'liquidated demand in money' are to be respectively understood in a synonymous, or in an opposed sense; when those terms are understood in the former sense, the rule may be rendered as 'debt, that is, liquidated demand in money'; when those terms are understood in the latter sense, as 'debt as well as liquidated demand in money.' 'Debt, as distinguished from 'liquidated demand in money' signifies money due or owing—whether it be or be not of ascertained amount; liquidated demand in money' signifies a money claim of ascertained amount only; thus, money payable on an implied contract in respect of use and occupation of land, or on a quantum meruit for work done and materials supplied, or on a quantum valebant for goods sold, constitutes a debt, but not a liquidated demand in money, unless, indeed, the particular contract in question imports not merely an obligation of payment, but also the exact sum payable. Debt being, therefore, in logical language a genus of which liquidated demand in money is a species, it

(*w*) *Bailey* v. *Bailey*, L.R., 13 Q.B D. 885.
(*x*) *Furber* v. *Taylor* (1900), 2 Q.B. 719.
(*y*) *Chalk* v. *Tennant*, 57 L.T. 598.
(*z*) *Westmorland* v. *Fieldin* (1891), 3 Ch. 15: Annual Practice (1903), 19.
(*a*) Law of Summary Judgment, p. 8.

appears to us that the application of Order III, Rule 6, must be restricted to that species; in other words, we hold that the Rule must be read 'debt, that is, liquidated demand in money'—and that it only extends to debts which can be brought within the category of liquidated demands in money, not to debts in general. Take as an example, a claim for work done and materials supplied; this, in our opinion, will or will not be within the Rule according as the contract under which the claim is made did or did not, respectively, expressly or impliedly fix the amount or rate of renumeration. If no amount or rate were agreed upon, then, in the absence of custom or usage settling such amount or rate, the claim can only be for a fair and reasonable compensation, and this, we submit, although it may be for a debt, is certainly not a liquidated demand in money, and is not within the Rule."

It is submitted that Cavanagh's above-quoted opinion as to the proper construction of the expression "debt or liquidated demand," for the purposes of special indorsement, is amply supported by judicial authority. While Quain, J., (*b*) was merely in doubt, (1876), as to whether Order III, Rule 6, referred to "anything but a monetary demand," Malins, V.C., thought, (1880), that the same rule was "evidently confined to" the case of a "demand for *a specific sum of money*," (*c*), and Fry, J., expressly held, (1884), that "the special indorsement created by Order III, Rule 6, applies only to a mere money demand" (*d*). Of course, the rule had, in 1883, been extended, (sub-s. F.), so as to include the class of actions for the recovery of land hereinbefore discussed, so that it is, perhaps, superfluous to remark that Fry, J.'s, decision, and the one about to be again cited, had no reference to that part of the special indorsement Rule.—On adding to the foregoing decisions of Malins, V.C., and Fry, J., that of the court of five judges deciding, (1892), that "Order III, Rule 6, applies only to cases in which the demand which the plaintiff seeks to recover . . . is a *liquidated* demand," (*e*), we have a judicial construction of the words "debt or liquidated demand in money,"

(*b*) *Butterworth* v. *Lee*, W.N. (1876) p. 9.

(*c*) *Yeatman* v. *Snow*, 28 W.R. 575.

(*d*) *Hill* v. *Sidebottom*, 57 L.R. 224.

(*e*) *Shelba Gold Mining Co.* v. *Trubshaw*, supra, followed by Ontario Court of Appeal in *Solmes* v. *Stafford*, supra.

contained in the special indorsement rule, the same as Cavanagh's, viz., "*debt, that is, liquidated demand in money.*"

The opinion of the learned editors of The Annual Practice for 1903, is, (*f*), be it noted, that these words "debt or liquidated demand," "seem properly applicable to *a definite sum of money* which would formerly have been recoverable in the old common law action of *debt* in its most technical form." On the question as to the operation of Order III, Rule 6, in respect of claims for quantum meruit, to which Cavanagh refers in his above-quoted statement, the same editors say, (*g*): "It has been assumed in certain English cases, (*h*), . . . and decided in certain Irish cases, (*i*) . . . that a claim for reasonable remuneration not expressly fixed by contract for work done is within the expression 'debt or liquidated demand.' This result is at variance with several ably reasoned judgments on the corresponding words in the Irish C.L.P. Act, 1855." . . . Any definite sum of money recoverable at common law on express or implied agreement is within Rule 6; thus, in general, money due on the common counts, as had and received—or paid—or lent—on account stated—is within the rule, but not, it would seem, money claimed on a mere quantum meruit" (*j*).

Finally, as to the operation of the special indorsement Rule in respect of the above-mentioned classes of claims on a quantum meruit a quantum valebant, or for use and occupation, that operation has been more specifically stated in the following summary, (*k*): "The rule covers all cases where a definite remuneration is fixed by express agreement or by usage or custom; the rule also covers all cases where, in pursuance of such agreement, or usage, or custom, a definite remuneration is subsequently fixed—e.g., an amount fixed by an arbitrator's award, or by an architect's certificate, (*l*), made in pursuance of a

(*f*) Ibid, p. 15.

(*g*) Ibid, p. 16.

(*h*) *Runnacles* v. *Mesquita*, 1 Q.B.D. 416; *Phillips* v. *Harris*, W.N. (1876) 54.

(*i*) *Stephenson* v. *Weir*, 4 L.R. Ir. 369; *Kilgariff* v. *McGrane*, 8 L.R. Ir. 351; *Whelan* v. *Kelly*, 14 L.R. Ir. 387.

(*j*) Annual Practice (1903), p. 20.

(*k*) Law of Summary Judgment, etc., 21.

(*l*) *Vide Meade* v. *Mouillot*, 4 L.R. Ir. 207.

contract, or otherwise binding; the rule also covers all cases where, by an account stated, or other transaction, the original claim is transmuted into a liquidated demand. On the other hand, the rule does not cover any case where the claim is to recover compensation for use and occupation, or for services rendered, or for goods sold, the remuneration for which has not been fixed by agreement, or in any other binding way."

A tolerably clear general statement respecting what is and what is not a "liquidated demand" within the meaning of the special indorsement rule may be gathered from the above-quoted remarks. Greene, B., offered the followlng explanation of the term "liquidated demand" in the course of a decision under a General Order made in pursuance of the Irish C. L. P. Act, which prescribed a certain notice where the plaintiff's demand was "for a debt or liquidated sum founded on a contract express or implied." "A liquidated demand in the Rule," said Baron Greene (*m*), "means a demand of such a nature that the plaintiff can by calculation ascertain the amount and claim it, . . . Those cases in which it does not apply are actions of the nature of trespass, etc., in which the sum to be recovered cannot be estimated by the plaintiff himself, but by a jury." . . .

But the following definition of a "liquidated demand" (*n*) appears to the writer to more appropriately define it, as related to the subject of special indorsement: "a demand is a liquidated one if the amount of it has been ascertained—*settled by the agreement of the parties to it, or otherwise*" (i.e., either expressly, or, along the lines suggested by Cavanagh, by implication of law).

"The question whether a demand is liquidated or not liquidated," said Lord O'Hagan (1880), in delivering a judgment of the Irish Court of Appeal under the Irish Rule corresponding to English Order III, Rule 6, "is a question of fact and not of law" (*o*). As illustrated by s. 57 of The Bills of Exchange Act, 1882, declaring that certain demands shall be deemed to be liquidated (whether they are so in fact, or not) this question is now, to some extent, one of law, also.

(*m*) *Cullen* v. *Moran*, 2 Ir. Jur. N.S. 28.
(*n*) *Mitchell* v. *Addison*, 20 Georgia, 53.
(*o*) *Robinson* v. *Ralston*, L.R. Ir. 8 Ch. 29.

Although for an amount subject to be altered or diminished by taxation, a claim on a solicitor's untaxed bill of costs may be specially indorsed (*p*). A special practice, however, regulates the granting of summary judgment on the special indorsement in such a case, as shall later appear. A claim for a sum of varying amount, e.g., a claim against a mortgagor for a fixed amount for interest, less the amount of rents got in by a receiver, to be applied by him towards paying off the interest and arrears, cannot be made the subject of a special indorsement (*q*). As has been noted, however (*r*) the last cited decision is not to be taken as laying it down that the mere appointment of a receiver prevents the indorsement of the writ with a claim for a liquidated amount (*s*)—the ground upon which the decision in *Poulett* v. *Hill* went being that the writ ought not to have been indorsed for a liquidated sum, because there was a prior action in progress wherein an account had to be taken. Therefore, the appointment of a receiver by a mortgagee under power conferred by the mortgage does not interfere with there being a valid special indorsement for the amount of principal and interest due (*t*).

Not all liquidated demands for money are within the expression "debt or liquidated demand;" for, as the Court of Appeal held in the above-cited case of *Bailey* v. *Bailey*, a money claim for the enforcement of which some special remedy is provided by statute (in that case the claim being recoverable only in a Court of Equity), is not properly a specially indorsable claim. This statement, however, must be taken subject to sub-s. (E) of the Rule as to special indorsement, providing that a claim for a debt or liquidated demand payable "on a trust," may be specially indorsed.

It has been decided that those words "on a trust" will permit of the special indorsement of a claim by a cestui que trust, or beneficiary, to recover from his trustee money due from and held by the trustee on an express imperative trust, (*a*). "Thus," says

(*p*) *Smith* v. *Edwardes*, 22 Q.B.D. 10.
(*q*) *Poulett* v *Hill* (1893) 1 Ch. 277.
(*r*) Annual Practice (1903) 15.
(*s*) *Lynde* v. *Waithman* (1895) 2 Q.B. 187.
(*t*) Ibid.
(*a*) *Wilson* v. *Dundas*, W.N. (1875) 232.

Cavanagh, (*b*), in commenting on the last-cited decision, "rent or income of an estate or fund vested in A, upon trust to receive and pay over the same to B, is, when wrongfully retained in A's hands, recoverable by B on specially indorsed writ." The last-named learned writer understood another decision, (*c*), to support the view that money held on an implied trust is similarly recoverable, (*d*), as where, for example, a principal seeks to recover from his agent a bonus or profit of a liquidated nature received by the agent in the course of his agency, and, therefore, held by him for the principal. "Where there is a purely discretionary trust to pay over the corpus or income of a fund, Order III, Rule 6, is, (*e*), clearly inapplicable; so, the rule appears to be likewise inapplicable, so long as there has been no actual receipt and wrongful detainer of money fixed with a trust; thus the remedy we apprehend, against a trustee who by his neglect has never received or paid over trust monies is not by specially indorsed writ." . . .

Further, the equitable nature of the remedy provided for the recovery of a claim against the separate estate of a married woman does not prevent such a claim being specially indorsed (*v*), but the judgment granted on the special indorsement in this class of action is limited, as provided for in *Scott* v. *Morley*, supra. This is the practice in Ontario, too, now (*w*), although, since the last-cited English cases, Boyd, C., held (*x*), as opposed to earlier decisions of the Master-in-Chambers (*y*), and Rose, J. (*z*), that "summary proceedings upon specially indorsed writs apply where the action is of a personal nature against the defendant, and do not apply where (the defendant being a married woman) the judgment can only be of a proprietary nature."

If it satisfy the definition of a "liquidated demand," which the writer has attempted to clearly state in the foregoing paragraphs

(*b*) Law of Summary Judgment, etc., supra, p. 44.

(*c*) *De Bussche* v. *Alt*, L.R., 8 Ch. D. 286.

(*d*) Law of Summary Judgment, etc., supra, p. 44.

(*e*) Ibid.

(*v*) *Scott* v. *Morley*, 20 Q.B.D. 120; *Downe* v. *Fletcher*, 21 Q.B.D. 120.

(*w*) *Nesbitt* v. *Armstrong*, 14 P.R. 366.

(*x*) *Cameron* v. *Heighs*, 14 P.R. 56.

(*y*) *Quebec Bank* v. *Radford*, 10 P.R. 619; *Cameron* v. *Rutherford*, 10 P.R. 620.

(*z*) *Kinnear* v. *Blue*, 10 P.R. 465.

a claim may properly be made the subject of a special indorsement, even though it be of the nature of liquidated damages (*a*). Space will not permit of more than a passing consideration of this last-named class of claims. Suffice it, therefore, to get some idea of the meaning of this phrase "liquidated damages," and of the general attitude of the courts toward this branch of the subject.

Liquidated damages is (*b*) "the amount agreed upon by a party to a contract to be paid as compensation for the breach of it, and intended to be recovered, whether the actual damages sustained by the breach be more or less, in contradistinction to a penalty, which is only the maximum amount agreed to be paid, and is intended to be reducible in proportion to the actual damages sustained." The primary meaning of the phrase "liquidated damages," is, (*c*), that the sum named has been "assessed between the parties," (*d*). "The tendency of modern decisions, (*e*), is to hold contracting parties to the bargains they make, and the clear meaning of the words they use." "Where the parties to a contract have agreed," says Lord Esher, (*f*), "that in case of one of the parties doing or omitting to do some one thing, he shall pay a specific sum to the other as damages, as a general rule such sum is to be regarded by the court as liquidated damages, and not a penalty. One recognized exception to such rule is where a sum of money is to be payable upon the non-payment of a smaller specific sum, in which case the courts have treated the larger sum as a penalty, not as liquidated damages."

Subject to the change effected by the provision in Ontario Rule 138, of 1897, altering our practice relative to interest claims to the extent already shewn, it may be said that claims for *unliquidated* damages, whether in tort or in contract, cannot be made the subject of special indorsement, even though the measure of damages be stated in fixed, definite terms, (*g*). Consequently,

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(*a*) *Hodsoll* v. *Baxter*, supra.
(*b*) Wharton's Law Lexicon, 464.
(*c*) Stroud's Law Dictionary, 439.
(*d*) Per Cotton, L.J., *Wallis* v. *Smith*, 52 L.J. Ch. 154.
(*e*) Stroud's Law Dictionary, supra; *Wallis* v. *Smith*, supra.
(*f*) *Law* v. *Local Board of Redditch*, (1892) 1 Q.B. p. 130.
(*g*) *Knight* v. *Abbott*, 10 Q.B.D. 11.

a writ cannot, (*h*), properly be specially indorsed for such a claim as one for the balance of purchase money due under an agreement, where defendant refuses to complete the purchase. On an application for summary judgment under old Ontario Rule 80, where the writ was indorsed with a claim for the price of land which the plaintiff had agreed to sell to the defendant; who refused to carry out the contract of sale, Dalton, M.C., in the course of a very instructive judgment on this point, said (*j*): "I think the claim here cannot be effectively specially indorsed on the summons. A claim for the price of land *sold and conveyed* might be so indorsed, but it must be on an executed and performed consideration. Here no property has passed, the plaintiff still owns the land—there is no debt, and what the plaintiff is entitled to is damages against the defendant for not accepting" . . .

The decisions as to what claims may or may not be specially indorsed under that sub-sec. (B) of the special indorsement Rule permitting the writ to be specially indorsed with a claim to recover a debt or liquidated demand arising "On a bond or contract under seal for payment of a liquidated amount of money," afford additional illustrations of the application of the same principles as have already been seen to govern the decisions with respect to the special indorsement of other classes of claims.

Thus, it was held (*k*) that a claim on a bond within 8 & 9 Will. 3, c. 11, s. 8, that is, such a double bond conditioned for the performance of a covenant or agreement other than payment of a single lesser sum of money, (see said sec. 8), as a bond conditioned for the payment of an annuity quarterly, where the penal sum became due on failure to pay any quarterly instalment, could not properly be made the subject of a special indorsement. "It is clear to my mind," said Coleridge, C.J., in the last cited case, "that the provisions of 8 & 9 Will. 3, c. 11, s. 8, constitute a special procedure which is intended to be saved by Order XIII., Rule 14. That order, read with the statute, provides a complete code of procedure, and the provisions of the other rules and orders with respect to specially indorsed writs are, therefore, excluded from applying."

(*h*) *Leader* v. *Tod-Heatley*, W.N. (1891) 38.
(*j*) *Hood* v. *Martin*, 9 P.R. 313.
(*k*) *Luther* v. *Caralampie*, 21 Q.B.D. 414.

Such a claim as one on a bond within 8 & 9 Will. 3, c. 11, s. 9, is without the special indorsement Rule for this reason, also, namely, that it is not a claim for a "debt or liquidated demand," as that expression has been above defined. Although, under the provisions of the last-named statute, the obligee is allowed to sign judgment for the full amount of the penalty named in the bond, he has still to go to a jury and have his damages in respect of the breaches assessed, and can only obtain execution for the amount so assessed—the judgment so signed for the full amount of the penalty to remain to answer any further breach, the obligee to have a scire facias against the obligor on that judgment in case of fresh breaches, or summon the obligor to show cause why execution should not be had upon the judgment in respect of the damages occasioned by those fresh breaches; which damages are to be ascertained in the same manner as before. The foregoing will, it is hoped, explain Coleridge, C.J.'s, statement that "you could not get *final* judgment for the whole amount of the bond,' in such a case (*l*).

The following kinds of bonds are (*m*) within 8 & 9 Will. 3, c. 11; and, therefore, a claim on any of them is not a proper subject for special indorsement: (1) a bond for payment of an annuity: (2) a bond for the performance of an award: (3) a bond for the performance of any other specific act. Not all double bonds (that is, such bonds as where A. binds himself to pay £500 to B., on a given day, on the condition that the bond shall be void in case A. shall pay £250 to B., or perform any other single specified act on on earlier day) are within 8 & 9 Will. 3, c. 11, however, as is evidenced by form 7 in the appendix C., s. IV., to which the English special indorsement rule refers.

As to the Ontario practice on this last-mentioned point, it is, perhaps, noteworthy, that while the form referred to in our former special indorsement rule, (245), read thus: "The plaintiff's claim is for principal and interest due upon a bond. The following are the particulars: Bond dated ——. *Condition* for payment of $500 on (date)," the form referred to in present Rule 138 has the word "*Conditions*."

(*l*) Ibid.

(*m*) Chitty Arch. 1281.

Our present Rule 580 provides that "notwithstanding anything in the Rules contained," the provisions of 8 & 9 Will. 3, c. 11 . . . "as to the assignment or suggestion of breaches, and as to judgment, shall continue in force in Ontario."

Osler, J.A., has recently declared the intention of the foregoing Rule 580, and clearly stated the Ontario practice with respect to the special indorsement of claims on bonds within the statute to which that Rule refers. In the course of his judgment on the appeal to the Court of Appeal in an action (*n*) upon a bond, with a penalty conditioned for the payment of a sum of money by instalments, with interest in the meantime on the unpaid principal half-yearly, the last-named learned Judge says: "The practice in an action of this kind before the Judicature Act and Rules was well understood . . . The final judgment for the penalty was suspended, as it were, until the assessment of the damages for the breaches assigned in the declaration, or suggested after judgment, the entry on the rule in default of plea being: 'Therefore, it is considered that the plaintiff ought to recover his said debt and his damages on account of the detention thereof'—and then continuing with a direction that final judgment should be stayed until after assessment of the damages sustained by reason of the breaches."

"The procedure is now, perhaps, not quite so clear. The claim in such an action is not the subject of a special indorsement under Rules 138 and 603, as being a bond or contract for the payment of a liquidated sum. It is rather in the nature of a claim for damages, and the provisions of the statute of William, except in so far as they have been altered by our practice (see 2 George 4, c. 1, s. 29; C.S.U.C. c. 22, s. 149; R.S.O., 1877, c. 50, s. 132; and now Con. Rules 578-9), as to the manner in which such damages are to be assessed or ascertained, constitute a special procedure, which, as to the particular matters therein provided for, that is to say, the assignment or suggestion of breaches, and the judgment standing as a security for future breaches, is intended to be saved by Con. Rule 580: *Tuther* v. *Caralampi*," supra.

This subject has also been considered by our courts in a later action, (*o*), brought to recover the taxed costs of certain appeals to

(*n*) *Star Life Society* v. *Southgate* 18 P.R. at p. 154.

(*o*) *Turner* v. *Appleby*, 19 P.R. 145, 175.

the Court of Appeal, for the payment of which the defendants had become bound by the appeal bond in the action, as sureties. The indorsement on the writ was (*p*), a special indorsement, but Street, J., delivering the judgment of the King's Bench Divisional Court, (Armour, C.J., and Street, J.), setting aside, on various grounds, a judgment signed for default of appearance or defence, held that "The special indorsement of the writ here was unauthorized, (see Con. Rule 580), and therefore the judgment cannot stand as upon a specially indorsed writ; the claim is in the nature of a claim for damages requiring assessment, and final judgment could not, therefore, be entered for it in any event upon default of statement of defence." . . . "The practice to be followed upon a cause of action upon a bond of the nature of that sued on here, is laid down by the Court of Appeal in *Standard Life Assurance Society* v. *Southgate*, supra.

Another of the present Ontario Rules, (1073) provides for replevin bonds being "subject to the provisions of" 8 and 9 William 3, c. 11, s. 8. Hence, a claim on such a bond cannot be specially indorsed here, as it once (*q*) could.

Lord Tenterden says, (*r*), "a bond for the payment of a sum certain at a day certain is not within the statute of William, for, in order to ascertain the precise sum due in such a case, computation only is necessary, and the intervention either of a jury or of a Court of Equity is unnecessary;" and, Bramwell, B., held, (*s*), that a common money bond is within the statute of Anne, and not within the statute of William, "because only one breach can be assigned, and the penal sum is not for the performance of several covenants."

Sec. 12 of the statute last referred to, (4&5 Anne, c. 16,), provides that . . . "where an action of debt is brought upon any bond which hath a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, if the obligor, his heirs, etc., have, before the action brought paid to the obligee, his executors, etc., the principal and interest due by the defeasance or condition of such bond, though such payment was not

(*p*) Ibid, p. 145.
(*q*) *Bletcher* v. *Burn*, 24 U.C.Q.B. 259.
(*r*) *Murray* v. *Earl of Stair*, 2 B. & C. 82.
(*s*) *Preston* v. *Dania*, L.R., 8 Ex. 19.

made strictly according to the defeasance, yet it shall and may nevertheless be pleaded in bar of such action, and shall be as effectual a bar thereof as if the money had been paid at the day and place according to the condition or defeasance, and had been so pleaded." Sec. 13, of the same act, provides that . . . "if at any time pending an action upon any such bond with a penalty, the defendant shall bring into court where the action shall be depending all the principal money and interest due on such bond, and also all such costs as have been expended in any suit or suits at law or in Equity upon such bond, the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of the said bond, and . . . shall and may give judgment to discharge every such defendant of and from the same accordingly."

That is, briefly stated, a bond within above-quoted s. 12 will be cancelled on payment by the obligor of the sum really due. It follows, therefore, that in such cases, as opposed to cases on bonds within the statute of William, above discussed, the obligee may, (*t*), get final judgment for "a debt or liquidated demand," as that expression is used in the special indorsement rule, and the claim in such a case is a proper subject of special indorsement.

On its being objected to a writ indorsed with a claim for the full penalty, (£500), named in a common money bond under which judgment could only be obtained for £250, that the writ was indorsed with a claim for unliquidated damages, and not specially, under Order III, Rule 6, A. L. Smith, J., replied, (*u*): "The indorsement is really as good a special indorsement as it has ever been my lot to see. (Defendant's counsel) says it is bad because it claims £500, whereas there can only be judgment for £250; and, under Rule 1, the application is for liberty to enter final judgment for the amount indorsed. If this is so, Order XIV will be brought to a standstill; but I have dealt with scores of summonses in which the plaintiff has claimed, for example, £100, and taken £50, and Rule 4 expressly says that the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to, or as is admitted."

It has been held, too, (*v*), that a writ may be specially

(*t*) Gerrard v. Clowes (1892) 2 Q.B.D. 11.
(*u*) Ibid, at pp. 12, 13.
(*v*) *Jacobs* v. *Thomas*, 5 B. & Ad. 40.

indorsed for a claim on a bond for payment of one sum of money in gross at the expiration of a fixed period with interest payable in the meantime half-yearly, the bond containing a proviso that, in default of payment of the interest half-yearly, the obligee may demand payment of the principal and interest due. A claim on a bail bond may be recovered by way of special indorsement, (*w*); and, quite recently, in a case, (*x*), where "a defendant in prison for breach of an injunction entered into a bond to pay £100 if, after release, he again committed any act in further breach of the injunction, and after his release committed a deliberate, though trifling breach of the injunction, it was held that the £100 could be sued for by specially indorsed writ, as liquidated damages," (*y*).

Cavanagh considered, (*z*), that, under the expression "bond or contract under seal for the payment of a liquidated sum of money," there is comprehended every kind of deed, (other than guarantees under seal), which contains an undertaking to pay a definite sum of money. Such deeds may be, (*a*), divided into two classes: (1) Deeds Poll, (foremost amongst which are Bonds); (2) Indentures or Deeds inter Parties.

As to the secondly-named class, Cavanagh understood (*c*), the cases, (*b*), as holding that any indenture which contains a covenant for the payment of a definite sum of money is, so far as such covenant goes, within the special indorsement rule. Under this head, comes, for example: (1) A claim on a lease containing a covenant for payment of rent, or, (2), on a life policy with a covenant for payment of the sum assured, or, (3), on a marriage settlement, with a covenant for the payment of a jointure, or portion. But a claim on "a covenant which is not itself for payment of money is not within the rule; although the measure of damages for breach thereof may, in the event, be a definite sum; thus a covenant by the assignee of a lease indemnifying the assignor against the rent reserved is not within the rule; hence, in

(*w*) *Moody* v. *Pheasant*, 2 B. & P. 446.
(*x*) *Strickland* v *Williams* (1899), 1 Q.B. 382.
(*y*) Annual Practice (1903), 20.
(*z*) Law of Summary Judgment, etc., p. 40.
(*a*) Ibid.
(*c*) Law of Summary Judgment, etc., p. 410.
(*b*) *Berridge* v. *Roberts*, W.N. (1876), 42; *Anglo-Italian Bank* v. *Davies*, 38 L.T. 197.

an action to recover the amount of rent, which the assignor has been compelled to pay the lessor through default of the assignee, the claim cannot be specially indorsed" (*d*).

In this connection, there is to be noted Boyd, C.'s decision, (*e*), to the effect that the special indorsement procedure does not extend to a claim upon an *implied* covenant.

In passing hurriedly over the sub-s., (C), of the special indorsement rule, referring to claims "on a statute where the sum sought to be recovered is a fixed sum of money, or in the nature of a debt other than a penalty," suffice it to quote Cavanagh's remark, (*f*), that "fixed sums of money due upon statutes are the subject of special indorsement when recoverable by action in the High Court of Justice."

Finally, concerning that sub-sec. of the rule now under consideration which remains to be dealt with, namely, the one, (D), relative to actions "on a guarantee, whether under seal or not, where the claim against the principal is, in respect of a debt or liquidated demand," the last-named learned author says, (*g*): "For the application of Order III, Rule 6, it is necessary that the guarantee should be for payment by the principal debtor of a liquidated sum of money; this excludes general guarantees for the fidelity of a clerk or servant, or for performance by lessee of covenants in a lease, other than for payment of rent, or other ascertained sum, or for the doing of any act on the part of the principal other than the payment of a definite sum of money. Subject to the class of exceptions just mentioned, Order III, Rule 6, extends to claims on guarantees of every description, and that, whether the contract be simple or under seal, and whether the surety be sued alone or jointly with the principal debtor, (*h*)."

The first object of special indorsement for the purposes of the rule providing for summary judgment *after* appearance has already been stated to be to confine the power to give speedy judgment to simple cases to such claims as may be the subject of

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(*d*) Ibid.

(*e*) *Davidson* v. *Gard*, 15 P.R. 31.

(*f*) Law of Summary Judgments, etc. 42.

(*g*) Ibid, 43.

(*h*) *Cf. Lloyds Banking Co.* v. *Ogle*, L.R.; 1 Ex. D. 262; *New Biggin Loan Co.* v. *Brady*, 18 Ir. L.T.R. 53; Anon; W.N. (1876) 106.

special indorsement, and are so indorsed. Having clearly ascertained, it is hoped, just what claims may properly be the subject of special indorsement, it remains to briefly inquire further concerning the nature and formal requisites of a special indorsement.

A specially indorsed writ, it has been held, (*i*), is not a pleading, nor a writ and pleading combined, but it is *a writ*, and is not *delivered* but *served*. Consequently, a specially indorsed writ, like an ordinary writ, may be served at any hour of the day, or in vacation, (*j*), and it is not, (*k*), fatal to the validity of a specially indorsed writ, as Burton, J.A., expressed it, (*l*), that there is an omission of an averment which might be necessary in a statement of claim. But though a specially indorsed writ is not a pleading, it operates (*m*), as such to the extent that service of it is delivery of a statement of claim to a defendant under the rules and the time for defence is to be reckoned from the service thereof in the same way as from delivery of statement of claim.

As to the proper *form* of a special indorsement, we have, hereinbefore seen what was required for the purposes of s. 25 of the English C.L.P. Act, of 1852, and that the decision of the English Court of Appeal (*n*) to the effect that "the same form of special indorsement will do now as before the Judicature Acts," is still applicable, both in England and Ontario.

The decisions under the Judicature Acts, however, deal somewhat more specifically with this matter, so that it may be well to briefly refer to a few of them.

"The object of the special indorsement is this," said Cockburn, C.J. (*o*): "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 under Order XIV, and on the other hand it is intended that the defendant should have an opportunity of avoiding such further proceedings by payment of the debt. I think a party who is placed in the predicament of being liable to

(*i*) *Veale* v. *Automatic Co.*, 18 Q.B.D. 631.

(*j*) *Murray* v. *Stephenson*, 19 Q.B.D. 60.

(*k*) *Satchwell* v. *Clarke*, 66 L.T., N.S. 641; *Bradley* v. *Chamberlain*, (1893) 1 Q.B. 439.

(*l*) *Clarkson* v. *Dwan*, supra.

(*m*) *Anlaby* v. *Pretorius*, 20 Q.B.D. 764.

(*n*) *Aston* v. *Hurwitz*, supra.

(*o*) *Walker* v. *Hicks*, 3 Q.B.D. 8.

have a judgment signed against him summarily, is entitled to have sufficient particulars to enable him to satisfy his mind whether he ought to pay or resist . . . to know specifically what is the claim against him." Mellor, J.; who was of the same opinion, added, in part, as follows: "Before the plaintiff can ask for final judgment, the defendant ought to have afforded to him by the indorsement of reasonably specific particulars of claim *on the writ*, an opportunity of seeing whether the claim is one to which he has any defence or not." Pollock, B., said (*p*): "What is sufficient must always be a question of degree. The true test is given by Cockburn, C.J., and Mellor, J., in (above cited) case of *Walker* v. *Hicks*. The sufficiency of the particulars to enable the defendant to satisfy his mind whether he ought to pay or resist must depend on the course of dealing between the parties." According to Coleridge, C.J., (*q*) "if sufficient particulars are stated to bring to the mind of the defendant knowledge as to what the plaintiff's claim is, there is a good special indorsement."

The practical application of the principles just stated is well illustrated by the decisions in the two last-cited cases of *Smith* v. *Wilson*, and *Bickers* v. *Speight*. The writ in the former was indorsed as follows: "The plaintiff's claim is £49, 5s., 8d. The following are the particulars." It then went on, "To goods," with dates and amounts; and, after giving credit for certain payments, it stated the balance due to be £49, 5s., 8d. A Master's order allowing the plaintiff to sign judgment having been affirmed by Field, J., a motion was made before the Divisional Court to set that order aside, on the ground that the writ was not a specially indorsed writ within the meaning of Order III, Rule 6. "This indorsement," urged defendant's counsel, "does not comply with the directions contained in Appendix A, s. 7, and, therefore, does not disclose a cause of action so as to entitle the plaintiff to sign judgment under Order XIV, Rule 1. It does not show that he claim is for goods sold, or for goods illegally detained, or follow any of the examples given in the appendix, by describing their kind or quality." The Divisional Court (Denman, J., and Pollock, B.) saw "no sufficient ground for overruling the decision of the Master and the Judge." "It is impossible to doubt," says Denman,

(*p*) *Smith* v. *Wilson* L.R. 4 C.P.D. at p. 395.
(*q*) *Bickers* v. *Speight*, 22 Q.B.D. 7.

J., "that this writ was intended to be specially indorsed in the manner there (Appendix A) pointed out. The indorsement here, no doubt, varies somewhat from the first example there given. The words there used are, 'The plaintiff's claim is for the price of goods sold. The following are the particulars.' It then goes on to describe the kind of goods, and to give credit for a cash payment. Here, the indorsement is (supra). It would not have been correct to head the indorsement, 'The plaintiff's claim is £49, 5s., 8d., for *goods sold and delivered*, as it is suggested it ought to have been, because, after the items relating to goods, there come two items for a returned draft of £20 and notarial charges 1s., 8d. The form given in the schedule, therefore, would not have been strictly applicable. The object of the rule is well stated in *Walker* v. *Hicks*, and I think it has been sufficiently complied with here. This indorsement gives the defendant ample information to enable him to satisfy his mind whether he ought to pay or resist.' There is no suggestion that the defendant has been or could be prejudiced . . . Applying *the test of common sense* to this case, I think it would be manifestly unjust to set aside the judgment." Pollock, B., took the same view. "One cannot," says the last-named learned Judge, "shut one's eyes to what *in one's common experience* is the invariable way in which invoices are sent in. The nature, quality and character of the goods supplied must, unless under very peculiar and special circumstances, be known to both parties. Returned draft is not to be confounded with a cause of action founded on a dishonored bill. I think the indorsement here was abundantly sufficient." On the appeal to the Court of Appeal in the same case, Jessel, M.R.; who, too, considered that the object of Order III, Rule 6, was well stated in *Walker* v. *Hicks*, observed (*r*): "This writ is indorsed 'To goods,' and the amount is carried out. Everybody knows what it means, and the defendant also knows perfectly well it means 'goods sold to you.'"

The indorsement on the writ in *Bickers* v. *Speight* read thus: "The plaintiff's claim is £130 due to him from the defendant under and by virtue of an assignment under the hand of one Martha Inman, and dated July 14, 1888, particulars whereof are as follows:" The indorsement then set out the alleged assignment in these words: "I do hereby authorize and request you to pay to

(*r*) 5 C.P.D. 25.

Mr. Emanuel Bickers, of ———, the sum of £130, being the amount due or to become due from you to me, as appears by an I.O.U. signed by you, and dated Feb. 4, 1885, and his receipt for the same shall be a good discharge." *The I.O.U. was made an exhibit*; and contained the words 'for money lent.' "By Order XX., Rule 1," contended counsel, arguing against the sufficiency of the foregoing indorsement before the Divisional Court, "the special indorsement is to be deemed to be the statement of claim. Therefore, by Order XIX., Rule 4, it must contain a statement of the material facts relied on. By Order XX., Rule 8, 'In every case in which the cause of action is a stated or settled account, the same shall be alleged with particulars.' This is not done here. The expression 'due or to become due' is insufficient; it should be stated how much is due, and how much is accruing due." The above argument did not convince Coleridge, C.J., and Wills, J.; who held that "the objection which has been taken to this special indorsement must fail." "In the present case," remarks Wills, J., "the contents of the I.O.U. may be reasonably supposed to be within the knowledge of the defendant, just as in that case, (*Aston* v. *Hurwitz*, supra), the contents of the account rendered might be supposed to be within the knowledge of the person to whom it had been rendered; and *the I.O.U. contains the elements which are wanting* in the earlier part of the indorsement."

Thus, in the foregoing decision, the Divisional Court, apparently, considered it proper to look beyond the special indorsement form; and having, by supplementing the facts there stated, fully ascertained the nature of the claim, declared the special indorement to be sufficient.

Such a course is opposed to the one laid down under s. 25 of the English C.L.P. Act; and, strange to say, in the very case in which this contrary course was taken, it was held that the same principle was to be applied in judging of the sufficiency of a special indorsement as was applied under the C.L.P. Act. With respect to s. 25 of the last-named Act, as above seen, (*s*), a court of four judges held that "it should appear *on the face of the indorsement itself* that the claim is for a liquidated demand." Further, in the leading case of *Walker* v. *Hicks*, supra, Mellor, J.

(*s*) *Rogers* v. *Hunt*, supra.

spoke as above quoted; and, in the Court of Appeal, Lopes, L.J., said (*t*): "The object, (of the special indorsement rule), plainly is that the defendant may be able to look to the writ and see, without *any assistance*, what sum *he must pay* in order to stay the action." It is true that, in delivering the decision of a court of five judges already cited, (*u*), Coleridge, C.J., said: "We think that the question what a plaintiff "seeks to recover" is not, upon an application for judgment under Order XIV., concluded necessarily by the indorsement on the writ, especially if it be ambiguous."

But, when the last-mentioned case was cited before a Divisional Court, (Matthew, J., and A. L. Smith, J.), as showing that "the indorsement on the writ is not necessarily conclusive, but the affidavits may be looked at to ascertain the nature of the claim," Matthew, J., replied (*v*) that "it is most important that a defendant should know *from the writ* what the exact claim against him is." "A passage in the judgment of the court in *Sheba G. M. Co.* v. *Trubshawe*," (supra), continues Matthew, J., "is relied upon for the plaintiffs, as showing that the affidavits may be looked at in order to prove how the claim arose. That case, however, was decided on the form of the indorsement, and on the form only; but the court, having come to the conclusion that the indorsement was defective, looked at the affidavits, and found that the plaintiff ought not to have treated the claim for interest as a liquidated demand." "It was contended," says A. L. Smith, J., in the same case, "that the judgment in *Sheba G. M. Co.* v. *Trubshawe* shows that the indorsement is not necessarily conclusive, and that the affidavits may be looked at; but what was said was that, although the claim might be correct in form, if it appeared in fact that the interest was claimable only as damages, there would not be a good special indorsement."

Reading the context to the above-quoted words of Coleridge, C.J., in the light of the foregoing remarks of Matthew and A. L. Smith, J.J., it is easy to understand the purpose for which a special indorsement may be taken to be inconclusive, and that the decision in *Sheba G. M. Co.* v. *Trubshawe* is not contrary to, but really conforms with the practice laid down under s. 25 of the C. L. P. Act. "In *Rodway*

(*t*) *Wilks* v. *Wood*, (1892), 1 Q.B., at p. 688.
(*u*) *Sheba G. M. Co.* v. *Trubshawe*, supra.
(*v*) *Gold Ores Reduction Co.* v. *Farr*, (1892), 2 Q. B. 14.

v. *Lucas*," (supra), Lord Coleridge there goes on to say, "the indorsement was indistinguishable from that in the present case. The application there was to set the judgment aside. The Court held that—after judgment, at any rate—the indorsement was capable of being construed as covering the case of interest due under a contract, and, there being no affidavit of merits, refused to set the judgment aside, but they added that, if a case should arise in which the special indorsement should be resorted to, although the interest was, in fact, claimable only as damages, they would set the judgment aside, as an abuse of the process of the Court. In other words, the Court would disregard the form, and look to the substance, and, if satisfied upon the affidavits that, however correct the claim might be in form, the case was one in which the plaintiff had no business to treat the interest as a liquidated demand, and attempt to get the benefit of the special indorsement, they would prevent him from resorting to a remedy to which he was not entitled. It seems to us that the present case falls precisely within this principle. No one suspects the advisers of the plaintiffs of an intention to strain or misapply the process of the Court; but is plain from their own affidavits that they have, in fact, been attempting to get judgment under Order XIV for unliquidated damages in the shape of interest. It matters not in such a case whether the writ be right or wrong in form. It is not a case in which they have any business to resort to Order XIV, and they must take the consequences."

It is noteworthy, too, in this connection, that Coleridge, C.J., himself is reported (*w*) to have said, since the judgment in *Sheba G. M. Co.* v. *Trubshawe*, that "it had been decided by the Court of Appeal in several cases, and the principle was manifestly right, that, if the machinery of specially indorsed writs was made use of *the writ* should set out *fully* the cause of action."

It has already been seen that, in Ontario, MacMahon, J., referred (*x*) to the above cases of *Smith* v. *Wilson*, and *Bickers* v. *Speight*, "as to what is a sufficient special indorsement." Later (*y*), Winchester, M.C., cited the same cases on this question; and, on the appeal from Mr. Winchester's order, Boyd, C., stated the effect of the words of Coleridge, C.J., in *Fruhauf* v. *Grosvenor*, (supra), to be that "the indorsement must be complete in itself,

(*w*) *Fruhauf* v. *Grosvenor*, 8 T.L.R. 744.

(*x*) *Nesbitt* v. *Armstrong*, supra.

(*y*) *Davidson* v. *Gurd*, 15 P.R. 31.

containing everything which entitles the plaintiff to recover." On another occasion, (*z*), when Winchester, M.C., had followed *Fruhauf* v. *Grosvenor*, Armour, C.J., said, on appeal: "The judgment of the learned Master is right, and must be affirmed. The true rule as to what is a good special indorsement is to be found in *Walker* v. *Hicks*, supra, and *Gold O. R. Co.* v. *Parr*, supra. It is very important, on account of the summary remedy given in the case of a special indorsement, that the plaintiff should not obtain any undue advantage by omitting to show with precision the grounds of his claim, and that the defendant should understand *from the special indorsement* precisely what it is that the plaintiff claims." According to Maclennan, J.A., (*a*), "to comply with the Rules, a special indorsement must be such that it would be right to allow judgment to be signed for the claim so indorsed, in the absence of the defendant, on the ground that, by not entering an appearance, he must be taken to have admitted everything stated therein. To answer that character the indorsement must state, not in technical, but in plain general terms, a legal cause of action by the plaintiff against the defendant, such as if proved as stated, would entitle them to judgment therefor."

"Now, on motion for judgment," remarks Boyd, C., (*b*), "the function of the affidavits is to verify the cause of action stated in the special indorsement: *May* v. *Chidley* (1894) 1 Q.B. at p. 453: but the affidavits in this case show that the special indorsement is not in conformity with the facts, and, therefore, fail to verify it;" and, when the last-named Ontario case came up in the Court of Appeal, Burton, J.A., "quite conceded" that "the proper office of the affidavit" was to verify the indorsement, while Hagarty, C.J.O., concurred in "the remark of the Chancellor that the function of the affidavits is to verify the cause of action stated in the special indorsement." "They are not," says Hagarty, C.J.O., "for the purpose of making a bad special indorsement good by a disclosure of facts not appearing there."

An important point in the English definition of a proper special indorsement still remains to be considered. We have already seen that, under s. 25 of the C. L. P. Act, it was held that, where a plaintiff sought to add to an otherwise valid special

(*z*) *Munro* v. *Pike*, 15 P.R. 164.

(*a*) *Clarkson* v. *Dwan*, supra, at p. 216.

(*b*) Ibid, 17 P.R. at p. 95.

indorsement, a claim which was not properly recoverable by this summary mode of proceeding, the whole indorsement was treated as a nullity, (*c*), and the plaintiff was forced to proceed in a different way, i.e., to declare. The words in s 25 were, as was pointed out in the decision in *Sheba G. M.* v. *Trubshawe*, supra not so clearly in favor of such a construction as those of Order III, Rule 6; which has, since 1883, provided that "in all actions where the plaintiff seeks *only* to recover a debt or liquidated demand in money, . . the writ of summons may, at the option of the plaintiff, be specially indorsed." . . . The final result of the repeated efforts, (*d*), to secure a broader interpretation of the special indorsement Rule, for the purposes of the practice since the Judicature Acts, may be summed up in the following words of Lord Esher, in one of the latest cases, (*e*), on this subject: "All I can say is that the word "only" means "only", and that, if anything else is added to the liquidated demand, the writ does not come within the definition of a specially indorsed writ."

The operation of Order XIV, Rule 1, being confined, therefore, as Wills, J., expressed it, (*f*) "to the case of a defendant appearing to a writ of summons specially indorsed with a liquidated demand under Order III, Rule 6, and with nothing else," there logically followed, in the course of strict practice, the rule, (*g*), requiring that when the summons under Order XIV was taken out, the plaintiff should "have his tackle in order,' i.e., that the indorsement on the writ should be in the required form. Consequently, whenever an unliquidated claim was added to the indorsement, no proceedings under Order XIV could follow, without the issue of a fresh summons, after the indorsement had been amended by striking out the unliquidated demand.

To avoid the inconvenient effect of the decisions in such cases as have just been cited, (*h*), R.S.C., 1893, Rule 3, (1) (b), now Order XIV, Rule 1, (b), was passed; providing that, "if on the hearing of any application under this Rule, (Order XIV, Rule 1), it should appear that any claim which could not have been

(*c*) *Rogers* v. *Hunt*, supra.

(*d*) *Hill* v. *Sidebottom*, supra; *Imbert-Terry v. Carver*, 34 C.D. 506; *Clarke* v *Berger*, 36 W.R. 809, et al.

(*e*) *Wilks* v. *Wood* (1892), 1 Q.B. 684.

(*f*) *Gurney* v. *Small*, (1891), 2 Q.B. 584.

(*g*) *Paxton* v. *Baird*, 41 W.R. 88.

(*h*) Per Meredith, J., *Clarkson* v. *Dwan*, supra.

specially indorsed under Order III, Rule 6, has been included in the indorsement on the writ, the Judge may, if he shall think fit, forthwith amend the indorsement by striking out such claim, or, may deal with the claim specially indorsed as if no other claim had been included in the indorsement, and allow the action to proceed as respects the residue of the claim."

The intention and effect of the above-quoted provision was somewhat considered in a later case, (*i*), in which the views expressed by the learned Judges in the Divisional Court, and Court of Appeal, seem to be summed up pretty well in counsel for plaintiff's statement, (*j*). that "Order XIV, Rule 1, (b), applies where something is included in the indorsement which cannot be specially indorsed at all; it has no application to the case of a mere incomplete or defective special indorsement; such an indorsement is curable by amendment, without leave."

Commenting on the effect of the last-cited decision, Osler, J.A., says, (*k*): "While not relaxing in any the least degree the former decisions, it shows, nevertheless, that by exercising the right of amendment given by the Rules, the plaintiff may amend his special indorsement, and so convert a faulty one, (where the claim is one which may be specially indorsed), into a good one. This he may do even after the motion for judgment has been launched."

Of the same tenor are the remarks of the learned editors of the Yearly Practice for 1903; who say (*l*): "This Rule, (Order XIV, Rule 1, (b)), does not affect the decisions as to what is, and what is not a good special indorsement; but, where a special indorsement is partly good and partly bad, it enables the Master, on the hearing of the application for judgment, to expunge, or to ignore the bad part. It is, therefore, no longer fatal to the application if, at the time when the summons is taken out, the indorsement on the writ is not a good special indorsement. The Rule does not apply where the indorsement is deficient, and something must be added in order to make it a good special indorsement . . . ; and such a case is governed by the Rules as to power of amendment by parties. It applies only where the indorsement contains too much." . . .

(*i*) *Roberts* v. *Plant* (1895), 1 Q.B. 597.
(*j*) Ibid.
(*k*) *Clarkson* v. *Dwan*, supra.
(*l*) Ibid.

Such unwarranted addition to the indorsement form must be the result of a bonâ fide mistake, however; for, as the last-cited authorities point out, (*m*), if it is not, another Rule passed in 1893, (R.S.C., Nov. 1893, Rule 3, (9), now Order 14, Rule 9, (b)), applies, namely, the one directing that "if the plaintiff makes an application under this order where the case is not within the order . . . the application shall be dismissed with costs to be paid forthwith by the plaintiff."

In view of the conclusion to Order XIV, Rule 1, (b), to the effect that the Judge may "allow the action to proceed as respects the residue of the claim," a conclusion which apparently sanctions compound claims, partly special, and partly not, and which appears to provide for judgment under Order XIV, being obtained in such cases for the special part of the claim, without prejudice to proceedings to recover the residue, it is rather surprising to be informed that the established English practice is to regard Order XIV, Rule 1, (b), as above stated, or, in other words, (*n*), "as only intended to give the Court discretionary power to prevent technical objections from defeating the purpose of Order XIV, in cases where a bonâ fide mistake has been made in drawing a special indorsement." As explaining why the Rule has been so interpreted, it has been pointed out, (*o*), that, while Order XIV, Rule 1, still opens with the words "where the defendant appears to a writ of summons specially indorsed under Order III, Rule 6," the word "only" has not been eliminated from the first sentence of the last-named Order, and, further, that, as we have seen, the above-quoted Order XIV, Rule 9, (b), imposes a penalty on a plaintiff proceeding under Order XIV on a claim not within the Order (*p*).

Summing up under this head, it may be said that, according to the present English practice, "no claim which could not by itself be made the subject of a special indorsement can be included therein, or joined therewith. Its presence vitiates the special indorsement, though the Court has now power to remedy the fault by amendment" (*q*).

As to the nature and extent of the power of amendment in the converse case; to which Order XIV, Rule 1, (b), does not

(*m*) Ibid.
(*n*) Annual Practice (1903), 128.
(*o*) Ibid.
(*p*) Vide *Rodway* v. *Lucas*, supra; *Sheba G. M. Co.* v. *Trubshaw*, supra.
(*q*) Annual Practice (1903), 14.

apply, namely, where something must be *added* in order to make a good special indorsement, Lord Esher thus speaks, (*r*): "(Defendant's counsel) says that, when the writ was issued, the plaintiff had not brought himself within the terms of Order XIV, because he had not indorsed on the writ a complete cause of action, not having stated that notice of dishonor was given. It was argued that there was no power of amendment before adjudication on the summons taken out; but the proceedings must be commenced afresh, thereby causing useless expense. In my opinion, the power of amendment in this case is just the same as in any other case. An amendment ought not to be allowed if it will occasion injustice; but if it can do no injustice, and will only save expense, it ought to be made." On this branch of the subject, another very instructive and more specific discussion is found in a case (*s*) which has quite recently come up before the Irish Court of Appeal. The indorsement on the writ in that action of ejectment was as follows:

"The plaintiff's claim is to recover possession of all that and those, the house and premises, No. 13 Mountjoy Square, situate in the parish of St. George and county of the city of Dublin, for non-payment of the rent thereof. And the amount of rent now due is as follows:—1899, November 1. One year's rent due to this date, £90." The writ was signed by a solicitor; who claimed £1 10s. for costs.

It appeared from the plaintiff's affidavit, filed on the motion for final judgment under Order XIV, Rule 1, that by lease dated 13th October, 1882, the plaintiff let the house 13 Mountjoy Square to Edward Caraher for 100 years, from the 1st November, 1881, at the rent of £90, and that Edward Caraher, the lessee, died on 5th January, 1900, and no personal representative had been raised to him. The affidavit of the defendant J. F. Caraher was to the effect that he was in possession, but that he never was tenant, or paid any rent. Boyd, J., on these facts, made an order allowing the plaintiff to amend the statement of claim indorsed on the writ, by stating therein the tenure of the premises, and thereupon that the plaintiff be at liberty to sign final judgment against the defendant, for recovery of possession of the house and premises. "The writ as originally issued," said Walker, L.J., on the appeal to the Court of Appeal from Boyd, J.'s judgment, "contained some of

(*r*) *Roberts* v. *Plant*, supra, at p. 903.
(*s*) *Guiness* v. *Caraher* (1900), 2 I.R. 505.

the ingredients which go to make up a specially indorsed writ. It had the words 'statement of claim' at the top of it, and it was signed by a solicitor. But every averment necessary to make it a specially indorsed writ between those two was wanting. Therefore, it was not a specially indorsed writ. If the plaintiff's contention is sound, it follows that every writ to recover possession of land, on the ground of rent being due, may be launched in the form of what is in substance an ordinary writ, and then changed into a specially indorsed one, when the plaintiff comes to move for judgment. The plaintiff is bound to exercise an option under Order III. Rule 6, as to which form of writ he will issue. Where does the option come in, if a writ can be issued in the ordinary form first, and changed afterwards into a specially indorsed one? There is no option at all exercised. I think if a plaintiff has issued what is in substance a specially indorsed writ, there is power to amend, but he cannot change an ordinary writ into a specially indorsed one, by supplying the substantial particulars." Fitzgibbon, L.J., after stating that "in practice cases we must be careful not to limit the beneficial operation of the Rules of Court unnecessarily," lays it down that "if a plaintiff wants to get summary judgment, he must exercise the option given to him by the Order of specially indorsing his writ, and he must do this at the issue of the writ, and before it is served on the defendant. Furthermore, the special indorsement *must* be to the effect of the appropriate form in Appendix C." "I have no hesitation," says the last-named learned Judge, "in holding that this option cannot be exercised for the first time after service. If a plaintiff has issued and served an ordinary writ, not specially indorsed, that writ cannot afterwards be changed into a specially indorsed one. I do not dispute, nor do I desire to define, the power to *amend*; I deny the power to *create* a specially indorsed writ after service." The opinion of Holmes, L.J., in the same case, was that "a statement of claim indorsed on a writ of summons may be amended like any other statement of claim." "On a motion for judgment," Holmes, L.J., goes on to say, "the Court often exercises its discretion in allowing an omission to be supplied, or an averment to be struck out or altered by way of an amendment. But I am of opinion that the order allowing the amendment in this case is wrong in principle, inasmuch as to enable a plaintiff to obtain a summary judgment for possession, it has changed the whole character of the indorsement on the writ. . . . The plaintiff was given a right to obtain summary judgment, provided the writ of summons is

specially indorsed. Can such a right be claimed by a plaintiff who deliberately rejects the appropriate form and uses instead the form of general indorsement? I think not; and I think that he cannot have his position bettered by permitting him on the hearing of the application, which when made was untenable, to amend by *essentially altering* the character of the indorsement."

The English practice against the allowance of compound claims, partly special and partly not, did not meet with general favor among the Ontario Judges. The manifest convenience and saving of expense which would result to a plaintiff from the sanctioning of compound claims, led Boyd, C., (*u*), proceeding along what he took to be a proper line of analogy, (*v*), to favor such a course of practice. Meredith, J., while recognizing that "before the liberal interpretation of the Rules," in the English case which Boyd, C., had cited, and in other cases (*w*) "the current of authority in Ontario was uniformly against a plaintiff's claim to final judgment under Rule 739, upon a specially indorsed writ where other claims, not the subject of special indorsement, were added", and while also recognizing that *Bisset* v. *Jones* was distinguishable, as being based upon a different rule, nevertheless followed, (*x*), the course taken by the Chancellor. "If the Rules do not warrant it," said Meredith, J., (*y*), "they ought to." But a strict compliance with the English decisions was insisted upon by a Divisional Court, (*z*), and by the Court of Appeal, (*a*), successively. Thus our practice stood in 1897; when it was altered, so as to permit of compound claims.

Our present Rule 138 provides: "The writ of summons may, at the option of the plaintiff, be specially indorsed with a statement of his claim, or of the remedy or relief to which he claims to be entitled, *where the plaintiff seeks* to recover a debt or liquidated demand in money." . . . And Rule 602, (2), states that a motion under Rule 603, (1), "may be made in respect of a cause of action specially indorsed under Rule 138, though the writ may also be indorsed with any other claim, and such order may be made in respect of the cause of action so specially indorsed as

(*u*) *Huffman* v. *Doner*, 12 P.R. 492; *Hay* v. *Johnston*, 12 P.R. 596.
(*v*) *Bissett* v. *Jones*, 32 Ch. D. 635.
(*w*) *Smith* v. *Davies*, 28 Ch. D. 650, *Blake* v. *Harvey*, 29 Ch. D. 827.
(*x*) *Mackenzie* v. *Ross*, 14 P.R. 299.
(*y*) Ibid.
(*z*) *Hollender* v. *Kjoulkes*, supra.
(*a*) *Solmes* v. *Stafford*, supra.

might be made if no other claim were indorsed on the writ."

With respect to compound claims, however, it must be remembered that the case of *Independent Order of Foresters* v. *Pegg*, supra, decided that, although the covenant in a mortgage deed for payment of principal and interest is *by itself*, within Rule 138, a claim for such payment, when conjoined with a claim for foreclosure, or sale, is not the subject of a special indorsement. On this point, the English and Ontario practices are the same (*b*).

The subject of amendment on an application for summary judgment under Rule 603 (1) is thus provided for by Rule 603 (3): "On any such motion, any amendment of the writ which might be ordered on a substantive motion may be directed, and judgment may be awarded in accordance with the writ as amended."

It is submitted that, allowing for the already-noted difference between the English and the Ontario summary judgment practices in regard to actions for the recovery of land, rendering the foregoing leading case of *Guinness* v. *Caraher*, to a certain extent, inapplicable here, the principles governing the power of amendment in Ontario are as therein stated. It may, perhaps, be useful to note, here, that the new Ontario Rule 300; which came into force on the 2nd inst., provides: "A plaintiff may, without leave, amend his statement of claim, whether indorsed on the writ or not, once, either before the statement of defence has been delivered, or after it has been delivered, and before the expiration of the time limited for reply, and before replying."

So much for this important one of the two conditions precedent to an application under either English Order XIV., Rule 1, or Ontario Rule 603 (1), namely, that there be a writ of summons specially indorsed within the meaning of either English Order III., Rule 6, or our Rule 138, or so indorsed as to be capable of being dealt with, either in the exercise of the power of amendment between parties, as such power is above defined, or under English Order XIV., Rule 1 (*b*), or Ontario Rule 603, (3), respectively.

In conclusion, regarding the other of those two conditions precedent, namely, that there be an appearance by *a* defendant, it is to be noticed that if an appearance has, before amendment, been entered to a writ of summons containing a defective special indorsement, such appearance stands (*c*), to the writ as amended.

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(*b*) *Hill* v. *Sidebottom*, supra; *Imbert-Terry* v. *Carver*, supra; *Clarke* v. *Berger*, supra.

(c) *Roberts* v. *Plant*, supra; *Paxton* v. *Baird*, (1903) 1 Q.B. 139.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Full Court.] BAXTER *v.* JONES. [June 5.

Fire insurance—Agent's liability—Gratuitous undertaking—Mandate.

The defendant, a general insurance agent, undertook gratuitously to have an additional $500 policy placed on the property of the plaintiffs; and before completion of this transaction he also undertook at the plaintiffs' request to notify the companies already holding policies of the additional insurance as is required under their policies. A loss occurred and owing to the defendant having failed to give such notice the plaintiffs were placed in the power of the insurance companies and had to accept $1,000 less than they otherwise would have had to do.

Held, that the transaction was one of mandate. If the defendant had not entered upon the execution of the business entrusted to him he would have incurred no liability, but having undertaken to perform a voluntary act he was liable for negligently performing it in such a manner as to cause loss or injury to the plaintiffs: *Coggs* v. *Bernard*, 1 Sm. L.C. 182.

Riddell, K.C., and *Stephens*, for plaintiffs. *Shepley*, K.C., and *Washington*, K.C., for defendants.

Full Court.] LA BANQUE PROVINCIALE *v.* CHARBONNEAU. [June 29.

Material alteration in note—Negligence—Liability of manager.

The defendant, the manager of a branch of the plaintiff bank, accepted a promissory note, not expressed to be joint and several, as security for an advance, instead of a joint and several one, although expressly instructed to require the latter. Shortly afterwards he discovered the mistake, and at the suggestion of one of the makers of the note he inserted the words "jointly and severally" on the understanding that the alteration was to be initialled by all the makers. This however was not done; and, after consultation with the bank's solicitor, the inserted words were crossed out by the defendant. In the result the bank were held to have lost their remedy on the note on the ground of material alteration. The bank then brought this action against the defendant for damages on the ground of negligence.

Held, (OSLER, J.A., dissenting) that the form of the note as taken was to all intents and purposes as valid as if made jointly and severally, and therefore in this regard only nominal damages could be recoverable.

The defendant also was not liable in damages for the consequences of his subsequent acts. What he did was done in good faith, and in ignorance of the legal consequences. The defendant exercised reasonable care and diligence in all of the circumstances of the case, and the mere fact that his judgment was mistaken, and his acts prejudical to the plaintiffs was not enough to render him liable.

Aylesworth, K.C., and *Barry*, for plaintiff. *Hogg*, K.C., and *Magee*, for defendant.

Full Court.] CITY OF TORONTO ASSESSMENT APPEALS. [June 29.

Assessment Act—Street railway companies—"Rolling stock, plant and appliances"—Construction of statute.

Held, that 2 Edw. VII., c. 31, s. 1, sub-s. 4, O., substituting a new section (18) in the Assessment Act, and providing that "Save as aforesaid, rolling stock, plant and appliances mentioned in sub-s. 2 hereof, shall not be land within the meaning of the Assessment Act, and shall not be assessable," does not exempt the appellant companies from assessment in respect of their plant and appliances (though otherwise land within the meaning of sub-s. 9, s. 2, of the Assessment Act), which is not upon the streets, roads, highways, etc., as mentioned in sub-s. 3 of that section.

The object of sub-s. 4 is to make it clear that rolling stock, etc., of the railway companies which is found and used in the streets shall not, save as mentioned in sub-s. 3, be, by reason merely of the wide words "substructure and superstructure" used in sub-s. 3, be liable to taxation as land. The words "plant and appliances" following the specific term "rolling stock" are to be read as restricted to the same genus as the latter, the whole having the meaning of rolling stock, rolling plant and appliances, such as tools in connection with or belonging to such stock; and the reference is to "rolling stock, plant and appliances" of such companies mentioned in sub-s. 2, as have such rolling stock.

O'Brien, K.C., *Bicknell*, K.C., *J. Bain*, *J. S. Lundy*, and *G. E. Henderson*, for various appellants. *Aylesworth*, K.C., *Fullerton*, K.C., and *Chisholm*, for the City of Toronto, respondents.

Full Court.] REX *v.* LEWIS. [June 29.

Criminal law—Necessaries—Medical treatment—Christian scientist—Crim. Code s.s. 209, 210.

The word "Necessaries" in s. 209 of the Crim. Code which enacts that everyone who has charge of any other person unable by reason of detention, age, sickness, insanity, or any other cause, to withdraw himself from such charge, is under a legal duty to supply that person with the necessaries of life,—includes proper medical aid, assistance, care and treatment. And therefore where the jury found that the prisoner, a Christian scientist

had without lawful excuse omitted to provide medical treatment for his infant child, under sixteen years of age when it was reasonable and proper that such treatment should be provided, and that the child died from such neglect.

Held, that the defendant had been guilty of an indictable offence under s. 210 of the Code, which enacts that every one who as parent, guardian, or head of a family, is under a legal duty to provide necessaries for any child under sixteen, is criminally responsible for omitting without lawful excuse to do so, etc.

Aylesworth, K.C. and *Vickers* for prisoner. *Cartwright*, K.C. and *Ford* for Crown.

Province of New Brunswick.

SUPREME COURT.

Barker, J.] MASTERS *v.* MASTERS. [July 9.

Partition—Proving lunacy—Costs—Apportionment.

In a suit for partition and sale of lands made necessary by a co-tenant being a lunatic, her lunacy was proven by affidavit under s. 80 of 53 Vict., c. 4. A motion that the costs of appointing a guardian to such lunatic and of proving the lunacy be charged upon the lunatic's share of the proceeds of the sale of the land in the above suit was refused.

Teed, K.C., for plaintiffs.

Barker, J.] WATSON *v.* PATTERSON. [Aug. 18.

Injunction—Obstruction of river—Log driving—Removal of obstruction before motion—Dismissal of suit—Costs—Assessment of damages—Remedy at law.

Plaintiff was prevented from driving lumber down a tributary of the St. John River by the closing of the passage by a pier and booms erected by the defendant in connection with his saw mill and by logs of the defendant. Defendant is the owner of both sides of the river. This suit was for a mandatory injunction to compel the removal of the pier, booms and logs so as to open up and keep open a passage for the plaintiff's lumber, and for an assessment of damages. The bill was filed and motion heard May 23, two days before the obstructions had been removed.

Held, that the injunction in respect of future obstructions should be refused, and plaintiff left to his remedy at law for recovery of damages, if any, but that the bill should be dismissed without costs; plaintiff to have costs of obtaining and serving interim injunction.

Lawson, K.C., for plaintiff. *Alward*, K.C., for defendant.

Province of Nova Scotia.

SUPREME COURT.

McDonald, C. J.] LISCOMB FALLS MINING CO. *v.* BISHOP [August 13.

Mining property—Contract to erect mills—Action on—Removal without injury to freehold—Liability of sheriff for wrongful seizure of property not liable to execution.

Plaintiffs who were holders of a number of prospecting gold licenses in G. county applied to the Crown Lands Department for a grant covering the whole or a part of the lands covered by the prospecting license. They paid into the department the sum required by law and their application after being accepted was referred to the surveyor of the department in the usual course, but no grant had actually passed at the time of the sale which gave rise to the action. Plaintiffs erected a mill on the land included in their application and employed the defendant B. to erect the necessary buildings and plant. For the debt accruing to him in this connection B. recovered judgements against plaintiffs and issued execution with instructions to the sheriff to levy on the goods and chattles of the plaintiffs for the sum of $300,75. Under this execution the sheriff levied on the mill, machinery, and other personal property found on the mining property and sold the same. The action was instituted by plaintiffs against the sheriff, and B. and the purchasers at the sheriff's sale alleging that the mill and its appurtenances so sold were not personal property at the time of the sale but were attached to the soil and part of the real estate and could not be sold under B's. execution. The property, which was sold *en bloc*, included a considerable amount of property which was clearly liable to seizure under the execution and the instructions indorsed thereon.

Plaintiffs claimed, (a) a declaration that the sale was void and to have the same set aside; (b) an order for the return of the personal property and damages for its detention; (c) damages for the trespass to the real estate and the personal property and for the conversion of said property. The evidence as to whether the mill, buildings, machinery, etc. could be removed without damage to the freehold was contradictory, but the learned trial judge found that it could be removed without such injury.

Held, that all claims made by plaintiffs must be refused and judgment entered in favour of defendants with costs.

Semble, that if the sheriff in taking property that was liable to be taken under execution at the same time seized and sold other property that was not liable to be so taken, without instructions, or in violation of his instructions, the remedy would be against the sheriff personally and not against the execution creditor.

Smith v. *Keal* 9 Q.B.D., 354, referred to.

H. A. Lovett for plaintiffs. *W. A. Henry* for defendants.