N O V A S C O T I A
COUNTY OF HALIFAX

C.H.13567

I N T H E C O U N T Y C O U R T
OF DISTRICT NUMBER ONE

BETWEEN:

LAWRENCE E. BENNETT, of Timberlea, in the County of Halifax, Province of Nova Scotia,

Plaintiff

- and -

SPURGEON SAVORY, of Timberlea, aforesaid,

Defendant

Patricia A. Coolen, for the plaintiff.

1976, April 29, O Hearn, J.C.C.:- This is a reference by the clerk of the court, to me, under Civil Procedure Rule 51.05, posing two questions:

> May judgment be entered for a liquidated demand of $800.00 without evidence or to the value of the motor vehicle as set out in the Statement of Claim.
>
> Should the affidavit of service of the process server refer to the original originating service and/or a certified copy there of should the copy referred to in the affidavit of the process server be referred to as an Exhibit "A" in the present action.

The plaintiff's claim is for the conversion of a motor vehicle, including a specified amount of $800.00 'being the value of the said motor vehicle' and damages for wrongful detention and conversion. The affidavit of the plaintiff's solicitor indicates that the defendant was duly served on February 19, 1976 and has failed to file a defence. It further discloses that the plaintiff desires to discontinue the action for general damages and enter default judgment on the claim for value.

The other question arises because of what happened on service of the originating notice. The affidavit of William Burns, process server, states that on February 19th he attempted to serve the originating notice and statement of claim, and that the defendant destroyed the original originating notice and statement of claim by burning them. Mr. Burns' affidavit does not refer to the originating notice, either as an exhibit or as a document, a true copy of which is on file with the clerk of the court, but states:

> 2. THAT an Originating Notice (Action) and Statement of Claim were issued on the 9th day of February, 1976 on the above named action.

The application is under Civil Procedure Rule 12.01, which is as follows:

> 12.01. (1) Where an originating notice contains any one of the claims mentioned in paragraph (2) and a defendant fails to file a defence thereto within ten days of the service of the notice or within such time as the court may order, the plaintiff may enter judgment against the defendant and continue the proceeding against any other defendant.
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> (2) The judgment may be for costs, and
>
> (a) where a claim is for a liquidated demand only, for a sum not exceeding the claim, and where part of the claim is for interest at an unspecified rate, then for an additional sum for the interest to the date of entering judgment at the rate of six per centum per annum; [Amend. 12/12/74]
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> (b) where a claim is for unliquidated damages only, for damages to be assessed;
>
> (c) where a claim relates to the detention of goods only, for the delivery of the goods or their value to be assessed,
>
> (d) where a claim is for the possession of land only, for possession of the land, provided if there is more than one defendant judgment shall not be enforced against any defendant until judgment for possession of the land has been entered against all the defendants. [E. 13/1/2/3/4]
>
> (3) Where interlocutory judgment is entered and the damages or value of the goods are assessed and costs taxed, a final judgment may be entered for the recovery of the damages, or the delivery of the goods or their value as assessed, and costs as taxed.

Miss Coolen, for the plaintiff, argues that the claim for value should be treated as a 'liquidated demand'. The revision of the rules, resulting in the Civil Procedure Rules, may well have enlarged the meaning of 'liquidated demand'. Certainly it has always been understood in a broader sense in Nova Scotia than in Ontario, for example, where there are numerous cases on the meaning of the expression. Some of these derived meanings depend upon the *ejusdem generis* rule to narrow the meaning to the kind of claim that appears in the examples given in the Ontario rule, examples that were substantially the same as those set forth in our former rule dealing with special endorsements, R.S.C. O.III, r.5. In the restructuring of our rules the examples have been eliminated and the originating notice that has been substituted for the writ in an action now contains, in every case, a 'stay clause' in doubly hypothetical form, i.e., it states that if the claim is for a debt or other liquidated demand and the amount is paid, the proceeding will be stayed. Special endorsements, as such, have been abolished, but the substance of the old procedure for a default judgment on liquidated claims has been retained in a much simplified form.

The classical discussion of 'liquidated demand' is contained in Odgers' *Procedure, Pleading and Practice*. In the Fifth Edition it is at p.41, in the following terms:

> What is "a debt or liquidated demand in money payable by the defendant"? These words include every "liquidated demand payable in money," although no fixed sum was expressly agreed on at the date of contract. (See *Runnacles v. Mesquita*, 1 Q.B.D.416; and *Phillips v. Harris*, (1876) W.N.54.) If no price or remuneration was then fixed, the plaintiff will be paid whatever is regular and usual, according to prices current in the trade, or to some scale of charges recognised in the profession (*"quantum meruit"*—such sum as he had earned); and the case is still within the rule. (*Stephenson v. Weir*, 4 L.R.Ir. 369; *Whelan v. Kelly*, 14 L.R.Ir. 387.) The

> first precedent of a special indorsement given in R.S.C., Appendix C, sect.IV.,* is an action on a butcher's bill, where it is improbable that the exact price to be paid for each joint was expressly fixed at the time it was ordered. What is excluded by these words from the operation of the rule is an action for unliquidated damages, that is to say, an action in which the amount to be recovered depends upon all the circumstances of the case and on the conduct of the parties, and is fixed by opinion or conjecture. In such cases one cannot say positively beforehand whether the jury will award the plaintiff a farthing, or forty shillings, or a hundred pounds. Merely inserting a figure on the writ (*e.g.*"and the plaintiff claims 500*l*. damages") will not make such a claim liquidated. But whenever the amount to which the plaintiff is entitled (if he is entitled to anything) can be ascertained by calculation or fixed by any scale of charges, or other positive *data*, it is said to be *liquidated* or "made clear," and then the writ can be specially indorsed.

See also the authority cited in *Stroud's Judicial Dictionary* (3d) under 'liquidated demand'. The citation from Odgers has often been quoted in the cases as a concise summary of the legal understanding of the term.

It is apparent from these sources that some *quantum meruit* and *quantum valeat* demands can be treated as liquidated demands. This applies, however, only where they are for work, services, goods and materials supplied on some consensual basis (or possibly on application of the doctrine of restitution) where there are established rates, charges or standards that can be referred to. There was, indeed, an opinion and practice among the older practitioners in the Province that any *quantum meruit* claim could be made by special endorsement and could be the subject of a default judgment, i.e., the demand if specified in liquidated terms would be valid and prevail until challenged, and if challenged on the

basis that it was not a liquidated demand proceedings could go forward as on a general endorsement. This was probably based on the Nova Scotia case of *Graham v. Warwick Gold Mining Co.*, (1905) 37 N.S.R. 307 (C.A.), but this seems to have been an ordinary case of reasonable remuneration for work and labour based on established rates.

In the instant case the claim is for detention and conversion of a motor vehicle. I do not think that the value on a motor vehicle can be ascertained accurately from established rates and charges without recourse to evidence. Certainly that is not the practice in other cases where the question arises, such as property damage claims. Moreover, Rule 12.01(2)(c) specifically deals with the case where the claim relates to the detention of goods and there does not appear to be any basis for making a distinction in the case of conversion, except that the judgment need not be for delivery of the goods. Accordingly, I think that this claim falls under Rule 12.01(2)(c) or (b) and that the plaintiff may enter judgment, on proper proof of service, for damages to be assessed. In doing so, the plaintiff's solicitor can determine whether the claim for general damages is to be abandoned or not.

On the other question, Rule 12.05 requires an affidavit to be filed, proving due service of the originating notice on the defendant, in the absence of an acknowledgment by the defendant's solicitor, accepting service on the defendant's behalf. The manner of referring to exhibits in the affidavit is determined by Rule 38.03: if 'produced, attached or otherwise annexed' to the affidavit, it must be certified by the person before whom the affidavit is sworn. Otherwise, it must be left with the prothonotary or clerk, but in either case it must bear the certificate of the person before whom the affidavit is sworn. In the instant case, the original documents of which proof of service is to be

provided, have been destroyed but the plaintiff can prove service by annexing true copies to the affidavit of service, properly certified. In an extreme case it might be proper merely to refer to a document that can be positively identified as being in the possession of the clerk or prothonotary without certifying it, but I do not think that this is that case as it is quite feasible to prove certified copies.

The Civil Procedure Rules appear to have dropped the mandatory endorsement by the process server of certain data so that that question does not arise, but it was not feasible in any case here to do so. So that were it still a requirement it could have been dispensed with. I would, therefore, answer the clerk's questions as follows:

(1) Upon proper proof of service of the original originating notice and statement of claim, the plaintiff may enter judgment for damages including the value of the motor vehicle, to be assessed;

(2) The affidavit of service of the process server should refer to the original originating notice and statement of claim by reference to a true copy annexed to the affidavit of service and certified by the person before whom the affidavit of service is sworn.

P. Z. Chisholm

Judge of the County Court of
District Number One