CIVIL PROCEDURE *

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I. LEGISLATION

Only provincial legislation is considered in this survey, leaving out new subordinate rules and regulations. The maritime provinces and Ontario showed the most significant legislative changes. The Ontario Judicature Act [1] made three changes in rules of practice. In an action involving the title to land registered under the Land Titles Act, [2] section 38 of the Judicature Act requires a caution or notice of the action to be registered in the proper registry office. Certain exceptions [3] to this are provided and a new exception has been added. It may be dispensed with in any action to enforce a lien under the Mechanics' Lien Act. [4] Additions were made to section 75 respecting medical examinations to enable the examining doctor to ask questions relevant to the examination; any answers are now allowed to be admitted as evidence. Only the doctor and patient are to be present at the examination, except with the consent of both parties or as the court may direct. Finally, section 79 now provides that costs awarded to the Crown are not to be reduced merely because the Crown counsel is a salaried civil servant.

Changes have occurred in two areas in the East: in the jurisdiction of the lower courts and in the structure of the Supreme Courts of New Brunswick and Nova Scotia. Newfoundland, Nova Scotia and Prince Edward Island all increased the monetary jurisdiction of their lower courts. Sections 23 and 24 of the County Court Act [5] of Prince Edward Island have been amended increasing the jurisdiction from $500 to $1,000. An amendment to section 27 of the County Court Act [6] of Nova Scotia increased the basis from $1,000 to $2,500 in 1956; [7] in 1966, the monetary basis of the jurisdiction was again increased from $2,500 to $10,000. [8] In Newfoundland, a new subsection was

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[1] ONT. REV. STAT. c. 197 (1960).
[2] ONT. REV. STAT. c. 204 (1960).
[3] Ont. Stat. 1966 c. 73, § 1.
[4] ONT. REV. STAT. c. 233 (1960).
[5] P.E.I. REV. STAT. c. 35 (1951).
[6] N.S. REV. STAT. c. 59 (1954).
[7] N.S. Stat. 1956 c. 19, § 1.
[8] N.S. Stat. 1966 c. 24, § 1.

added to section 19 of the District Courts Act;[9] this increased the jurisdictional basis from $1,000 to $2,500 in tort actions arising out of the operation of a motor vehicle.

In both New Brunswick and Nova Scotia there were changes in the judicature acts. In New Brunswick the changes to the Judicature Act[10] involved the basic structure of the courts in that province. Whereas there was one Supreme Court composed of Appeal, Chancery and Queen's Bench Divisions, the amendment[11] provides for the absorption of the Chancery Division into the Queen's Bench Division. In accord with these changes there is set out a new complement of judges for the remaining two divisions and a system for determining their relative seniority.[12] The jurisdiction of the old Chancery Division has been given to the Queen's Bench Division, and all actions pending in the former were automatically transferred to the latter.[13] Amendments to the Judicature Act of Nova Scotia were passed in 1962[14] but the majority of them were not brought into effect until 1966.[15] Those coming into force in 1966 altered the numbers and titles of the judges in the Supreme Court. Sections 26 to 34 and 34A respecting sittings at Halifax and on circuit were repealed; the judges of the Supreme Court were given power to make rules respecting the sittings of the court and any other related matters.[16] The jurisdiction of the Appeal Division was enlarged; added were powers previously in the Supreme Court in banco. The jurisdiction assigned to the other judges is that not specifically assigned to the Appeal Division.[17]

II. Jurisdiction of Courts

The question of whether a court has jurisdiction often arises in matrimonial causes. Of two recent cases in the Maritimes, one considered the jurisdiction of the court over the subject matter of the action, the other considered its jurisdiction over the parties to the action.

The Supreme Court of Newfoundland in *Bursey v. Bursey*[18] considered, as a preliminary point of law, whether it had jurisdiction to grant a decree of nullity of marriage on the ground of impotence existing at the time of marriage. After reviewing the history of the court, Mr. Chief Justice Furlong

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[9] Nfld. Stat. 1966 c. 41, § 4, amending Nfld. Rev. Stat. c. 116, § 19(1)(a) (1952).

[10] N.B. Rev. Stat. c. 120 (1952).

[11] N.B. Acts 1966 c. 70, § 2.

[12] N.B. Acts 1966 c. 70, §§ 2, 3, 4.

[13] N.B. Acts 1966 c. 70, §§ 6, 7.

[14] N.S. Stat. 1962 c. 18.

[15] Although the amendment was passed in 1962, §§ 5, 5A, 7-11, 13, 14, 17, 22, 24-34, 34A, 36, 36A and 45 were proclaimed and in force in 1966.

[16] N.S. Stat 1962 c. 18, § 13.

[17] N.S. Stat 1962 c. 18, § 9.

[18] 51 Mar. Prov. 256 (Nfld. Sup. Ct. 1966).

concluded: "the jurisdiction of this court is sufficiently ample for it to dispose of all matters which come before it and which the Court is not specifically forbidden to consider." [19] He believed that the jurisdiction of the court was ample for it to adjudicate on a petition for a decree of nullity of marriage for impotence existing at the time of the marriage and that the action should proceed. *Pennie v. Pennie* [20] in Nova Scotia was a petition for a decree of judicial separation based on physical and mental cruelty. Both parties were resident but not domiciled in Nova Scotia. The court held, following *Armytage v. Armytage*, [21] that since a decree of judicial separation did not change the status of the parties, the basis of the court's jurisdiction was residence rather than domicile.

Two cases from western Canada, which considered the problem of enforcing maintenance orders under reciprocal enforcement legislation, took the view that a court will have no power to enforce the foreign order unless it has jurisdiction to make such an order or enforce such an order made within its own province. In *Overton v. Overton*, [22] the applicant had received a divorce decree *nisi* from the Alberta Supreme Court along with an order for maintenance with provision for periodic adjustment. The respondent subsequently moved to British Columbia, and as a result the applicant was obliged in 1965 to file her maintenance order in British Columbia's Family and Children's Court. The judge of the family court dismissed the show cause summons when she applied under this order to have an adjustment made in her allowance. He felt himself bound by a dictum in *Todesco v. Zabkar*, [23] but, desiring to clarify the problem, stated the case to the Supreme Court of British Columbia. Mr. Justice McInnes, in Supreme Court Chambers, agreed that the family court had no jurisdiction to enforce any decree of the Supreme Court of British Columbia made in divorce and matrimonial causes and consequently would have no jurisdiction to enforce a similar decree from another province.

A similar result was reached in *Strauch v. Strauch*. [24] A decree *nisi* with a maintenance order was granted in Ontario in 1962. This order was registered in the Alberta family court under reciprocal enforcement legislation. When the applicant tried to enforce the order in Alberta, the respondent brought certiorari attacking the jurisdiction of the family court. Mr. Justice Riley, in Supreme Court Chambers, found that the Reciprocal Enforcement of Maintenance Orders Act [25] permitted the family court to enforce orders from

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[19] *Id.* at 261.
[20] 52 Mar. Prov. 68 (N.S. Div. & Mat. Causes Ct. 1966).
[21] [1898] P. 178.
[22] 56 W.W.R. (n.s.) 447 (B.C. Sup. Ct. Chamb. 1966).
[23] 53 W.W.R. (n.s.) 589 (B.C. Sup. Ct. Chamb. 1965).
[24] 56 W.W.R. (n.s.) 242 (Alta. Sup. Ct. Chamb. 1966).
[25] Alta. Stat. 1958 c. 42.

outside of the province only if the court could make such orders itself. Since it could not itself make such an order in divorce proceedings in the exercise of its own original jurisdiction, it could not enforce such an order of a foreign jurisdiction.

The jurisdiction of a court may be attacked when a defence or counterclaim involves an amount or raises an issue that is outside the jurisdiction of the court. The general rule is that the claim must be heard but execution may be stayed pending disposition of the counterclaim in a court having jurisdiction. *Szabo v. Myers* [26] in the Ontario High Court is a recent application of the rule. The monetary counterclaim was beyond the jurisdiction of the division court. The claim in division court was for $324.20 while the defendant counterclaimed for $1,944. The county court claimed jurisdiction over both the claim and counterclaim. On appeal by the plaintiff to the Ontario High Court it was held that the order was not supported by the Division Courts Act. [27] Pursuant to section 63(1) of the act, the claim should have been heard in the division court and execution stayed until the counterclaim was disposed of in a competent court. The order of the county court was set aside and the plaintiff was allowed to proceed in division court.

Hyland v. Kidd [28] was an action for damages arising out of an automobile collision, but the defendant implied in his pleadings that his use of the road was related to a title in land. The defendant's car struck the plaintiff's car while it was parked in a lane used by the defendant. The Nova Scotia County Court's jurisdiction was challenged because section 26 of the County Court Act [29] prohibits the county court from trying any action in which the question of title to land is in issue. The county court pointed out an exception in section 39 of the same act, which provides that where any defence or counterclaim of a defendant involves matter beyond the jurisdiction of the court, such defence or counterclaim shall not affect the competence or the duty of the court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the court has jurisdiction to administer shall be given to the defendant upon any such counterclaim. The court ruled that section 39 had been judicially construed to mean that the power of a court to grant relief in respect of such counterclaim was limited to the amount of the plaintiff's claim. The section in its general sense, however, could be applied to any matter beyond the jurisdiction of the court and the defence raised by the defendant was triable although it might bring title to land into question.

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[26] [1966] 2 Ont. 603 (High Ct.).
[27] ONT. REV. STAT. c. 110 (1960).
[28] 52 Mar. Prov. 60 (N.S. County Ct. 1966).
[29] N.S. REV. STAT. c. 59 (1954).

III. Pre-trial Procedure

A. *Writs of Summons*

A few cases dealt with renewal of the issued writ after the expiration of a limitation period. The collision in *Manning v. Gieschen* [30] occurred on December 14, 1961; on December 13, 1962, a writ was issued. The writ was not served nor renewed until October 9, 1964, when it was renewed by an *ex parte* order and was served. The defendants, who entered conditional appearance, moved to set aside the order renewing the writ. On Mr. Justice Branca's refusal to set aside the order, the defendants appealed to the British Columbia Court of Appeal. They argued that no special circumstance supported the lower court's order, which had the effect of depriving the defendants of their statutory defence based on the lapse of twelve months from the date of the accident. [31] The British Columbia Supreme Court Rules provide that a plaintiff may apply to the court for leave to renew a writ, if it has not been served before the expiration of twelve months from the date of its issue. [32] The rules further confer upon the court the power to enlarge or abridge the time appointed by the rules "although the application for the same is not made until after the expiration of the time appointed or allowed." [33] The court reversed Mr. Justice Branca and set aside the order. Mr. Justice Sheppard, referring to *Kelly v. Schuitema*, [34] held that the discretionary power to renew a writ after the time for service has expired will not be exercised when the effect of the renewal will be to deprive the defendant of a limitation which has accrued, unless very special circumstances are shown to justify the exercise of that discretion. In this case there was no evidence that the defendants had contributed to the plaintiff's omission to serve or renew the writ and no assertion that the plaintiff was prevented by any circumstance. Although it was not argued on the appeal, the court also commented that an order renewing the writ, thereby depriving the defendants of their statutory defence, could not be heard *ex parte*.

In *Burns & Dutton Concrete & Constr. Co. v. Dominion Ins. Corp.*, [35] Dominion Insurance and a third party, a subcontractor, bound themselves in a surety bond to the appellant, Burns & Dutton. The surety bond, dated August 30, 1961, contained a limitation clause that any action under it against the respondent should be commenced within two years from its date. The subcontractor failed to perform its contract, and on August 14, 1963, after

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[30] 56 W.W.R. (n.s.) 124 (B.C. 1965).

[31] *See* Motor-Vehicle Act Amendment Act, B.C. Stat. 1963 c. 27, § 16 which amends B.C. Rev. Stat. c. 253, § 79(1) (1960) and reads: "[N]o action shall be brought against a person for the recovery of damages occasioned in an occurrence involving a motor-vehicle after the expiration of twelve months from the time when the damages were sustained."

[32] B.C. Sup. Ct. R., 0.8, R.R. 1, M.R. 45 (1961).

[33] B.C. Sup. Ct. R., 0.64, R.R. 7, M.R. 967 (1961).

[34] 48 W.W.R. (n.s.) 491 (B.C. 1964).

[35] 55 W.W.R. (n.s.) 619 (B.C. 1966).

unsuccessful negotiations between the solicitors for the parties on the quantum of damages, a writ was issued. Due to error of appellant's counsel, the writ was not served within the required twelve month period. Realizing his error, counsel for the appellant applied for and received an *ex parte* order extending the time to apply for a renewal of the writ and an order renewing the writ. On appeal, the British Columbia Court of Appeal held that failure to perform a mechanical act such as service of a writ of summons, was not a "very special circumstance" sufficient to justify an extension of time under the rules. [36] Whether special circumstances exist depends primarily upon the interests of justice; plaintiff's failure to serve his writ is not a factor to justify depriving the defendant of an accrued defence based on a contractual limitation.

Eckel v. Braun [37] further supports judicial reluctance to exercise discretion in favor of a party if the application is founded on a solicitor's inadvertence. Plaintiff's counsel in this case had made only token gestures in searching for the defendant, and failing to locate him, had put away the plaintiff's file in his office and forgotten it. The plaintiff himself had not inquired into the progress of his action throughout this period. The court refused to exercise its power under the Saskatchewan Rules of Court, [38] reasoning that the renewal of a writ would have the effect of depriving a defendant of a defence based upon a statute of limitations; [39] the discretion of the court to renew in a case such as this should be exercised with caution, and pursuant to rule 11, [40] if the court is "satisfied that reasonable efforts have been made to serve such defendant, or for other good reason." No reasonable effort to serve the defendant was shown in this case; the negligence of a solicitor, of itself, is not a "good reason," but merely one circumstance to be considered with all other relevant matters.

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[36] *Supra* note 33.

[37] 54 W.W.R. (n.s.) 614 (Sask. Q.B. 1965).

[38] The SASK. R. C., 11 (1961) provides as follows:

> No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of twelve months or within six months thereafter, apply *ex parte* to the court for leave to renew the writ; and the court, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent writ of summons (or both) be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed writ... and a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of issuing of the original writ of summons.

Rule 534 provides: "The Court may enlarge or abridge the time appointed by these rules, or fixed by any order for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require; and any such enlargement may be ordered, although the application for the same is not made until after the expiration of the time appointed or allowed...."

[39] Renewal in this case would have extended the twelve month period provided in the Vehicles Act, SASK. REV. STAT. c. 377, § 170(1) (1965).

[40] *Supra* note 38.

These three cases are consistent with established law on the issues involved. A defendant ought not to be kept indefinitely unaware that an action has been commenced against him because of lack of service. Only if the defendant himself is to blame for the plaintiff's delay in serving the writ, or the plaintiff has been prevented from serving it by some exceptional circumstance, will the court renew the writ after the expiration of its effective period.

B. *Change of Venue*

McPhatter v. Thorimbert [41] reiterated the existing rule on a change of venue. The defendant applied for a change of venue from Vancouver to Victoria, British Columbia, alleging a preponderance of convenience. The plaintiffs, all counsel and a witness, lived in Vancouver; some of the witnesses lived at nearby communities. Mr. Justice Kirke Smith denied the application because "nothing short of a great or considerable preponderance of convenience and expense would justify the taking from the respondent the right which the law has given him to select his own place of trial." [42] With today's fast and relatively inexpensive transportation, he asserted, the short distance between Vancouver and Victoria could only be a minor inconvenience to litigants or their witnesses.

C. *Pleadings*

(1) *Amendments*

Several cases were concerned with applications for leave to amend pleadings. The Alberta case of *Pepper v. Sisters of Charity of North-West Territories* [43] deserves more than passing interest. Some sixteen months after filing their statement of defence, the defendants applied for leave to amend it. They contended that if the incident giving rise to plaintiff's action did in fact occur, then plaintiff's statement of claim was barred by section 40 of the Alberta Hospitals Act which requires that the action should be commenced within one year after the cause of action arose. [44] They now claimed that their former defence based on a limitation period of two years under the Limitation of Actions Act [45] was inadvertent; they had intended to plead the Alberta Hospitals Act. [46] Mr. Justice Farthing, in dismissing the application, conceded that cases [47] have recognized a wide discretionary power to permit parties to amend their pleadings. He believed, however, that the general principle underlying all the cases was that the court should amend

[41] 56 W.W.R. (n.s.) 497 (B.C. Sup. Ct. Chamb. 1966).
[42] *Id.* at 498 *quoting* from Armstrong v. City of Revelstoke, [1927] 2 W.W.R. 245, at 246 (B.C.).
[43] 57 W.W.R. (n.s.) 279 (Alta. Sup. Ct. Chamb. 1966).
[44] Alta. Stat. 1961 c. 36.
[45] ALTA. REV. STAT. c. 177 (1955).
[46] *Supra* note 44.
[47] *See, e.g.*, Simrod v. Cooper, [1952] Ont. W.N. 720 (Senior Master).

where the opposite party had not been misled or substantially injured by the error. [48] The considerable measure of freedom in amendment of pleadings under rule 189 of the Alberta Rules of Court should be understood with this qualification. Here the plaintiff would be prejudiced by the requested amendment since she would be deprived of her cause of action. The equity of the decision is, of course, obvious; however, certain other decisions cast doubt upon the validity of Farthing's conclusion. The alleged prejudice seems to be of doubtful significance. As held in *Theberge v. Salmon River Logging Co.*, [49] it cannot be said that a plaintiff would be prejudiced by an amendment if the defence to be alleged in the amendment, had it been pleaded at the first opportunity, would have as effectively defeated the plaintiff's claim as it would if permitted to be pleaded now. The Alberta Hospitals Act, [50] if it is a valid defence at all, would have afforded as complete a defence had it been pleaded at the first opportunity, as it would if allowed to be pleaded now.

Laughren v. Rosetown Union Hospital [51] indicates a more liberal exercise of discretion by a Saskatchewan court regarding amendments under rule 200 of the Saskatchewan Rules of Court. [52] The plaintiff brought an action against the defendant for damages arising out of its refusal to allow him to receive out-patient diagnostic services at the hospital. In his statement of claim, the plaintiff described his rights as those of a "burgess" under the Hospital Standards Act. [53] However, in his proposed reply to the statement of defence, he described himself as a beneficiary under the Saskatchewan Hospitalization Act. [54] The defendants submitted that this part of the reply raised a new ground of claim in contravention of rule 147. [55]

The court disallowed this section of the reply, but allowed the plaintiff to amend his statement of claim and plead the Hospitalization Act. The net result was that the plaintiff was thereby allowed to do indirectly what he could not do directly.

In the British Columbia case of *Machan v. Machan*, [56] the husband sued for divorce, and the wife counterclaimed for a judicial separation due to the plaintiff's cruelty. In the counterclaim the husband was asked if he had committed adultery, and he replied that he had done so on one occasion

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[48] *Citing* Durham v. West, [1959] Ont. W.N. 169, at 170.

[49] 17 W.W.R. (n.s.) 659 (B.C. Sup. Ct. 1956).

[50] *Supra* note 44.

[51] 56 W.W.R. (n.s.) 165 (Sask. Q.B. Chamb. 1966).

[52] Rule 200: "The Court may, at any stage of the proceedings allow either party to alter or amend his pleadings, in such manner and upon such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

[53] SASK. REV. STAT. c. 265 (1965).

[54] SASK. REV. STAT. c. 253 (1965).

[55] Rule 147: "No pleading, not being a petition, shall except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same."

[56] 56 W.W.R. (n.s.) 321 (B.C. Sup. Ct. 1966).

several years ago. At the close of the trial, counsel for the wife sought to amend the counterclaim to ask for a dissolution of the marriage based on the adultery of the husband. Counsel for the plaintiff stated that he neither consented to such an order nor opposed it, and if the order were made there would be no request for leave to reply to the allegation of adultery made by the wife. The court acknowledged authorities for the proposition that courts ought to be reluctant to permit amendments which set up new causes of action. However, it allowed the requested amendment: "The golden thread running through judgments concerning amendments is whether an amendment can be made without injustice to the other side." [57] The husband's counsel, in neither consenting nor objecting to the order, led the court to believe that the plaintiff would not be prejudiced by the order granting leave to amend. The court stated: "the decisive factor in my decision is that the plaintiff does not oppose." [58]

In *Quigley v. Young*, [59] the jury award to one of the plaintiffs was more than he claimed in the statement of claim. The trial court allowed an amendment to claim the amount thus awarded by the jury. As a result, the total sum awarded to the plaintiffs was in excess of the jurisdiction of the court. [60] The Ontario Court of Appeal allowed the defendant's appeal on the ground that the lower court, in granting the amendment, deprived the defendant of the right [61] to dispute the jurisdiction of the court and to have the action tried in the Supreme Court. The appeal court would have been willing to allow the amendment had the total amount not increased the claim beyond the jurisdiction of the lower court.

(2) *Failure to Renew Within Twelve Months*

In *Murdock v. Borysuk* [62] the plaintiff had issued the statement of claim some eighteen months before serving it and did not have it renewed within the twelve month period as required by rule 15 of the Alberta Rules of Court. After the plaintiff had noted the defendants in default and proceeded to assess damages, the defendants moved for an order to set aside the service and strike out the judgment on the ground that the statement of claim became a nullity due to the failure to renew. The district court, relying on *Crown Lumber v. Malcolm*, [63] held the statement of claim a nullity, granted the

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[57] *Id.* at 323-24 *quoting* from Voghell v. Voghell, 33 W.W.R. (n.s.) 673, at 686 (N.W.T. 1960).

[58] *Supra* note 56, at 324.

[59] [1966] 1 Ont. 407.

[60] County Courts Act, ONT. REV. STAT. c. 76, § 19(1)(b) (1960) as amended by Ont. Stat. 1961-62 c. 24, § 5(1)(b) reads: "The county and district courts have jurisdiction in.... (b) personal actions, except actions for criminal conversation and actions for libel, where the sum claimed does not exceed $3,000."

[61] Given him by ONT. REV. STAT. c. 76, § 19(2) (1960) as amended by Ont. Stat. 1961-62 c. 24, § 5(2).

[62] 57 W.W.R. (n.s.) 253 (Alta. 1966).

[63] 9 W.W.R. 481 (Alta. Sup. Ct. Chamb. 1915). Rule 15 at the time *Crown Lumber* was decided expressly prohibited renewal after the twelve month period.

defendants' motion and denied the plaintiff's application to renew the statement of claim. Mr. Justice Porter, speaking for the Alberta Court of Appeal, noted that rule 15 had been amended and the reasoning of Mr. Justice Riley in *Miller v. Jones*,[64] decided after the amendment to rule 15, was relevant. In that case, Riley allowed the application for leave to renew the statement of claim because, after the express prohibition had been removed by the amendment to rule 15, it was within his discretion to extend the time for renewal under rule 640, even after the period fixed by rule 15 for renewal. Porter reasoned that the failure to renew the statement of claim in the present case was a mere irregularity that could be corrected.[65] He allowed the plaintiff, if so advised, to apply to renew the statement of claim.

(3) *General Denials*

The authorities have always held that a general traverse of allegations of fact in a statement of claim, standing alone, is ineffective as a denial of such allegations, so that they must be taken to have been admitted. The authorities do not say that a general traverse may not be used at all. Where, as in *Phillip Tattersfield & Associates Landscape Architects Ltd. v. Gray*,[66] the defence contains a general traverse followed by specific denials, that defence should be regarded as a whole. The court in this case examined the statement of defence in detail and found that each of the allegations of the plaintiff, which the defence purported to deny, had, in substance, been denied specifically and without evasion. The plaintiff had not been left in doubt as to what must be proved and what could be taken as admitted.

D. *Preliminary Questions*

As a rule, courts refuse to encourage piecemeal trials of actions. It is proper, however, to have preliminary questions decided in advance because the high cost of a lengthy trial is often avoided. The issue before the Alberta Court of Appeal in *Canadian Cancer Soc'y v. Bank of Montreal*[67] was whether the order directing a trial on the question whether or not the plaintiff had an account with the defendant bank was proper. The plaintiff, a charitable institution, sought to recover sums charged by the bank to the plaintiff's account on cheques which were allegedly forged. The defendant pleaded the plaintiff was not its customer, although it admitted maintaining an account in the name of "Alberta Branch, Canadian Cancer Society." The court held that this was a question that could be decided in advance. Referring to rule

[64] 38 W.W.R. (n.s.) 237 (Alta. Sup. Ct. 1962).

[65] Rule 648 provides that non-compliance with the rules does not render the act or proceeding void, "but the same may be set aside either wholly or in part as irregular or amended or otherwise dealt with as to the court or judge may seem just."

[66] 56 W.W.R. (n.s.) 544 (B.C. Sup. Ct. Chamb. 1966).

[67] 57 W.W.R. (n.s.) 182 (Alta. 1966).

282 of the Alberta Rules of Court, [68] the court believed that this rule was wide enough to allow the preliminary question to be decided in advance; indeed, noted the court, the determination of the question of the plaintiff's right to bring his action is one of the uses to which this rule has been most frequently put.

E. *Want of Prosecution*

The question whether an action ought to be dismissed for failure to proceed during a lengthy period of time has to be decided upon the merits of each case. Mr. Justice Coffin of the Nova Scotia Supreme Court in *Seamone v. Acadian Lines Ltd.* [69] articulated two basic questions that must be answered: 1) Has the plaintiff given a reasonable explanation for the delay? 2) Has the defendant been prejudiced by the delay? The defendant in this case appealed from an order refusing his application to dismiss for want of prosecution. Coffin found that a delay due to change of solicitor is not an unreasonable delay. Besides, only one term of court had been missed and the defendant's witnesses were still available. Since the inconvenience and minor prejudice suffered by the defendant were capable of being compensated for in costs, he concluded that no reason existed for granting the order requested.

The statement of claim in *Michie v. Genshorek* [70] before the Manitoba Queen's Bench, was issued on June 4, 1962. After the filing of the statement of defence on July 20, 1962, no other step was taken until the defendant served notice of motion to dismiss for want of prosecution on January 12, 1965. The defendant's solicitors on the record were solicitors for the defendant's insurer. Its adjuster had interviewed the defendant immediately following the accident but efforts made, commencing in March, 1964, to locate the defendant were unsuccessful. The court held that rule 284 of the Manitoba Rules of Court was available to an insurer who defends and that without the instructions or concurrence of the defendant the insurer is entitled to have the action dismissed for want of prosecution. The plaintiff in the case had not shown an adequate explanation and justification for the delay in setting the action down for trial. If she had proceeded with reasonable diligence, the defendant and his two passengers would have been available to give evidence. In justice to the defendant's insurer, the action had to be dismissed.

F. *Examination for Discovery*

The scope of the examination has been the main problem in cases on examination for discovery. In *Shickele v. Rousseau*, [71] the appellant, a doctor

[68] Rule 282: "The court or a judge may order that different questions of fact arising in any action be tried by different modes or that one or more questions of fact be tried before the others and may appoint the place or places for trial; and in all cases may order that one or more issues of facts be tried before any other or others."

[69] 54 D.L.R.2d 442 (N.S. Sup. Ct. 1966).

[70] 54 W.W.R. (n.s.) 126 (Man. Q.B. Chamb. 1966).

[71] 55 W.W.R. (n.s.) 568 (B.C. 1966).

of medicine, was sued by the respondents for damages caused by his alleged negligence in administering tetanus anti-toxin and tetanus toxoid. He was ordered to answer certain questions about his professional opinion on the nature, treatment and incidence of tetanus, and the methods of preventing its developing from wounds. On appeal, he objected that an examination for discovery must be confined to eliciting facts and not matters of opinion even though relevant to the issues. The British Columbia Court of Appeal held that as the respondent had suffered injury, not by contracting tetanus, but from the anti-tetanus treatment negligently administered, questions about the appellant's opinion on the characteristics of tetanus and its cure were outside the issues raised by the pleadings and ought to be disallowed. Questions directed to his opinion on proper anti-tetanus treatment and when it should be given, including the incidence of tetanus, were within the scope of the pleadings and should be allowed if discovery could be directed to matters of opinion. In a decision which is the first of its kind in an appellate court in Canada, Mr. Justice Davey, contradicting the established law in courts of first instance, found there was no reason why a party to an action that raises directly his professional or technical advice or conduct should not be required to give, on discovery, his expert opinion on matters directly connected with the issues raised, where that opinion would be admissible and relevant at the trial. This is an important extension of the scope of examination for discovery from that of gathering relevant facts to securing, in certain narrow situations, relevant opinions. On the other hand, *Norris v. Moyse* [72] followed the traditional rule on opinion evidence given during discovery. It held that a deponent is not compellable to give his opinion on the credibility of another deponent, although relevant to the issue between the parties. It was for the court to determine the weight to be attached to the affidavit of a deponent. This case was decided before *Schickele*, but in any case, it did not fall within the narrow confines of that rule since it was not an expert opinion that was being sought.

Federated Co-ops. Ltd. v. Claude Neon Ruddy Kester Ltd. [73] was an appeal from a judge's dismissal of an application to require an officer of the third party to attend for examination for discovery. The third party in this action, a subcontractor, was not permitted to plead to the plaintiff's claim. The designated officer of the defendant, on his examination for discovery, disclaimed knowledge of the faulty work done by the third party that caused damage to the plaintiff. The plaintiff then desired to examine for discovery an officer of the third party, but the designated officer, on his appearance, refused to answer any questions of the plaintiff. The Saskatchewan Court of Appeal held that the general rule on examination for discovery was that a party may only examine an adverse party on matters in issue between them

[72] 55 W.W.R. (n.s.) 62 (Man. Q.B. referee in Chamb. 1965).
[73] 55 W.W.R. (n.s.) 113 (Sask. 1965).

as raised in the pleadings. Since there were no pleadings between the plaintiff and the third party because the third party was not allowed to file a statement of defence against the plaintiff, the application for examination could not be allowed.

A. & D. Logging Co. v. Convair Logging Ltd. [74] dealt with examination for discovery after trial. The plaintiff obtained, after trial, a declaratory judgment that it was entitled to cut and remove timber from certain timber berths. Before trial the matters on discovery were limited to the question of road damages in the timber berths, and not to damages resulting from the prevention of the plaintiff from cutting timber. The court's judgment, however, awarded damages to be assessed by the district court registrar, for plaintiff's failure to carry on its normal logging operations in accordance with its contracts. This award of damages, after declaratory judgment, had not been foreseen by the parties, and the defendant applied for leave to examine for discovery an officer of the plaintiff company touching the quantum of damages. Plaintiff's counsel objected that it was too late for discovery. Mr. Justice Wootton of the British Columbia Supreme Court held that although the rule [75] provides for examinations before the trial, a court may order examinations after trial if justified by exceptional circumstances. Such circumstances existed in this case; the examinations before trial did not cover the damages which the registrar was now directed to assess, and the examination would facilitate the assessments. Besides, the plaintiff, in any event, would have to prove the damages to which it was entitled. While the whole intention of the provisions for examination for discovery was that the parties before trial should have opportunity for full disclosure to meet any issues which might arise on the trial, there was a discretion in the court, to be exercised only in most exceptional circumstances, to order an examination after trial. The court considered the unusual course of the proceedings, the absence of any default by the defendants and the fact that examination for discovery could not prejudice the plaintiff as very exceptional circumstances on which to exercise its discretion.

G. *Production*

Production of documents has given rise to interesting developments. The scope of production and discovery by the Crown under section 10 of the Proceedings Against the Crown Act [76] was litigated in *Ratkevicius v. The Queen.* [77] The action was for damages resulting from a limb of a tree, alleged to be owned by the defendant and growing on defendant's property, falling on the plaintiff's car while he was driving on a highway. The plaintiff applied

[74] 57 W.W.R. (n.s.) 440 (B.C. Sup. Ct. Chamb. 1966).

[75] Rule 370c: "A party to an action or issue, whether plaintiff or defendant may, without order, be orally examined before the trial . . . ."

[76] Ont. Stat. 1962-63 c. 109 as amended by Ont. Stat. 1965 c. 104, § 2.

[77] [1966] 2 Ont. 774 (Master's Chamb.).

for an order requiring production by the Crown of all documents to be used by it at the trial. The senior master held that the Proceedings Against the Crown Act had no application to the action by virtue of the provisions of section 2(1) thereof, which provide that that act "does not affect and is subject to" a number of statutes including the Highway Improvement Act. [78] The plaintiff's action in this case was instituted pursuant to the Highway Improvement Act, which gives no right to either production by or discovery of the Crown.

A party's application for production of a document which is otherwise valid may be refused because of the privileged nature of the document. What constitutes a privilege, however, is not always easy to determine, but a number of recent cases attempted clarification in a number of situations. In *Township of North York v. Donwood Terrace Devs.*, [79] the defendant applied for production of a report in the hands of the plaintiff. The plaintiff claimed privilege from production on the ground that the investigation covered by the report was commenced on behalf of the township's liability insurer "in contemplation of the fact that claims would be made against the township" with respect to damage from floods. The senior master noted that there was no suggestion in the affidavit on production that the report was ordered solely or substantially for the purpose of being laid before a solicitor or counsel for advice in contemplation of litigation, pending or anticipated, over claims arising out of the floods, or that it was even one of the purposes for which the report was ordered. In fact, there was nothing therein to indicate the document might be privileged except the fact that it was addressed to the township solicitor. This was done pursuant to a request to the consulting engineers made on the day of the date of the report, in order to secure a privilege against disclosure. He held that the claim for privilege was therefore not a valid one. *Petursson v. Petursson* [80] involved the plaintiff's claim of proceeds of an insurance policy on the life of her husband, whom she had killed. After release from prison and during the course of this action, the plaintiff had been committed to an Ontario mental hospital. The defendants, persons who would be entitled to the insurance proceeds if the plaintiff's action failed, contended that the plaintiff was not entitled to the proceeds because the insured died as a result of the plaintiff's crime. The plaintiff replied that she had been at all material times of unsound mind. The defendants were partially successful in their application before the senior master to inspect and copy plaintiff's medical record at the hospital. The plaintiff appealed from this order, alleging the privileged nature of the documents. Mr. Justice McDermott agreed with the plaintiff. Whatever may be

[78] ONT. REV. STAT. c. 171 (1960).
[79] [1966] 2 Ont. 669 (Master's Chamb.).
[80] [1966] 2 Ont. 626 (High Ct.).

the proper practice in the application of rule 349 [81] to hospitals, [82] rule 349 was not intended to provide a means of discovery against a third person not a party to the action, and does not go so far as to permit an exploration of mental hospital records, which are of a highly confidential nature and contain much hearsay evidence, for the purpose of discovery only (which the defendants desired). Furthermore, he argued, the issue was not the present mental condition of the patient, but rather her mental condition at the time of killing her husband and at the time of her subsequent trial. The time to deal with the question of mental hospital records under the regulations pursuant to the Mental Hospitals Act would be at the trial of this action when the trial judge could consider their admissibility.

The Ontario Court of Appeal in *Circosta v. Lilly*, [83] in discussing the privileged nature of professional communications, declared rule 352a of the Ontario Rules of Practice ultra vires of the Rules Committee; the rule purports to effect an alteration of the substantive law, whereas the authority of the Rules Committee under the Judicature Act [84] is limited entirely to procedure. Rules 352a and 352b [85] were enacted on July 23, 1966. The plaintiff in *Circosta* instituted an action on July 8, 1965, claiming damages for personal injuries. On September 1, 1966, the defendant's solicitor served a demand requiring production of all medical reports such as were covered by the new rule, and subsequently moved to dismiss the plaintiff's action for failure to comply with the rule, or in the alternative for an order to compel the plaintiff to produce the reports. The plaintiff refused production alleging privilege and contending that rule 352a was ultra vires of the Rules Committee, being legislation in the guise of regulation. The rule, the plaintiff urged, denied him his substantive right to refuse production of privileged material and hence was not merely procedural. In the alternative, the plaintiff submitted that the rule was ultra vires since it could have the effect of denying a plaintiff his common-law protection against self-incrimination. Mr. Justice Lieff in the Supreme Court of Ontario decided that in an action for damages based upon negligence, the substantive right being asserted by the plaintiff was to recover damages for negligence; all else was procedural. He stated: "Merely because a procedural Rule removes a remedy or a mode of exercise

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[81] ONT. R. P. 349 (1960) as amended to Dec. 31, 1965.

[82] Where physical injuries are involved, and notwithstanding the regulations under the Mental Hospitals Act, ONT. REV. STAT. c. 236 (1960), which contemplate the production of documents in the custody of a mental hospital at trial upon an order of the court.

[83] [1967] 1 Ont. 398.

[84] ONT. REV. STAT. c. 197, § 111(9) (1960).

[85] Rule 352a: "Unless otherwise ordered by the court, all medical reports, including x-ray reports, electroencephalogram reports and other like reports, obtained by or prepared for a party, that are relevant to the matters in issue in an action shall be produced to the parties adverse in interest within five days of notice to produce the same (Form 33A)."

Rule 352b: "Except by leave of the judge presiding at the trial, a medical practitioner who has medically examined any party to the action shall not be permitted to give evidence at the trial touching upon such examination unless a report thereof has been produced to all other parties at least five days before the trial."

of a substantive right, it does not follow that the Rule itself is substantive." [86] The rule deprived the plaintiff of the exercise of the right in the particular case, although it continued to exist for all other purposes. The court found it unnecessary to decide what effect a denial of the privilege against self-incrimination might have on the application of the rule. It suggested that in any case where non-disclosure could be justified, the rule offers the plaintiff an opportunity to invoke the discretion of the court. Lieff concluded that a case for non-production had not been established. Allowing the appeal to the Ontario Court of Appeal, Mr. Justice Kelly explained that, while in private international law, rules regulating the production of evidence might be regarded as procedural, nevertheless such rules, founded upon well-settled legal principles, confer a substantive right on the client. This substantive right may be adversely affected only by the direct action of the legislature. It cannot come within the limited delegated authority which the legislature has committed to the Rules Committee.

H. *Payment into Court in Satisfaction*

Cases dealing with payment of money into court by a defendant in satisfaction of the plaintiff's claim show interesting differences in approach in different jurisdictions. Ontario, Manitoba and British Columbia have substantially the same rule [87] providing that, in exercising his discretion as to costs, the judge is to take into consideration the fact that payment into court was made, the amount of such payment and whether liability has been admitted or denied. In *Ross v. Martin*, [88] Mr. Justice Moorhouse in the Ontario High Court allowed the plaintiff his costs to the date of payment into court and the defendant his costs after the date of payment. He said that there was no serious suggestion of prejudice in the circumstances of the case and he had taken into account the payment into court and defendant's admission of liability. In *Klaus v. Beck*, [89] Mr. Justice Bastin in the Manitoba Queen's Bench decided that the plaintiff was to have the costs to the date of payment into court, but no costs should be allowed to either party thereafter. He found circumstances which justified him in not awarding costs to the defendant subsequent to the payment of money into court. Liability was denied and the defendant vigorously defended his position at the trial, even though his defence had no merit. This added to the length of the trial. In *Lash v. Westland* [90] Mr. Justice Gregory in the British Columbia Supreme Court followed the "practice which has been well established in this court" that the defendant is entitled to costs after payment in, where, after delivery of notice of payment in, the plaintiff presses on to trial and recovers less

[86] [1967] 1 Ont. 185, at 192 (High Ct. 1966).
[87] ONT. R. P. 317; MAN. Q.B.R. 280; B.C. SUP. CT. R. 0.22, R. 6, M.R. 264.
[88] [1966] 2 Ont. 306 (High Ct.).
[89] 56 W.W.R. (n.s.) 504 (Man. Q.B. 1966).
[90] 55 W.W.R. (n.s.) 19 (B.C. Sup. Ct. 1965).

than was paid in. In both the Manitoba and Ontario cases referred to above, the plaintiff had recovered less than the amount paid into court by the defendant.

In *Welch v. Carter* [91] the court permitted the defendants to make a payment into court in satisfaction of the plaintiff's claim after notice of trial. The case could not be placed on the ready list for trial for at least two months; the plaintiffs would have ample time to decide whether or not they should accept the money. A different problem arose in *Lash v. Westland.* [92] One week after verdict was given for the plaintiffs, they filed notice that they accepted the larger amount paid into court by the defendants two days before trial. Under the relevant British Columbia rule [93] plaintiffs were allowed fourteen days within which to file notice of acceptance. The British Columbia Supreme Court held that the rule must be construed as though it contained a proviso that, notwithstanding that the fourteen-day period specified therein had not expired, the plaintiff's right to accept a payment into court comes to an end on the commencement of the trial.

I. *Security for Costs*

Nova Scotia allows the defendant to require security for costs from a plaintiff who resides out of the province. [94] The Nova Scotia Supreme Court held that a company's registration under the Domestic, Dominion and Foreign Corporations Act [95] does not confer upon the company residence in the province. The registration of a foreign company clothes it with power to carry on its business in the province; it does not, however, confer residential status. [96] Even if the plaintiff is a resident outside the province, some exceptions to the grant of security for costs are well recognized. Such an exception was reiterated in the British Columbia case of *Tazzi v. Laurentide Fin. Corp.* [97] The defendant's application for security for costs against the

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[91] [1966] 1 Ont. 449 (Master's Chamb. 1965).

[92] *Supra* note 90.

[93] 0.22, R. 2, M.R. 255a(1) reads:

Where money is paid into Court under Rule 21, the plaintiff may, within 14 days of the receipt of the notice of payment into Court, or where more than one payment into Court has been made, within 14 days of the receipt of the notice of the last payment into Court, accept the whole sum or any one or more of the specified sums in satisfaction of the claim, or in satisfaction of the cause or causes of action to which the specified sum or sums relate, by giving notice to the defendant . . . and thereupon he shall be entitled to receive payment of the accepted sum or sums in satisfaction as aforesaid.

[94] Order LXIII, r. 5(1) reads:

Security for cost may be ordered when by law or by the practice a party has heretofore been entitled to obtain security for costs and, without restricting the generality of this provision, also in the following cases:—

(a) Where the plaintiff resides out of Nova Scotia; and the court or a judge may make such order for security for costs, and staying proceedings until security is given, as seems just.

[95] N.S. REV. STAT. c. 74 (1954).

[96] Canadian Channing Corp. v. Gauthier, 55 D.L.R.2d 146, at 151 (N.S. Sup. Ct. 1965), *quoting* from Frost & Wood Co. v. Howes, 4 D.L.R. 527, at 528 (Alta. Sup. Ct. Chamb. 1912).

[97] 55 W.W.R. (n.s.) 306 (B.C. Sup. Ct. 1966).

plaintiff was refused because it admitted owing to the plaintiff a certain sum that represented fees for legal services. The court, referring to a passage from the judgment of Mr. Justice Davey in *Crozat v. Brogden*, [98] stated:

> There is no authority to be found, either in the reports or in any text book for the refusal by the Court of an order for security for costs by a person resident abroad, suing in these Courts, except in the well-known exceptions of either cross actions, or of an action against a defendant who has money of the plaintiff's in his hands, so that he can repay himself if necessary, or (it may be) if the plaintiff has substantial property within the jurisdiction. [99]

The case of *Hellenius v. Lees* [100] considered the court's discretion to reduce the amount of security for costs given by the plaintiff. Defendant objected to plaintiff's request for a reduction in the amount of security based on economic difficulty by arguing that the court had little, if any, discretion to interfere with a *praecipe* order for security for costs. The senior master, in reducing the *praecipe* order for security against the plaintiff, pointed out: "While the court has little, if any, discretion to interfere with the right of a defendant to a *praecipe* order for security for costs, it has clearly a wide discretion on application for increased security." [101] Impecuniosity, said the court, is a ground for refusing an application for increased security for costs; it should also be a ground for diminishing the amount of security if not for setting aside such an order.

To obtain security for costs in an action for libel in Ontario, the defendant must in all cases show that plaintiff possesses no property to answer for costs if judgment is rendered for the defendant. *Oshanek v. Toronto Daily Star*, [102] interpreting section 13(1) of the Libel and Slander Act of Ontario, [103] held that it is not enough to show that the action is based on trivial or frivolous grounds or that the defendant's statements were made in good faith. Besides showing either of these facts, the defendant must establish the insufficiency of plaintiff's property to answer for costs. [104]

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[98] [1894] 2 Q.B. 30 (C.A.).

[99] *Supra* note 97, at 308 *quoting* from [1894] 2 Q.B. 30, at 36. *See also* O'Brien v. Brown, 25 W.W.R. (n.s.) 578 (B.C. Sup. Ct. 1958), and Launer v. Sommerfield, 48 W.W.R. (n.s.) 224 (B.C. Sup. Ct. Chamb. 1964).

[100] [1966] 2 Ont. 7 (Master's Chamb.).

[101] *Id.* at 10, *quoting* from Comtois v. Edmonson, [1955] Ont. W. N. 357, at 357-58.

[102] [1966] 1 Ont. 492 (Master's Chamb. 1965).

[103] ONT. REV. STAT. c. 211, § 13(1) (1960) provides:

> In an action for a libel in a newspaper or in a broadcast, the defendant may, at any time after the delivery of the statement of claim or the expiry of the time within which it should have been delivered, apply to the court for security for costs, upon notice and an affidavit by the defendant or his agent showing the nature of the action and of the defence, that the plaintiff is not possessed of property sufficient to answer the cost of the action in case judgment is given in favour of the defendant, that the defendant has a good defence on the merits and that the statements complained of were made in good faith, or that the grounds of action are trivial or frivolous and the court may make an order for the plaintiff to give security for costs, which shall be given in accordance with the practice in cases where a plaintiff resides out of Ontario, and the order is a stay of proceedings until security is given.

[104] *See also* Robinson v. Mills, 19 Ont. L.R. 162 (High Ct. Chamb. 1909).

J. *Physical Examinations*

As earlier pointed out, an amendment to the Ontario Judicature Act [105] has altered the law on medical examinations. The cases dealing with physical examination show that the existing practice was merely articulated in the amendment. However, there is no change in the law relating to psychiatric examination. *Smith v. Thyssen* [106] defined the allowable scope of physical examination in Ontario. The disputed order of the senior master provided that the plaintiff should "answer all proper questions relating to his physical condition having any connection with his claim for damages for personal injuries, providing Dr. Hawke undertakes in writing that he will not subject the infant plaintiff to psychiatric examination." [107] On appeal, Mr. Justice Hughes held that "physical examination" in section 75 of the Judicature Act does not include an examination of the mental state of the party, but questions as to physical condition are permissible. "The true position must surely be that 'physical examination' indicates an examination of the physical condition of the patient, not the method of examination itself. To say that such language can include an examination of the mental state of a patient, such as a psychiatrist would administer, is to invite that distortion which Landreville, J. found unacceptable in the *Angelov case*." [108] This rule offers a contrast to the rule laid down by Mr. Justice Osler in *Clouse v. Coleman* [109] that the examination contemplated is one "by touch or sight" and "not an oral examination of the person injured." [110] Following the approach of the Ontario Court of Appeal in *Abbs v. Smith* [111] that the court sets the terms of the examination, it has seldom been questioned that the court can order the party to answer questions put by the doctor in connection with his physical examination.

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[105] ONT. REV. STAT. c. 197, § 75(1) (1960) reads:

In any action or proceeding for the recovery of damages or other compensation for or in respect of bodily injury sustained by any person, the court which, or the judge, or the person who by consent of parties, or otherwise, has power to fix the amount of the damages or compensation, may order that the person in respect of whose injury damages or compensation are sought submit himself to a physical examination by a duly qualified medical practitioner, but no medical practitioner who is a witness on either side shall be appointed to make the examination.

Ont. Stat. 1966 c. 73, § 2 provides :

Section 75 of The Judicature Act is amended by adding thereto the following subsections :

(1a) Any duly qualified medical practitioner may in connection with an examination under subsection 1 ask the person being examined any questions that may be relevant to the purpose of the examination.

(1b) Any answer given or statement made by a person being examined during an examination under subsection 1 that is relevant to the purpose of the examination is admissible in evidence.

(1c) No person, other than the person being examined and the one or more medical practitioners making the examination, shall be present during the examination except with the consent of the parties or as may be ordered by the court, judge or other person who ordered the examination.

[106] [1965] 2 Ont. 797 (High Ct. Chamb.).

[107] *Id.* at 798.

[108] *Id.* at 800.

[109] 16 Practice R. 541 (Ont. 1895).

[110] *Id.* at 542.

[111] [1943] Ont. W.N. 101.

However, psychiatric examination seems not to be covered by section 75; the rule is not yet completely settled. In *Taub v. Noble,* [112] the court commented:

> A true appraisal of the injury requires that the whole man be examined, not merely a part of him. And where the injuries have resulted in a nervous disorder, it may be that some physician specializing in nervous disorders and diseases is the only one that can make a proper examination and give a prognosis. In directing the examination, the Courts should consider not whether the examiner is a neurologist, a psychiatrist, or one of many of the other specialists, but whether the proposed examiner has such skills that, when they are employed in the examination of the complaints alleged, he will be of appreciable assistance in enabling the Court to reach a just result. [113]

Hughes refused to follow these statements in *Smith,* reasoning that they are obiter, although they indicate judicial approval of a psychiatric examination under section 75. [114] Following *Angelov v. Hampel,* [115] he argued that "on the present wording of section 75(1) the right to request a purely mental examination by a psychiatrist would be straining its language to a point of distortion." [116]

K. *Jury Trials*

The general rule in Canada is that all civil actions are automatically tried by a judge without a jury unless one of the parties desires a jury. A party signifies his wish for a jury trial by either filing a jury notice (*e.g.*, Ontario) or making application to the court (*e.g.*, British Columbia and Saskatchewan). In both cases there is a discretion in the court whether to allow the jury trial or not. However, the discretion is exercised in different directions : in Ontario the rules favour jury trial if one of the parties wishes it; in British Columbia and Saskatchewan the rules favour trial by judge alone even if one of the parties wants a jury. An Ontario judge may, in his discretion, deny a jury trial; the discretion in Saskatchewan is to allow a jury trial; British Columbia falls somewhere in between.

In Ontario there is a presumption in favour of a jury if one party applies for trial by jury, but certain cases must be tried by judge alone. [117]

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[112] [1965] 1 Ont. 600 (High Ct. 1964).

[113] *Id.* at 604.

[114] *Supra* note 106, at 800.

[115] [1965] 2 Ont. 178 (High Ct.).

[116] *Id.* at 181.

[117] The rules relating to jury trials are found in the Judicature Act and the Supreme Court of Ontario Rules of Practice as follows :

> 57.(1) Subject to the rules and except where otherwise expressly provided by this Act, all issues of fact shall be tried and all damages shall be assessed by the judge without intervention of a jury.
>
> (2) The judge may nevertheless direct that the issues or any of them be tried and the damages assessed by a jury.
>
> 58.(1) Subject to the rules, if a party desires that the issues of fact be tried or the damages assessed by a jury, he may... file and serve on the opposite party a notice in

Motions to strike out jury notices and applications for trial by jury have provided the bulk of recent decisions on jury trials. When to decide whether a case should be tried by a jury and why a particular method should be preferred have been the most difficult questions that have confronted the courts. For instance, in *Ryan v. Whitton* [118] the trial judge struck out a jury notice before he had heard any evidence. The case was a consolidation of two actions, and the judge saw the possibility that the first would fail because of the lack of certain corroborating evidence which evidence might be supplied by the evidence in the second action. Thus, he believed that the case had difficulties making it impossible to instruct the jury in such a way that the jury would appreciate and give effect to the legal matter properly. The Court of Appeal, in granting a new trial by jury, ruled that "in that situation the learned trial Judge should have first heard the evidence in the presence of a jury and at the conclusion of all the evidence decided whether or not in the light of that evidence the case should be decided by the jury or by him alone." [119]

Cole v. Trans-Canada Air Lines [120] applied the rule in *Ryan*. In this case the defendant admitted liability, and the only issue was assessment of damages. Mr. Justice Haines rejected the application to strike out the jury notice and indicated that the evidence on such an issue would not be so complicated as to exclude a jury trial. Clarifying the rationale of *Ryan*, he pointed out that the trial judge should strike out the notice only after hearing evidence because sometimes submissions of counsel at the opening of a trial as to the complexities of the issues do not materialize as the case progresses. [121] The complexity of the evidence, however, was apparent in *Kovacs v. Skelton*. [122] The case involved the trial of eight separate issues for which a number of doctors would have to be called. Mr. Chief Justice Gale explained the difficulty of a jury trial: "After hearing eight issues as to damages, and not having the opportunity to take notes, it would be

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writing requiring that the issues be tried or the damages assessed by a jury, and if such notice is given, subject to subsection 3, they shall be tried or assessed accordingly.

(3) Notwithstanding the giving of the notice, the issues of fact may be tried or the damages assessed without the intervention of a jury if the judge presiding at the sittings so directs or if it is so ordered by a judge.

Judicature Act, ONT. REV. STAT. c. 197 (1960).

400.(1) When an application is made to a judge in chambers for an order striking out a jury notice and it appears to him that the action is one that ought to be tried without a jury, he shall direct that the issues shall be tried and the damages assessed without a jury, and, in case the action has been entered for trial, shall direct the action to be transferred to the non-jury list.

(2) The refusal of such an order by the judge in chambers does not interfere with the right of the judge presiding at the trial to try the action without a jury.

ONT. SUP. Ct. R.P. (1960) as amended to Dec. 31, 1965.

[118] [1964] 1 Ont. 111 (1963).

[119] *Id.* at 112.

[120] [1966] 2 Ont. 188 (High Ct.).

[121] *Id.* at 189.

[122] [1966] 1 Ont. 6 (High Ct. 1965).

extremely difficult, if not impossible, for a jury to be able to relate the evidence of any particular doctor, or several doctors, to a particular party."[123]

In medical malpractice cases the problem of jury or non-jury trial seems to be settled in Ontario. *Jaffray v. Sisters of St. Joseph*, [124] aside from reiterating the "now general rule" [125] that medical malpractice cases will be tried without a jury, has extended its application to cases involving the negligence of hospitals and nurses. Mr. Justice Brooke argued that such a case "is akin to an action for malpractice and the principles that have been applied in numerous judgments with respect to jury notice in this type of action are applicable and the jury notice is struck out." [126]

These cases indicate that courts are hesitant to deprive a litigant of his right to a jury trial. The judge should be convinced that a jury could not properly decide the case before he strikes out a jury notice or dismisses the jury. If there is only the possibility, or even probability, that the evidence will be complex, it should still be heard in front of the jury and then the decision made as to dismissal of the jury. [127]

The Ontario attitude is not distinguishable from the attitude of courts in British Columbia. [128] In the latter jurisdiction, the technical and complex character of evidence supports the preference for a non-jury trial. Thus in *McDonald v. Inland Natural Gas Co.*, [129] a scientific investigation was necessary in order to establish the allegations of negligence which were

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[123] *Id.* at 7.

[124] [1966] 2 Ont. 304 (High Ct.).

[125] 21 CAN. ENCYCL. DIGEST 306 (Ont. 2d ed. 1961).

[126] *Supra* note 124, at 306.

[127] This approach is a change from the former thinking of the Ontario Court of Appeal as shown in Martin v. Deutch, [1943] Ont. 683. In that case, Mr. Justice Laidlaw said: "It is the duty of a judge in chambers, and he is required by the Rule, to decide the question whether an action ought to be tried without a jury." [1943] Ont. 683, at 697. The change was reflected in the later Ontario Court of Appeal decision in Forrester v. Loblaw Groceterias Co., [1955] Ont. W.N. 204, where Chief Justice Pickup pointed out that:

> This Court is always loath to interfere with the discretion of a judge in chambers as to striking out a jury notice, but in this case no other ground is suggested as a reason for striking it out than the question whether the plaintiff was a trespasser or an invitee. We are of the opinion that the learned judge should not have struck out the jury notice in chambers but should have allowed the jury notice to stand and left it to the trial judge to decide whether the action should be tried with a jury.

[1955] Ont. W.N. 204, at 207.

[128] B.C. SUP. CT. R. order 36:

> 2. In every cause, matter or issue, unless under the provisions of Rule 6 of this Order a trial with a jury is ordered, the mode of trial shall be by a Judge without a jury: Provided that in any such case the Court or a Judge may at any time order any cause, matter or issue to be tried by a Judge with a jury, or by a Judge sitting with assessor or assessors....
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> 5. The Court or a Judge may direct the trial without a jury of any cause, matter or issue requiring any prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in their or his opinion conveniently be made with a jury, or where the issues are of an intricate and complex character.
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> 6. In any cause, matter or issue other than that referred to in Rules 2A, 3, 4 and 5 of this order, upon the filing and service of an application within four days after notice of trial has been given of any party thereto for a trial with a jury of the cause or matter of any issue of fact, an order shall be made for a trial with a jury.

[129] 57 W.W.R. (n.s.) 87 (B.C. 1966).

pleaded. The issues involved complex directions on the law. Mr. Justice Smith ordered a jury trial pursuant to rule 6 of Order 36. In ordering a trial before a judge without a jury, the British Columbia Court of Appeal stated:

> This case is clearly one coming within R. 5, of O. XXXVI and is one eminently suitable for trial before a judge without a jury so that, when considering the facts, the learned trial judge, aided as he would be by his notes of the evidence, might leisurely and thoughtfully, and in an experienced way, consider the facts, and aided by the submissions of counsel upon the applicable law, relate the facts as found to the law in an endeavour to arrive at a considered decision on the many complex and complicated issues which the justice of the case might demand. [130]

It appears, therefore, that although the wording of the British Columbia rules is somewhat different from the Ontario rules, the approach of the courts is much the same. A party has a prima facie right to a jury trial if he wants one, but if evidence is adduced on the application that the evidence will be very technical or complicated, the order will not be made.

In Saskatchewan the general presumption is against trial by jury; the discretion which a judge has under the rules is to allow a jury trial if he feels the case warrants it. As in other jurisdictions, his discretion is not completely unfettered. [131] *Prudential Trust Co. v. Lacy* [132] ruled that the defendant cannot demand a jury trial on the basis of a counterclaim. Following *McCusker v. MacDonald*, [133] the court held that the "action" within the scope of section 67 (now section 68) includes only original actions commenced by the plaintiff and does not include a counterclaim. The statement of claim determines the right of a party to a jury trial. [134] Furthermore, the statement of claim must show that the basis of the action primarily qualifies for a jury trial. Since, in this case, the action mainly concerned the declaration of rights and benefits under a petroleum and natural gas lease and the pecuniary remedy of accounting was purely ancillary, the court felt that the defendant was not entitled to a jury trial. [135] The court

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[130] *Id.* at 96.

[131] Queen's Bench Act, SASK. REV. STAT. c. 73, §§ 68, 69 (1965) provides:

(1) In actions for libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution or false imprisonment no matter what may be the amount claimed, and in actions where the claim, dispute or demand arises out of a tort, wrong or grievance in which the amount claimed exceeds $1,200 and in actions for a debt or on a contract in which the amount claimed exceeds $1,200, any party to the action may demand a jury in accordance with the provisions of the rules of court.

(2) Subject to the provisions of this section, in civil trials issues of fact and the assessment or inquiry of damages shall be heard and determined and judgment given by a judge without a jury.

Notwithstanding anything in section 68, a judge in chambers or a judge presiding at a trial may in his discretion, on the application of a party to the action, direct that the action or issues shall be tried or the damages assessed by a jury.

[132] 54 W.W.R. (n.s.) 245 (Sask. Q.B. Chamb. 1965).

[133] [1929] 1 W.W.R. 86 (Sask. 1928).

[134] *Supra* note 132, at 247.

[135] *Id.* at 249.

explained that "the judges of this court do not have the discretion enjoyed by their brethren elsewhere in Canada." [136]

The Saskatchewan courts seem to interpret the rules strictly, thus limiting the area of jury trials in civil actions.

IV. Post-trial Procedure

A. *Costs*

Where the rules of court provide that an appeal from a taxation for costs lies only in respect to items which have been objected to on taxation, great hardship may result from failure of a party's solicitor to attend at the taxation, either through illness or inadvertence, since there is no rule providing for relief in this situation. On a motion for a taxation de novo, a court may exercise its inherent powers to grant relief for any manifest hardship due to circumstances beyond a party's control. In one case, [137] the failure to attend was due to the solicitor's inadvertence, but the defendant was personally blameless and the amount of the bill was very substantial. The British Columbia Supreme Court granted relief under this wide discretion. A defendant who has had no opportunity to question a large solicitor-client bill should be given the opportunity of doing so.

The English and Ontario rules on taxation of costs of a counterclaim permit the plaintiff who successfully defends a counterclaim to be taxed only for such extra costs as were occasioned by the counterclaim. In British Columbia, however, the rule is otherwise; even where the subject matter of the counterclaim was identical with part of the defence and no issues were involved that had not already been raised in the pleadings of the main action, plaintiff's bill for defence of the counterclaim was allowed for the full amount, [138] the matter having been decided previously by the British Columbia Court of Appeal. [139]

A plaintiff will be deprived of costs until such time as he is properly before the court. Thus, where an infant's solicitor commenced an action in her name and not in the name of her next friend, the British Columbia Supreme Court ordered that an application to appoint a next friend be made, and that plaintiff's costs be disallowed until the irregularity had been cured. A request that plaintiff's solicitor be ordered to pay the costs personally was refused, since he had not deliberately commenced the action with knowledge of the client's age. [140]

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[136] *Id.* at 248. *See also* Racey v. Int'l Harvester Co., [1917] 1 W.W.R. 606 (Sask. Sup. Ct. en banc 1916).

[137] Wilson v. Wilson, 55 W.W.R. (n.s.) 96 (B.C. Sup. Ct. Chamb. 1965), *following* Caron v. Bannerman, 22 Man. 24 (K.B. 1912).

[138] W. B. Switzer Ltd. v. Kerr, 55 W.W.R. (n.s.) 767 (B.C. County Ct. 1966).

[139] McKee v. Wilson, [1936] 1 W.W.R. 388 (B.C. 1935).

[140] Parkes v. Demers, 56 W.W.R. (n.s.) 634 (B.C. Sup. Ct. Chamb. 1966).

Where a *praecipe* order for taxation of costs has been obtained by a solicitor and the clients contend that they wish to dispute the solicitor's retainer, if the court finds there is a bona fide dispute respecting the retainer, the *praecipe* order in question is a nullity and not merely an irregularity. It should appear that the retainer was disputed before the order was taken out, but where there is clear evidence of a dispute an exception may be made. Thus, in a case, where it was shown that the clients had reasonable grounds upon which to dispute the retainer, that very fact was some evidence of the existence of a bona fide dispute. [141]

An application to the Ontario Municipal Board [142] for the erection of a police village into a corporation was dismissed. The Township of Toronto was ordered to pay the unsuccessful applicant its costs on a solicitor and client basis upon the Supreme Court scale. The greater part of the substantial bill was for disbursements for expert witnesses. The taxing officer held the disbursements were fully recoverable, since they were incurred after the commencement of proceedings, were proper and reasonable and were fairly incurred in making a proper preparation and presentation of the case on the hearing. The taxing officer indicated he would like to see the case appealed; he did not think it a correct decision, but was bound by a decision of Chief Justice McRuer in *Re Magee & Ottawa S.S. Board.* [143] The taxing officer preferred a decision of the Manitoba Court of Appeal [144] which decided that fees and expenses paid by a successful litigant to experts are not "costs incidental to proceedings" within the meaning of the relevant rule of court, and cannot be taxed as disbursements. Only the amount prescribed by tariff for attendance at court of professional witnesses may be included.

V. Particular Problems

A. *Divorce*

Numerous problems on procedure were raised in cases involving matrimonial causes. The Supreme Court of British Columbia interpreted and sustained a rule issued under authority of an amendment to the Supreme Court Act. [145] Before 1960, the rule in British Columbia was that a

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[141] *Re* Solicitor, [1966] 2 Ont. 601 (Master's Chamb.).

[142] *Re* Police of Malton & Toronto, [1965] 2 Ont. 792 (Master's Chamb.).

[143] [1962] Ont. W.N. 83 (High Ct.).

[144] Weston Bakeries Ltd. v. Baker Perkins Inc., 31 W.W.R. (n.s.) 200 (Man. 1960).

[145] B.C. Rev. Stat. c. 374 (1960) provides:

15.(2) All causes and proceedings in the Court for dissolution of marriage, nullity of marriage, judicial separation, restitution of conjugal rights, or jactitation of marriage shall be commenced by writ of summons instead of by petition, and the practice and procedure therein shall, subject to Rules of Court, be the same as is provided for actions so commenced in the Court.

. . .

(4) Rules of Court may be made pursuant to section 79 for regulating the practice and procedure in all actions in the Court in divorce and matrimonial causes.

(5) Where in matters of practice and procedure there is a conflict between the Rules of Court and the Act [Divorce and Matrimonial Causes Act] the Rules of Court shall prevail.

respondent, in answer to a petition for divorce, could not claim affirmative relief in the same action; he was obliged to file a petition of his own. Order 60, rule 17, issued pursuant to the amendment, provides that a defendant seeking relief in the action shall deliver a counterclaim. [146] *Williamson v. Williamson* [147] rejected the contention that Order 60, rule 17, is ineffective in that it attempts to amend The Divorce and Matrimonial Causes Act 1857 [148] in a substantive way; that act makes no provision for a defendant's relief by means of anything other than a separate action. The court asserted that changes in mode of trial and form of pleading are changes in procedure, which the legislature is competent to bring about: "No question of substantive right or jurisdiction arises from the substitution of counterclaim for separate action so long as the change is made by what Robertson, J., in *Watkins v. Watkins* [149] referred to as the proper authority, and such is the case here." [150]

Machan v. Machan [151] affirmed the rule applicable to costs in matrimonial causes laid down in *Hynds v. Hynds*, [152] that the wife is entitled to her costs even though she has been unsuccessful in her claim or defence, unless her solicitor had no reasonable or probable grounds for believing that she was prosecuting or defending a just cause, or, it seems, unless she had a separate estate or ample funds of her own. [153]

The right of the wife to receive alimony while an action for dissolution of marriage was pending was contested in *Cameron v. Cameron*. [154] The right of the wife to receive interim alimony while an alimony action is pending was earlier settled in *Bain v. Bain*. [155] In that case Mr. Justice Kelly said: "The law is well settled that while an alimony action is pending a wife is entitled to have sufficient support from her husband to enable her to live in modest surroundings consistent with her station in life until such time as the action can be tried." [156] In *Bain* the wife was still living in the matrimonial home, and the husband had agreed to pay all the household expenses until the action was disposed of. In the instant case, however, the wife, alleging cruelty of the husband, left the matrimonial home. Nevertheless, an order for interim alimony was rendered. The senior master stated that the plaintiff ought not to be deprived of interim alimony by reason of having left the matrimonial home where, as here, she alleged that she had done so by reason of the husband's cruelty, notwithstanding

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[146] B.C. SUP. CT. R. (1961).
[147] 55 W.W.R. (n.s.) 445 (B.C. Sup. Ct. Chamb. 1966).
[148] 20 & 21 Vict., c. 85 (now B.C. REV. STAT. c. 118 (1960)).
[149] 50 B.C. 306 (Sup. Ct. 1936).
[150] *Supra* note 147, at 446.
[151] 56 W.W.R. (n.s.) 321 and 435 (B.C. Sup. Ct. 1966).
[152] 50 W.W.R. (n.s.) 426 (B.C. Sup. Ct. Chamb. 1964).
[153] *Id.* at 428. *See also* POWER, DIVORCE 160 (Payne ed. 1964).
[154] [1966] 1 Ont. 770 (Senior Master 1965).
[155] [1939] Ont. W.N. 475 (High Ct.).
[156] *Id.* at 476.

the fact that the trial judge might well find the alleged acts of cruelty insufficient to justify her leaving.

B. *Judicial Discretion*

A useful statement of the nature and function of a judge's judicial discretion appears in *Laurentide Fin. Corp. v. Robertson.* [157] In Alberta a money lender under the Money Lenders Act and the Small Loans Act may not, under the rules of practice, enter a default judgment after non-delivery of a statement of defence without the leave of the court. Clarification of the rule was sought in *Laurentide.* Mr. Justice Cullen in the Alberta district court said :

> When something is to be done within the discretion of the court or a judge, it means that it is to be done according to the rules of reason and justice, not according to private opinion; according to law and not humour; it must be legal and regular, not arbitrary, vague or fanciful .... If a thing is unjust in principle, discretion must not permit it to be done .... But the exercise of judicial discretion means, equally, that there is a duty on a judge to make an order if a fair case has been made out. [158]

He pointed out that there must be ample material before a judge for the due exercise of his discretion, and suggested the matters that should be disclosed in an application such as the one before him. [159]

In *Mellstrom v. Rance Const.* [160] a defendant stood by while a default judgment was rendered against him and then he sought to have the judgment set aside. He had full knowledge of the judgment but took no steps to question it until more than a year after being served personally with the writ and statement of claim, offering no reasonable explanation other than that he did not think he was liable. The judge found that there were no irregularities in the proceedings and that the judgment was strictly in accord with the statement of claim. He held that anyone who with knowledge of the consequences deliberately permitted a judgment to go against him by default could not successfully invoke a rule under which a court is given discretion to set aside a judgment.

The plaintiff in *Daniel v. Hess* [161] brought an action in the district court for damages arising out of a motor vehicle collision. Previously, the defendant had brought an action on the same set of facts in magistrate's court and had been successful, no counterclaim being asserted. In the instant case the defendant raised res judicata as a defence. Taking authority from the old

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[157] 54 W.W.R. (n.s.) 552 (Alta. Dist. Ct. 1966).

[158] *Id.* at 555.

[159] (a) The basis and nature of the claim; (b) the amount actually advanced; (c) the amount and nature of any charges, deductions, commissions, fees, fines or penalties; (d) whether the loan was a renewal or an original one; (e) the amount of any payments made or credits given; (f) the interest rate charged.

[160] 55 W.W.R. (n.s.) 229 (Sask. Q.B. Chamb. 1966).

[161] 54 W.W.R. (n.s.) 290 (Sask. Dist. Ct. 1966).

English case of *Henderson v. Henderson*,[162] Mr. Justice Hughes found that where a matter is litigated by parties who have an opportunity to put the whole case before the court, the same parties will not be permitted to raise the same subject matter before the court again. By not pressing his claims at the first trial, in which he took full part as defendant, the plaintiff precluded himself from subsequently pursuing his claim, for the court will not entertain a request to decide again on the same facts.

Re Immigration Act[163] was an appeal to the British Columbia Court of Appeal by a Greek seaman who deserted his ship in Vancouver and sought to remain in Canada. A special inquiry officer ordered him deported, but informed him he had a right of appeal to the immigration appeal board. After dismissal of his appeal to the board, he applied to the minister for a permit to allow him to remain in Canada. After due consideration, the minister rejected the request. The appellant contended that section 20 of the immigration regulations, which purports to empower the board to hear all appeals from a deportation order, is ultra vires of the minister. Section 62 of the Immigration Act[164] empowers the minister to make regulations not inconsistent with the act. Section 31(2) of the act provides that all appeals from deportation orders shall be reviewed and decided by the minister, except such as the minister refers to the immigration appeal board. The appellant's contention was that the minister himself should either hear the appeal or personally direct it to the board; a delegation to the board of all appeals by regulation 20 was ultra vires. The court specifically refused to decide the point, having found that, in any case, the minister had given the application a review at least as wide as if the appeal had gone to him in the first instance. There seems to be an implication that even if the correct procedure is not followed a substantial review by the proper persons will satisfy the statute.

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[162] 3 Hare 100 (Ch. 1843). *See also* 15 HALSBURY, LAWS OF ENGLAND 185 (3d ed. 1963).
[163] 56 W.W.R. (n.s.) 638 (B.C. 1966).
[164] CAN. REV. STAT. c. 325 (1952).