THE ALBERTA RULES OF COURT—1969

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On January 1, 1969 a new set of Rules of Court came into effect in Alberta. These new rules made considerable changes in many aspects of practice. In this article, prepared from material presented at a seminar on The Rules of Court held by The Committee on Continuing Legal Education at Edmonton and Calgary, January 28 and 30, 1969, the authors discuss the more significant changes.

The Rules of Court, 1969, came into force on the 1st of January.

The Rules have been substantially re-written but in many cases the effect of the Rules has not been changed. Much re-writing of the Rules was done in an effort to make them correspond with modern legislative drafting practice. It is the purpose of this paper to discuss the changes which are thought to be of the most significance to the legal profession in Alberta. The discussion, therefore, proceeds through the general rules, dealing with each part and pointing out those changes.

Part Two—Commencement of Proceedings

No basic change appears contemplated by this part. The statement of claim has, however, been made the primary method of commencing a proceeding. An attempt was made to define the situations where a petition may be used, by Rule 6, *viz*, where permitted by statutes; where there is no person against whom relief is sought; or the person against whom relief is sought is unknown or unascertained; or there are no issues of fact.

Part Three—Service of Documents

Personal service is still required of a document which commences a proceeding but service upon a solicitor or by double registered mail is preserved by Rules 16 and 22. Rule 15(2)(a) permits service on a corporation in any manner authorized by statute and thus varies an interpretation placed on the old rule by a District Court decision.[1]

In the case of service on an infant Rule 18(2) is new and it requires service upon the father, guardian or person with whom the infant appears to be residing or in whose care he is where the infant appears to be under the age of eighteen.

An English rule has formed the source of another new rule, Rule 21, permitting parties to enter into a contractual agreement as to the mode or place of service. If the place is out of the jurisdiction then an order for service must be obtained and the parties are not, under sub-section (3), permitted to contract to avoid what would otherwise be good service under the rules.

Rule 23 codifies a previous decision and prohibits dispensing with service of a document by which proceedings are commenced.[2]

Part Four—Service Out of the Jurisdiction

The general rule has been expanded by the extension of sub-rules (d) and (e) and the addition of sub-rules (f), (k), (l) and (o). Sub-

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1 *De Jong* v. *Sime* (1967), 59 W.W.R. 441; *contra*: *Berg* v. *Kingsley Builders Ltd.* (1967), 60 W.W.R. 59.

2 *Bauer* v. *Bauer*, [1928] 1 W.W.R. 755.

rule (f) permits service in cases where an action is in respect of a contract which is made within the jurisdiction, or which by its terms or implication is governed by Alberta law or where the parties have agreed that Alberta courts will have jurisdiction. Sub-sections (k) and (l) deal with actions in respect of mortgages of personal property situated in the jurisdiction. Rule 31 imports a change in the rule requiring the affidavit in support to show a "reasonable" cause of action and the word "reasonable" is a new introduction.

Part Five—Parties and Joinder of Causes of Action

While these rules are substantially re-written it still remains generally speaking true that claims by one or more plaintiffs against one or more defendants arising out of the same transactions in a series of transactions may be joined in the same action whether the relief is claimed in the alternative or separately. An example of the re-writing of the rules may be found in Rule 38 which gathers together provisions formerly found in Rules 50, 51, 61(1), 61(2), 61(3) and 73. In some instances the wording of the existing Ontario rules has been preferred and the new Rule 51 is derived from the English Rules order 15, Rule 13, in place of the old Rule 64.

Part Six—Infants and Persons Under Disability

The new Rule 59 changes the old rule in that it authorizes the defence by a "guardian" in place of the old Rule which was "guardian of his estate." It appears that these rules are permissive and are drawn, in that sense, in the same terms as the old rules.[3]

Rules 64 and 65 were picked up from other parts of the rules, from the old Rules 23(3) and 677.

Part Seven—Third Party Notice

A major change has been effected by these rules in that the third party notice is now available only for a claim over in the strictest sense. By the same rule, Rule 66, the form of the third party notice is prescribed by the rules. The same rule by sub-section (4) changes the time for issuing the third party notice so that a defendant may now issue a third party notice any time up until the time he actually defends the action or is noted in default and he must then serve it within 15 days.

Part Nine—Pleadings

Rule 67 requiring pleadings in third party proceedings to be served upon the plaintiff's solicitor should enable these matters to be included in the record. Rule 72 now provides for noting in default in this type of action. By Rule 75(1) the application for direction in the third party proceeding becomes mandatory.

Rule 77 is a new rule introducing a new procedure for issues between defendants and provides for the service of a notice making the claim over which will be disposed of at the trial. This is in lieu of third party notice. This is based on a recent English introduction. Another addition to this body of rules is Rule 79 making the procedure applicable to a defendant by counter claim.

Rule 88 now sets forth formal contents of the pleadings including the notice to the defendant.

All the rules relating to the striking out of pleadings are now con-

[3] *Stachuk* v. *Nielsen* (1958), 26 W.W.R. 567; *Mann* v. *Mann* 31 W.W.R. 140; *Hildebrand* v. *Franck*, [1922] 3 W.W.R. 755.

tained in Rule 129. The rules relating to amendment of pleadings have been amended and, in particular, to allow the delivery of an amended defence or a new defence to an amended statement of claim under Rule 130 and to prescribe the circumstances in which a fresh pleading must be delivered under Rule 136.

Part Ten—Procedure on Default

Under Rule 142 of the new rules, a demand of notice is now available in all kinds of actions but the defendant is now placed in a position where he must file either a statement of defence or a demand notice. In order to obtain default judgment or to note in default it is necessary to give proof by affidavit of the service of the statement of claim and the failure to file or serve a statement of defence, thus deciding an issue which had never clearly been determined by the courts.[4]

Rule 148 has been extended to determine when a claim for interest may be included in a default judgment. The rule provides that interest by way of damages may not be obtained by default unless leave is given. Presumably under sub-section (2) of that rule the plaintiff could obtain judgment for the principle sum and proceed with the interest claim at his convenience.

Rule 152 is the rule which deals with cases where the defendant has been noted in default and judgment not taken and in those circumstances the plaintiff may do one of two things, apply *ex parte* for judgment or set the matter down for assessment. In the former case the court may give judgment upon proof of the plaintiff's claim by affidavit or otherwise or set it down for assessment. This rule alters a practice which precluded plaintiffs from going directly to assessment.[5]

Under Rule 155 the default rule is applied to a counter-claim.

Part Eleven—Summary Judgment

The one major change in these rules is the replacement of the old Rules 128 and 140 with the single Rule 159. This rule has also been altered to permit a plaintiff to apply for summary judgment as to a claim or part of a claim or where the defence is only as to amount. This procedure may, for example, be available in tort actions where it was not previously available. Rule 161 is a restricted adaptation of the old Rule 138 and adopts Ontario practice.

By Rule 164 summary judgment procedures are now available in the case of a counterclaim and can be compared with Rule 155 which makes default judgment rules similarly available.

Part Twelve—Payment Into and Out of Court

These rules have been substantially changed in an effort to permit a party that pays into court to take the money out of court. There are reported cases indicating that plaintiffs were waiting for a considerable length of time (even up to trial), before making the final decision as to whether or not to take the money out of court.[6] The time within which the money may be taken out of court is now set at 45 days after the commencement of the examination for discovery of the defendant. It would appear that the money has to remain in court until trial in cases

4 *Clemons* v. *Milham* [1921] 2 W.W.R. 96, *Shandro* v. *Kornetsk* [1927] 1 W.W.R. 876, 1011.
5 *Sulef* v. *Parkin* (1966), 54 W.W.R. 502, *aff'd.* (1966), 57 W.W.R. 236.
6 *Griggs* v. *Petts*, [1939] 3 All E.R. 39; *Millar* v. *Building Contractors Ltd.*, [1953] 2 All E.R. 339.

where there is no discovery of the defendant. Where the money is paid in 45 days after commencement of examination for discovery it would appear that the court will have to decide, in its discretion as to costs, what would be a reasonable time to leave the funds in court.

Rule 169 continues the practice of requiring that payment in be taken into account in the exercise of discretion as to costs and the case law to which the committee was referred indicates that this will, in most cases, entitle the defendant who successfully paid into court to the costs following payment in.[7]

By Rule 170 the defendant is now entitled to surrender a counterclaim as part or whole payment in.

Part Thirteen—Discovery

In connection with the discovery of documents, Rule 186 has an expanded definition to include the recordings of sound.

The major change is to be found in Rule 190 which results, in effect, in an automatic service of a notice to admit upon parties when they have either served an affidavit of documents or have had an affidavit of documents served upon them. Unless the authenticity of a document is denied in an affidavit of documents or is disputed by a notice given within 30 days after service upon a party of the other side's affidavit of documents, the parties are taken to admit that any document described in the affidavit as an original document was printed, written, signed or executed as it purports to have been and that any copies are true copies and that, if the document is a letter, the original was dispatched to the addressee and received. This compendious notice to admit is taken from the English Order 27 and is designed to facilitate the proof of documents at trial. If a party denies the authenticity of a document he is to do so specifically and, if he denies a document which is later proved, the court is expected to take the denial into account in exercising its discretion as to costs.

Rule 190 (4) is intended to do away with the notice to produce documents at discovery and at trial and requires parties that have made affidavits of documents to produce the documents.

The changes in the examination for discovery rules are not extensive. Rule 200 (4) deems a corporate auditor to be an employee, thus enabling a party to examine the other side's auditor—a procedure that was not available under the previous rules.

Rule 202 expands the old Rule 242 to enable the examination of prior parties to instruments or assignments.

The clerk's power in respect to the examinations is now spelled out by Rules 203 (4) and 213 (1). The latter provides that validity of objections is to be determined by the court.

Rule 204 (7) is a new innovation relating to conduct money and is designed to preclude the conduct money being applied to the solicitor's own account. It might be advisable to pay the money to the client only upon his actual attendance so that there is no danger of the solicitor's being ordered to repay funds.

Rule 213 (2) introduces a significant amendment in that it is no longer

[7] *Findlay* v. *Railway Executive*, [1950] 2 All E.R. 969, 972; *Badry* v. *Alberta Bakery*, [1947] 2 W.W.R. 475.

an objection to a question, which is otherwise relevant, that the answer will disclose the name of a witness.

Examination for discovery transcripts can now be closed to the public by praecipe directed to the clerk under Rule 215(2).

Part Fourteen—Medical Examinations

The problem of making medical examinations effective while at the same time protecting the rights of parties who are proceeding to trial in an adversary system has been considered in many jurisdictions. The new Rule 217 provides in summary as follows: (1) the court may order the party to submit to a medical examination and may order a further examination, (2) the medical practitioner may ask questions relating to the medical condition, (3) the person to be examined may nominate a medical practitioner to be present, (4) recognized medical tests may be taken by written consent or upon order of the court, (5) the party causing the examination to be made is, on request, required to deliver a copy of a detailed written report of the medical practitioner and is then entitled to receive a like report of every examination previously or thereafter made arising out of the injury, and (6) the court may order the production of a report and exclude as a witness a doctor who refuses to give a report.

The Evershed and Wynn Committees in England recently considered attempts to make medical examinations more useful and new rules have recently been introduced both into Ontario and the Exchequer Court practice.

Part Fifteen—Court Expert

The old Rule 260 has been replaced with much broader machinery for court experts based largely on the new English Rules. These rules cover independent medical evidence and other expert evidence and provide that the court, on application or on its own motion, may appoint an expert who is required to report and verify his report by affidavit. The parties have the right to cross examine him on his report by applying to the court for cross-examination. This is a considerable expansion of prior rules and is designed to make the court expert a useful institution.

Part Sixteen—Pre-Trial Conference

This rule has been based on the British Columbia Rule and empowers the court, on application, to direct the parties or their solicitors to appear before it for a pre-trial conference to consider, in essence, all matters which would expedite the trial in action.

The procedure has been little used in British Columbia but is widely used in the American jurisdictions. It was looked upon with some favour by the Evershed Committee in England and as a result the new English Rules import some pre-trial consideration into the mandatory order for directions.[8]

Part Seventeen—Points of Law and Definition of Issues

These rules replace the old Rules 261 to 264 and incorporate points formerly covered in Rules 232, 282 and 449. There are a number of cases where it would appear to be desirable to delay the determination of some issues while others are determined in advance and these rules provide a code for that procedure.

8 The Evershed Report, Cnd. 8878, para 218.

Part Eighteen—Discontinuance

Rule 225 introduces some changes, notably the right to withdraw parts of the claim by discontinuance. Under Rule 225(5) leave is no longer required to discontinue an action which has been set down for trial so long as the parties consent to discontinuance.

Rule 228 is new and requires leave to withdraw other proceedings and is primarily thought of as a protection for the respondent who may raise the question of costs.

Part Twenty—Notice to Admit

The provisions of this rule represent a strengthening of the old rule. In the first place under Rule 230(2) if you do not reply you are taken to admit. Moreover, if you reply, you must deny specifically the matter, give reasons why you cannot admit or give objections as to the propriety of the requested admission. The request must be met in substance and there are specific provisions as to the awarding of costs against a party refusing to admit. The rule is designed to prevent the abuses which were formerly encountered.

Part Twenty-two—Mode of Trial

The major change in this area has been to remove all of those rules which, in essence, repeated the provisions of The Jury Act. In jury trials references have to be made to that Act.

Part Twenty-three—Entry For Trial

This part has been substantially re-written although there does not appear to be any major changes in the substance of the rules. Under Rule 240 there is now a provision that you have five days to give the notice of entry for trial and Rule 239 provides for delivery of a copy of a record to the opponent. A recent direction of the Chief Justice of the Trial Division requires the clerks to refuse to enter for action trials where the discoveries have not been completed unless there is an undertaking that the action will be ready for trial or the court otherwise orders.

Part Twenty-four—Delay in Prosecution of Action

The only change here is to codify the courts power to dismiss an action for want of prosecution or to give directions for speedy determination.

Part Twenty-five—Trial

While there has been some re-writing there does not appear to be any change of substance. Rule 260 is a new rule and is designed to remove some doubt that has arisen because of a difference in practice among various judges. The Rule specifically provides that the defendant may, at the close of the plaintiff's case, move for dismissal without being called upon to elect whether he will call evidence. This rule does not change the existing law which applies in the appeal court in a case of such a ruling.[9]

Part Twenty-six—Evidence

There are no substantial changes with respect to evidence at trial.

In relation to evidence *de bene esse* there has been some rewriting

[9] *Hayhurst* v. *Innisfail Motors Ltd.*, [1935] 1 W.W.R. 385.

and there have been some changes made in the commission evidence rules.

Rule 272 now provides machinery for enforcing sanctions where a party or a resident within the jurisdiction fails to attend an examination under this part.

Rule 274 is written to prescribe the form of oath and incorporates the provisions of the Evidence Act. The Commissioner taking evidence is to take an oath of office. It is now prescribed before whom he takes that oath under Rule 285; and under Rule 287 he is now given the power to administer the other necessary oaths. Rule 284 provides machinery for making objections so that they are determined in any event by the court and not by the Commissioner.

Under Rule 282 evidence taken on commission may be used at the trial without further order while evidence taken *de bene esse* may be used upon proof of the unavailability of the witness. There was a hiatus before.

The form of the Commission is now prescribed in Form E.

Affidavits

The most significant change in these rules is the abolition of the rule forbidding the affidavit to be taken before the solicitor of the party or that solicitor's partner or employee. One should point out that there was a common law prohibition[10] against the reception of such evidence and it would probably be sensible to have affidavits taken outside of the office in contentious matters. It was intended to abolish this requirement because of the difficulty that was encountered by people who practiced in outlying areas.

Part Twenty-seven—Judgment

These rules are changed primarily by re-organization and re-writing.

Rule 333 simplifies the form of satisfaction piece in use to conform with what is now generally used and requires an affidavit of execution only in cases where the client personally executes his satisfaction piece.

Part Twenty-eight—Enforcement of Judgments or Orders

This very technical part has been rewritten and consideration had to be given to the provisions of the Seizures Act. A Writ of Assistance is the process by which equity enables a litigant to recover land while the Writ of Possession served the same purpose at common law. Since the Writ of Assistance gave wider powers than the common law writ, Rule 349 carries forward the old powers of the Writ of Assistance. The ordinary Writ of Delivery is narrower. The Writ of Possession is used to recover possession of land. The old rule also mentioned a writ of *Habere Facias Possessionem.* This writ appears to have had its source in the Title Act of 1836 and has been deleted from the present rules. The other writ, the Writ of Sequestration, empowers the sequester to enter lands to receive rents and profits.

Where the rules covered areas which were covered by the Seizures Act generally speaking the old rule was deleted, as e.g. the old Rule 415.

The wording of the rules relating to examinations in aid of execution, Rule 372 to Rule 383, has been revised but not to make any change of

10 *Bourke* v. *Davis* (1889), 44 Ch.D. 110, 126.

significance. Rule 382 has been provided to bring the normal examination for discovery rules into play.

Part Thirty—Proceedings Under Statutes

This is an attempt to codify some judge made law and allows one machinery for invoking the court without the commencement of an action.

The type of case which this part deals with is that type of case arising, for example, under some of the provisions of the Companies Act, the Land Titles Act, Bills of Sale Act and The Conditional Sales Act, when the court is given power to make a direction or issue a certificate otherwise than in an action. The problem that has troubled the practitioners has been the method of invoking the court. Our Appellate Division had decided that in a proper case it was not necessary to commence any proceedings and the matter might be determined *ex parte*.[11]

The procedure provided by the new rules is that it is not necessary to start an action and an application can be made on an affidavit of facts to a judge who may then hear the matter *ex parte* or direct a hearing and designate who is to be served and the nature and mode of service. To the extent that the judge does not give directions the proceeding will be heard in the same way as an originating notice of motion and the court has the same powers that it has on the return of an originating notice of motion.

The rule also authorizes the taking of affidavits in such proceedings and requires the filing of the original material with the clerk.

Part Thirty-Two—Local Judge

These rules have not been changed in view of the fact that most of the suggestions asked for changes involving essential changes of jurisdiction which would more properly result from an amendment of the District Courts Act.

Part Thirty-Three—Originating Notice

The first major change in this rule is that the form of originating notice is now prescribed by Form G. That form is generally speaking, the form that has been used in the past. It is to be noted that it is now issued by the clerk.

Under Rule 88 it will have to be endorsed with the notice to the respondent. The notice is not prescribed but would be the form prescribed by an earlier decisions of our Appellate Division[12] and which is now in general use.

The originating notice is available in the circumstances in which it was available before, and under Rule 410 its use is extended slightly. Particular reference may be made to sub-section (e) introducing the case where no material facts are in dispute and the question is one of construction of a written instrument, by-law or regulation. There are a couple of new items added and there is a general power to use an originating notice in "Administration Proceedings."

Administration Proceedings are taken under Part 34. This new part covers most of the cases involving the administration of trusts and estates (formerly brought under an originating notice of motion) but

11 *Moreau* v. *Baker*, [1947] 1 W.W.R. 1098.
12 *In Re Mines Act, In Re Carbonite Coal*, [1927] 3 W.W.R. 690.

is somewhat expanded to cover all aspects of proceedings for the administration of an estate or trust under the direction of the court. This is an adoption of the new English Rules. The Code of Rules elaborating parties upon whom service is to be made, formerly found in Rule 467, has been eliminated thus leaving it upon an applicant to serve the parties whom he seeks to effect. There are also some rules incorporated into this part for the giving, in effect, of class orders under Rule 417.

Part Thirty-Six—Extraordinary Remedies

Alberta is one of the few jurisdictions whose replevin rules are contained in the Rules of Court, and the existing replevin rules appear to have been fairly extensively revised for this jurisdiction sometime in the 1930's and a few changes have been made.

The Mandamus Rules have not been extensively changed but the old Rule 514 was eliminated as being unnecessary and the former Rule 515 rendered redundant in view of the terms of the rules relating to sanctions.

The Interpleader Rules have been somewhat rewritten and in the main follow the provisions in the Ontario Rules.

Reference may usefully be made to Section 29(6) of The Seizures Act which provides for an alternative to interpleader procedures. A more general rule, Rule 449, setting forth procedure in interpleader issues has been used in place of the old Rule 524. Those rules which relate particularly to a sheriff or other judicial officer have been gathered in one place.

The rules relating to receivers have been modernized by deleting references to the Farm Creditor's Arrangement Act. The only change from the previous rules, apart from such modernization, is the addition of Rule 466 permitting the appointment of a receiver by way of equitable execution thus recognizing an inherent jurisdiction of the court.

Rules 467 and 468 have been rewritten to make more effective the court's power to order inspection and the preservation of property.

The Garnishee Rules were extensively revised after the receipt of a substantial amount of correspondence from interested parties.

In connection with the Garnishee Rules one of the major concerns was with exemptions which to some extent reflect Government policy and the only useful change which could be made appeared to be in the introduction by Rule 484 of some mechanism for reducing an exemption where both husband and wife are employed. Various elaborate formulae could be conceived but most of them would put an impossible burden upon the garnishee.

Under Rule 470(1) the contents of the affidavit in support of an order for leave to issue a garnishee before judgment has been specified. The rule is designed to codify what appeared to be the suitable materials to support such an application. It would appear that the provisions of Rule 470(1) are mandatory.

It is to be noted that Rule 470(3)(b) has removed the former requirement that the grounds for the information be given unless it was sworn that the information was given in confidence.

A significant change is in Rule 471(3) setting the limit of time for service upon the Defendant to twenty days after payment into court. Rule 475 is extensively re-written to simplify the position of the garnishee

who is normally both an innocent and disinterested party. Rule 475(1) sets forth the four alternatives to him, namely: (a) payment to the court; (b) an answer showing that the debt is or may not be attachable; (c) an answer stating that the money is accruing due but is not yet payable or (d) to file an answer showing that the debt belongs to some third person.

Rule 477 has been slightly rewritten to entitle the garnishee to collect some compensation for his trouble.

Rule 479 is new and compells the clerk to mail one copy of the garnishee's answer to the plaintiff or to notify the plaintiff of payment.

Rule 480 is an attempt to set forth a specific procedure for getting money out of court rather than the negatively expressed provision of the old Rule 555. Rule 481 embraces the material previously covered by Rules 559, 560, 561.

Rule 482 provides that the payment by the garnishee or satisfaction of the judgment against him discharges that debt of the garnishee to the defendant. Curiously, under former rules, an execution had to be issued before the garnishee was discharged and the rule appeared to be unduly limited.

A major change in the exemption rule, which is Rule 483, is the provision under sub-section (6) that a copy of the rule is now to be endorsed on or served with a summons.

There are now two different forms of garnishee summons available, Form K is to be used before judgment and Form L after judgment, thus, it is hoped, eliminating some unsatisfactory forms of garnishee summons issued when the one summons was really serving two purposes.

Part Forty—Time

The most significant change here is probably in Rule 548 dealing with the enlargement of time and it is now clear that this rule applies to all rules unless there is an express provision that it does not apply. A change of some importance is Rule 545 which provides that when less than seven days are allowed for the doing of some act Saturdays are not included in the calculation of time.

Part Forty-Two—Solicitors

Rules 554(2),(3),(4),(5)&(7) are new and are designed to fill in some gaps which previously existed. The rules now permit a party acting in person to serve a notice that he is now represented by a solicitor, and one who had a solicitor to serve a notice that he desires to act in person. The rules permit a solicitor to give the notice and require a notice of such change to give an address for service. There is now also a provision for permitting a change of solicitor where the predecessor has died or discontinued the practice of solicitor.

Provisions relating to filing of a notice of ceasing to act are dealt with by a separate rule and it involves essentially the same machinery as the previous rules with the addition that the notice must contain the last known address of the client. If the solicitor ceased to act and a new one has not been appointed, the client is now served at the address given in the notice.

A new provision is one requiring a solicitor to obtain directions naming the place for service where the other solicitor dies or ceases

to carry on practice. Under the previous rules this simply required service by mail but it seemed to work an undue hardship on an innocent client.

Part Forty-Three—Non-Compliance and Irregularities

The changes made here are to continue the tendency to characterize errors as "irregularities." Rule 560 provides that an action brought in the wrong form may be continued on such terms as the court chooses to impose.

Part Forty-Four—Matrimonial Clauses

The Divorce Rules were not amended by the Committee and are the new rules brought in by the Judges under the Divorce Act. There is no substantial change in the other rules. Rule 579 now makes it clear that you obtain a decree *nisi* and a decree absolute in the annulment of a voidable marriage but not otherwise. Certain of the Divorce rules relating to adjournments and the intervention of the Queen's proctor are made applicable.

Part Forty-Four—Matrimonial Causes

In this area some changes have been made in re-writing rules and a reference should be made to the Infant's Act. The proceedings are now taken by way of originating notice of motion instead of by petitions as previously and infants over fourteen must give written consent with the affidavit of a solicitor verifying the consent. These are new provisions.

Part Forty-Seven—Costs

The changes begin with the rules following after Rule 600. Under Rule 600 itself the definition of "costs" is rewritten to make the essential modification that costs must be "reasonable and proper" as applying to all items and the rule now clearly includes witness fees in discovery.

The discretionary power that the court has is preserved but a new Rule 601(3), makes it clear that the court does not have power to deal with costs after the entry of judgment—thus resolving a conflict which had emerged.

Rule 605 creates a departure from the old rules in that the same column for taxation applies whether the action is contested or not. In the contested cases the rule specifies a power to increase the allowance of costs in large actions in excess of the stipulated columns.

The limitation provisions of the old Rule 738 are carried forward in the new Rule 609 with a slight change in the amounts between $1,000 and $2,000 and the provision of lump sums in actions where money is not claimed.

Two old Rules, 739 and 747, are eliminated as are Rules 740 and 742. The latter rules set out rather complicated machinery dealing with cases when two parties might have been represented by the same counsel; however it was felt that this matter would be best left in the discretion of the court.

Rule 611 introduces a new machinery in that it allows the taxing officer to tax costs where a settlement agreement calls for payment of costs.

Rule 612 introduces a significant new provision with respect to conduct money. It allows the clerk of the court to determine the amount,

ex parte, in the first instance subject to re-adjustment upon actual attendance. This should eliminate some problems of trying to guess exactly what should be tendered to a witness who is to come from some distance.

There are substantial changes in the rules relating to solicitor-client costs. The old Rule 748 used to incorporate schedule C and Rule 738. This incorporation by reference has been eliminated to leave the determination of charges of solicitors as "reasonable" having regard to the enumerated circumstances.

In place of the rather lengthy rules dealing with agreements as to the costs, the new abridged Rule 614 permits agreements but renders them subject to taxation.

If an agreement as to costs is a contingency one, a separate code under Rules 614 to 621 comes into play. These rules are envisaged and authorized by the Judicature Act.[13] The definition of a "contingent" agreement is contained in Rule 615 which provides where compensation is to be contingent in whole or in part upon successful accomplishment of disposition of the subject matter the agreement must be evidenced in writing and a note or memorandum thereof signed by the client. The ingredients of that memorandum are prescribed by Rule 616(2) and in particular that memorandum must contain a notation to the effect that the agreement is subject to review. A contingent fee agreement must be filed with the clerk of the court but it is not open to inspection. If it is not filed then a solicitor is only entitled to reasonable compensation upon successful completion without regard to the contingency.

There are special review machineries available under Rule 619 giving the clerk or a judge power to vary or modify or disallow the agreement.

Rule 621 provides a new code dealing with the effect of a change of solicitors or the death or inability to act of a solicitor and provides that a taxation can be demanded. This rule also applies to contingent agreements but the costs awarded under such circumstances would not be collected until the successful accomplishment or disposition. There are now also rules dealing with the discontinuance, abandonment, or settlement of a matter by a client himself and generally speaking such circumstances entitles the solicitor to a taxation of his costs in cases other than abandonment if the abandonment by the client is found to be unreasonable. These provisions are all contained in the new Rule 621.

There are few significant changes in the rules relating to taxation and appeals from taxation. Under Rule 630 five days notice of taxation is now required and there is power in Rule 642 to accept a solicitor's certificate of disbursements in lieu of the old affidavit of solicitors. Rule 647 changes the time limit formerly imposed on the solicitor-client taxations. Rule 654 provides machinery for a reference by the clerk to a judge and the former would now take out an appointment of which he is to give notice.

The appeal procedure is modified in that the procedure of filing a written objection is now gone and the appeal now is by way of the filing of a notice of appeal to a judge in chambers. The times for appealing are also changed with the requirement that notice is to be filed within ten days of taxation and returnable within twenty and served not later than seven days before the appeal on the other solicitor.

13 The Judicature Act, S.A. 1967, c. 42, s. 4.

Part Forty-Eight—Small Claims Procedure

The major change here is the change of name to "small claims" and the increase in jurisdiction to $500. Replevin and interpleader have been removed from the scope of the small claims procedure because the procedure is really inappropriate for such proceedings.

Under Rule 660(5) an address for service and an address of the defendant must be included in the small claims summons.

While the jurisdiction has been increased if the amount involved is over $200, an order for service *ex juris* is required by Rule 661.

The practice of granting a fiat authorizing or ratifying a defective service is now authorized by Rule 662(2).

The dispute note is not changed but an address for service is required as an endorsement on the dispute note.

An additional day for giving notice of trial has been added, making it two days after entry and that notice may be given by registered mail.

In cases of default you can still sign judgment for liquidated amounts under Rule 666 and if the amounts are unliquidated a parallel procedure to large debt applies, namely you can set it down for assessment or note in default and apply to a judge for judgment. The judge is empowered to give judgment on affidavit evidence and it is hoped that in many cases this procedure will be adopted by the courts.

By Rule 671 a counterclaim may now exceed the jurisdiction but the whole action then proceeds under the regular procedure.

An individual party can no longer appear by agent although a corporation can and a student-at-law is now authorized to appear.

Rule 676 is a change from the old rules dealing with amounts of less than $500 recovered in an ordinary action. The Rule provides that if a party recovers less than $500 in the kind of action which could be brought by small claims summons then he is to be restricted to small claim costs less 1/3.

Some changes with respect to costs are made in Rule 677, primarily to deal with claims when more than $200 is involved. Under Rule 681 fees and disbursements in small claims proceedings are now taxable *ex parte* subject to the right of the other party to seek a review.

There is also a provision made for some examinations for discovery. Where a successful plaintiff recovers more than $200 and there has been an examination for discovery he is entitled to a flat fee of $25. When an unsuccessful plaintiff has been examined for discovery a similar allowance will be made. It was thought by the Committee that there might be some cases, in view of the increased jurisdiction, in which an examination for discovery should be sanctioned.

Part Fifty—Exhibits

Rule 699, a new rule, attempts to relieve the clerks from the difficulty previously imposed upon them of storing exhibits "forever" while at the same time protecting the party who has filed the exhibits and his right to have them returned to him. The machinery provided is that the clerk will give notice to the parties that he intends to apply for permission to dispose of the exhibits.

Part Fifty-Two—Sanctions

These four rules are wholly new and represent a great amount of research and drafting and re-drafting.

It is first to be observed that these rules apply only to cases of civil contempt. It was held by the Supreme Court of Canada in *Re Storgoff*[14] that the Provincial laws cannot affect criminal contempt and in *Poje* v. *A.G. of B.C.*[15] the Supreme Court held that the Rules of Court dealing with sanctions in B.C. will only apply to civil contempt. It is very difficult to determine when a particular contempt is civil or criminal as will be seen from the discussion in the *Poje* case itself. Generally speaking where a contempt involves a public injury or offence it is criminal in nature and the proper remedy is a criminal remedy but where it involves a private injury it is not criminal in nature.

Under the old rules provisions with respect to contempt were scattered throughout the text.

In addition the remedies for contempt were archaic in the extreme. Attachment and commital, when used in relation to contempt, were terms which had express and particular meanings. Attachment was the common law remedy involving seizure of the person by a sheriff's officer acting under a writ of attachment, which was issued by the court. Commital was less formal and more direct in that the offender's person was seized by the tipstaff of the court acting directly under its order. Generally the distinction was that a man was committed for doing what he ought not to do while he was attached for not doing what he was ordered to do. The technical distinctions in this field reached the point that in 1957 the Court of Appeal in England actually ordered a person released from prison where he had been attached rather than committed.[16]

It was felt by the Committee that these two remedies were inappropriate for Canadian conditions, being, as indicated technical procedures. It was decided that attachment and commital should be abolished and in place thereof a new code of punishments provided. It has recently been suggested that the abolition of "commital" in Rule 701 meant that there was no longer a right to commit and the punishments provided by 704 were ineffective. In the view of the Rules Committee commital and attachment were such technical terms that they have specific meanings and do not refer merely to a right to imprison. Rule 704 is drafted with the maximum penalty specified in accordance with modern drafting practice and enables the court to impose any lesser punishment.[17] The cases of civil contempt set out in the rules appear to be a summary of every provision which can be found either in the rules or in the case law relating to civil contempt.

It is to be noted that Rule 704(5) is a new addition providing for an appeal to the Appellate Division.

Part Fifty-Six and Sixty—Crown Practice

It is to be noted that Part Sixty is promulgated by the judges of the Supreme Court under Section 424 of the Criminal Code. Attempts were made, however, to have Crown practice in civil matters and Crown practice in criminal maters parallel.

14 [1945] S.C.R. 526.
15 [1953] 2 D.L.R. 785.
16 *Kemp* v. *Kemp* (1957), Current Law Citator, The Times, Nov. 26, 1957.
17 R. v. *Bell*, [1924] 2 W.W.R. 616.

As in the former rules the ancient orders of *mandamus, prohibition, certiorari, habeas corpus* and *quo warranto* are not issued but an order in the nature of each of them is issued.

While formerly every notice of motion in Crown practice had to be served on the Attorney-General this has been modified by Rule 739(3) to cover only cases in which the Attorney-General is genuinely interested. The old rule for security for costs has also been deleted.

Rule 740 is new, extending the right of appeal. Rule 743(2) while appearing innocent works a change of considerable substance. The problem has arisen that in considering the decision of an inferior tribunal the court was precluded by a decision of the Privy Council from examining the evidence to insure that the Board was within the area of jurisdiction assigned to it.[18] As the old Crown Practice Rules existed evidence came *with* the record and that meant it was not part of the record and could not be examined. The new rule states that for the purpose of the application for *certiorari* all things that are required by the rule to be returned to the clerk are deemed part of the record.

An attempt was made in Rule 744 to set forth the contents of the return to the motion more clearly.

That concludes the summary of the major changes in the rules. Other parts of the rules were not dealt with by the Rules Committee and are unamended.

18 *R. v. Nat Bell Liquors*, [1922] 2 A.C. 128.