SHOULD OUR CIVIL PROCEDURE BE REFORMED?

That the legal profession as a whole has not taken kindly to suggestions of change in legal procedure is amply demonstrated by history. The Commonwealth Reformers formulated a scheme for recasting the procedure of the Courts which contained many useful features. Their proposals were not well received by the profession, and any chance that existed of their adoption disappeared in the reactionary sentiment which resulted in the restoration of the Stuart Regime. Jeremy Bentham, over a century later, revived the agitation for procedural reform, and spent a lifetime and a fortune in the effort; he succeeded in arousing the public to take some interest in the question, but the attitude of the profession is well mirrored in the report of the Commission under Lord Chancellor Eldon, which could see nothing of an extensive nature to reform in the antiquated procedure of the Court of Chancery.

The adage *Tempora mutantur, nos et mutamur in illis* is as true of the legal profession as of any other class; and the more general becomes the knowledge of the needs and science of government, the more responsive does the legal profession become to demands for reform. The law becomes less and less a mystery cultivated by a close corporation; and the natural reluctance of the lawyer to change ceases to be an unreasonable obstacle to reform and becomes a reasoning check upon hasty and immature proposals.

The ultimate adoption of many of the reforms suggested by Cromwell's Radicals and Bentham was long delayed; that they were at all adopted was due to the co-operation of the legal profession; without that aid neither the Common Law Procedure Act, the Judicature Act nor the Law of Property Act could have been placed upon the Statute Book.

It is the purpose of this article to enquire first whether the common complaint of the public that the process of the civil law is slow and inadequate is well grounded and secondly whether the rules of procedure can be amended in such a way as to meet the complaint without impairment to the due administration of justice. These questions affect the community at large as well as the legal profession. Assuming that the public complaint is well founded, the problem of amendment should be solved by legal practitioners, who in the opinion of the writer will endeavour to serve the

public in this as in other directions by a sympathetic consideration of the difficulty and an earnest attempt to devise a remedy.

What follows applies particularly to existing conditions in the Province of Alberta; though some of it will have general application in other jurisdictions, with a procedure modelled upon the English Judicature Act.

The complaints fall under two heads, viz.: the inadequate machinery for the collection of debts of $100.00 and less; and the difficulty, delay and expense in obtaining judgment upon claims in excess of $100.00.

As to the Small Debts Procedure, the complaint is of long-standing; the demand for reform resulted in the passing in 1918 of "The Small Debts Act" conferring upon Justices of the Peace jurisdiction in claims for debts involving $50.00 or under. Later the amount was increased to $100.00 and the jurisdiction restricted to Police Magistrates. Under this Act a plaintiff can get his claim heard and disposed of speedily, but a notice of appeal to the District Court has the effect of a stay of execution. If no appeal is taken, execution cannot be issued until the twelfth day after judgment and no garnishment can be made until after the same interval. All these are serious defects from the point of view of the plaintiff, but notwithstanding this, the Small Debts Act is extensively used in Calgary and Edmonton, in preference to the District Court.

The objection to proceeding under the Small Debts Rules in the District Court is the delay between service of the summons and trial and the time lost by a plaintiff waiting at the appointed sittings for his case to be tried.

The time limited for the delivery of a dispute note is much too long and might reasonably be reduced from 20 to 10 days; similarly with the period between filing a dispute and trial, particularly when sittings are held monthly.

All that is necessary to make the District Court Small Debt jurisdiction effective is to shorten the time between service and dispute note and between dispute note and trial; and to make the sittings of the District Court more frequent. In the larger judicial centres there should be a sittings each week and in no case less often than twice a month, except only in vacation.

Turning to the larger claims, there seems to be considerable justification for criticism, and a need for reform. For some reason which is not obvious advantage is not taken of the Rules relating to summary judgment as generally as in England; even then summary

judgment can only be obtained for a liquidated sum; consequently many cases go to trial at large expense of money and time to a litigant in which the plaintiff has no real claim or the defendant has no real defence. The inevitable result is that the limited number of Judges of the Trial Division have to spend an unnecessary amount of time in hearing an action for the purpose of ascertaining what is the issue, and then if there appears to be an issue, in deciding the same.

The existing procedure in large debt actions still retains some of the features inherited from the period immediately preceding the Common Law Procedure Act; and most of those features conduce to delay and expense in getting an action tried in cases where there is a real issue for trial, and assist a defendant without a real defence in delaying his creditor. The system renders it easy for a person having no claim to commence and carry on a trivial or vexatious action and affords no facilities for ascertaining the exact issue to be tried until trial.

The duty of a party to legal proceedings to support his allegations by sworn evidence is elementary; and under the present rules must be discharged at some stage of the proceedings. If the plaintiff desires summary judgment he must verify his claim by affidavit and if the defendant asserts he has a good defence he must show it by affidavit and if the action goes to trial he must prove his allegations. But unless and until a stage has been reached in an action where a party is required to discharge this duty, the pleadings may be and generally are so loaded with allegations which cannot be supported by evidence that the real issue for trial cannot be ascertained. The result is that in order to clear the issue, considerable time, labour and expense has to be expended by way of discovery to ascertain what is the real case, or in procuring witnesses to meet allegations, which are not seriously made.

If the time for discharging the duty of proof was advanced to an earlier stage of the proceedings, it would result firstly, in deterring the plaintiffs from starting frivolous actions, based upon allegations, which are untrue; secondly, in deterring a defendant from putting in a defence when he had none; and thirdly, in preventing the issue from being clouded with unreal allegations; and generally in saving of time and money to litigants, the Courts and the Public.

The following plan is suggested for the purpose of carrying out the reform just indicated.

Every action should be started by filing a statement of claim, containing sufficient allegations of fact to entitle the plaintiff to

judgment; and should be verified by an affidavit of a person who has knowledge of the facts or who has made himself acquainted with the facts by enquiry; where the affidavit is made on information and belief, the source of the information should be precisely set out. Thereupon a summons would issue to the defendant, requiring him to enter an appearance and to give an address for service, within 14 days of the date of service, otherwise judgment.

If the defendant enters an appearance, the plaintiff may then issue and serve upon the defendant a summons to show cause why judgment should not be entered against him; and the defendant would then be required to file and deliver not later than two days before the return day, an affidavit setting out the facts upon which he relies for his defence.

Unless it is desired to cross-examine upon the affidavits the judge would upon the return day, ascertain from the claim and the affidavits whether the claim is sufficient or whether the defendant has established grounds of defence; and proceed in the latter case to ascertain what is the issue to be tried and for the settlement of the issue; and at the same time give such directions for discovery, interrogatories, production and inspection of documents and admissions of documents and as to facts as may seem proper, having regard to the issue.

If upon the return day, the issue is clear, and the question is purely a question of law, the judge would settle the form of the issue to be tried: similarly when the issue is a question of fact, definitely raised by the claim and the defendant's affidavit; then an order for trial might be made; but if the Judge considers it proper, he may defer the settlement of the issue and order for trial until discovery has been had.

If the parties or any one of them desires to cross-examine upon any affidavits the Judge would require the party to be cross-examined to appear before him upon a day to be appointed by him, and adjourn the further consideration of the matter to that day; and, after the cross-examination, he would proceed in the manner indicated when there is no cross-examination, except that no order for discovery would be made against a party who has made full disclosure of his case upon cross-examination.

If the plaintiff fails to establish a case for trial or the defendant fails to establish grounds for a defence, the Judge would proceed forthwith to judgment. If the plaintiff's claim is for a liquidated demand, judgment would be given for the amount proved to be due.

If the claim is for damages, the judge would proceed to hold an enquiry into the amount of the damages and then give judgment for the ascertained amount. Where the claim is for an injunction or an account, the Judge would make such order as may be properly made in the circumstances.

All the applications above mentioned would be disposed of by a Judge in Chambers; and there should be the same right of appeal as now exists in the case of orders in Chambers.

The procedure above outlined might be made applicable to every kind of action, except actions for Divorce, which are of a nature which require a public trial in all cases.

This scheme will certainly increase the work done in Chambers; but will as certainly cut down the number of actions to be tried, and will result in a great saving of time and consequential expense to both the litigants and the public in respect of the trial of actions, by properly clarifying the issue before trial and reducing the necessary proof to a minimum.

Finally the desirability of giving the Court power to stay execution upon a judgment upon terms seems to be worth consideration. There are innumerable cases where through circumstances beyond his control, an honest debtor cannot meet his liabilities; an execution as often as not puts him out of business, and makes the creditor's debt bad; and the cases in which a mortgagee in default has been enabled to redeem by reason of the exercise of a discretionary power to extend the redemption period are by no means rare.

Such a power does not seem to be in any sense inconsistent with the history or the theory of an action, nor is it an undue restriction on the rights of the creditor; for the institution of actions is based upon the theory that a creditor should exercise his rights through the Courts and should not be entitled to help himself. The present suggestion goes no further than compelling a creditor to be reasonable. Oftener than not, a restraint of this nature will constitute a protection to the creditor from himself; and will enable an honest debtor to discharge his liabilities without undue expense or harassment, and assist him to recover from his reverses.

It is accordingly suggested that the Court should on the application of the defendant and upon due notice to the plaintiff, have the power to order a stay of execution or of foreclosure upon the defendant making stated periodic payments; in a proper case he might be required to give security by holding specified property as under execution and as agent for the sheriff; and no order would be made

unless the judge was satisfied that the creditor would not be prejudiced, that the debtor would be enabled to re-establish himself and that without such order the debtor could not continue in business, or would be unnecessarily harassed. The order would be subject to review upon notice, upon the application of either party upon a material change in the circumstances of the debtor.

The above suggestions represent the personal views of the writer based upon some twenty years of practice in the law and incidental observations of the problems of the Province of Alberta; and are made chiefly for the purpose of provoking consideration, discussion and counter suggestions by lawyers as to what, if any reform, is desirable.

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