SOME PROBLEMS OF CIVIL PROCEDURE

The Hon. George S. Challies*

Examination on Discovery

This procedure, of English origin, extremely important as a method of limiting the issues before trial and often productive of settlements, has gradually been both extended and simplified. Today our discovery procedure differs considerably from that in England.

Examination after plea dates from the introduction of the Code, while examination before plea was first introduced as an amendment in 1926 and originally required a motion. The jurisprudence became extremely confused as to when an examination before plea could be held and whether or not an affidavit was necessary. On 21 February 1958,[1] an amendment greatly simplified the situation by permitting examination on mere notice as had always been the case for examination after plea.

Many useful suggestions have been made for further improvements including the following:

1. Alter the list of persons subject to examination so that the same persons would be subject to both types of examination;

2. Require notice of examination to the attorneys of all the parties in cases where there are plural defendants, in view of the judgment of the Supreme Court in *Jetté* & *Larocque v. Trudel-Dupuis*,[2] which permits the evidence of one defendant to avail in favour of plaintiff against the other defendant.

3. Extend the paragraph dealing with actions resulting from an offence or quasi-offence to permit the examination of the person in charge of the thing or animal which suffered damage,—which is not now possible.[3]

4. Replace the words "facts relating to the claim" by "facts relating to the demand or to any possible defence" to permit a defendant before plea to ask questions not only about the declaration, but also about a possible defence to the action, in order to encourage settlements;[4]

5. Permit, on motion to the court, more than one examination after plea if justice so requires;

6. Adopt the rule of the Common Law provinces that the deposition on discovery does not automatically form part of the record and thus remove the danger presently existing that a defence lawyer by examining plaintiff on

---

*The Hon. George S. Challies of the Superior Coutt.

[1]6-7 Eliz. II S.Q. 1957-58, c. 43.

[2][1959] S.C.R. 428.

[3]*Gagné v. Montréal* [1945] R.P. 294, Surveyer J.; *Beaudoin v. Brassard* (1938) 42 R.P. 1, Forest J.

[4]Weber, S. W., "Problems in Civil Procedure" (1950) 10 R. du B. 24.

discovery as defendant's witness may open the door to testimony in cases where it would not otherwise be admissible.[5]

Medical Examination

To remedy certain shortcomings in the present procedure as revealed by the jurisprudence a number of valuable recommendations have been made:

1. Extend the examination to permit a physical or mental examination of any party or of the victim of an offence or quasi-offence, whenever the physical or mental condition of such party or victim is in issue. At the present time a medical examination cannot be ordered in an action to annul a marriage.[6] Neither can it be ordered where a husband sues solely for the loss of services of his wife who was injured in an accident;[7]

2. Permit the examination by more than one physician or surgeon if the needs of the case so require. At present there is pending in the District of Chicoutimi a case where the victim of a grave motor accident is under the care of a neurologist, an internist, a gynecologist and an orthopedist. The defendant's attorney says, with reason, that no one doctor can be qualified to advise him or the court on the gravity of the injuries to a person under the care of four specialists;

3. Provide for a second or further medical examination as now permitted by section 74 of the Ontario Judicature Act. Additional examinations have been repeatedly refused by our courts;[8]

4. Permit a party to obtain and make copies of the records of specified hospitals relating to the physical and mental condition of the person examined, when neither the hospital nor a doctor is a party to the action. This is permitted in section 1493 of the new Louisiana code of procedure and in section 35 of the U.S. Federal rules but has been refused in Quebec.[9]

Other Forms of Discovery

The suggestion has been made that Discovery of Documents under art. 289 be on notice and not by motion, and that it should be possible to force a third party, in possession of a writing pertinent to the issues, to produce it in the record prior to the trial as provided in rule 350 of the Ontario Rules of Practice.

---

[5]*College Ste Marie v. Racette* [1944] R.L. 129 (K.B.). See also Meredith, "Examination on Discovery" (1958) 5 McGill L.J. 54.

[6]*M. v. M.* [1948] S.C. 364, Collins J.; *Fraser v. Rexford* (1941) 45 R.P. 398, Surveyer J.

[7]*Gravel v. Dufour* [1945] R.P. 114, Boulanger J.

[8]*Vallée v. Ville de Val d'Or* [1959] R.P. 126, Marquis J.; *Cartier v. Thivierge* [1952] R.P. 122, Drouin J.; *Moodie v. M.T.Co.* [1949] R.P. 80, Surveyer J.; *Batrie v. Prudential Insurance Co. of America* [1944] K.B. 289; *Mutual Life of N.Y. v. Lefebvre* [1942] K.B. 266; *Roussell v. Bell Tel. Co.* [1939] R.P. 327, Surveyer J.

[9]*Barron v. Steinberg's* [1953] R.L. 158, Montpetit J.

Another shortcoming in our present procedure is that a party may not now[10] before trial obtain permission to visit premises and make tests on any object as is permitted in Order 50 rule 3 of the English rules and in rule 34 of the U.S. Federal rules.

Peremption

At the present time peremption is a sword of Damocles hanging over the head of every busy lawyer. If he represents plaintiff and fails for two years to take a useful proceeding the suit may, on motion, be perempted and dismissed. Two years goes by remarkably quickly and once the motion is served and filed it is too late to take a proceeding.

Understandably enough a court is unwilling to perempt and much time is spent by the courts in endeavoring to find a legal reason for not perempting—often, alas, unsuccessfully. Members of the Bar are often placed in a very awkward position—between their duty to a client defendant and their unwillingness to perempt a confrere.

Many requests have been made for a basic change in the law which would require a notice of 30 days to plaintiff's lawyer before a motion for peremption can be presented, and permit peremption to be avoided by any useful proceeding taken before the expiration of the 30 day period.

Continuance of Suit

The present procedure is unnecessarily complicated requiring a petition by the person who has the right to continue a suit. If he fails so to do the opposite party must institute a separate action to compel him.

The Avant-projet in art. A.P. 249 provided a much simpler method for the person wishing to continue—viz—by filing an appearance and an affidavit setting forth the facts which have given rise to the continuance.

If the person who should continue the suit fails to do so, it has been suggested that the other party should be able, instead of taking a separate action, to implead the person in default by a simple motion accompanied by copies of the written pleadings.

Preliminary Exceptions

Preliminary exceptions, or their equivalent, are found in the procedural rules of all jurisdictions. In Ontario, for instance, rule of practice 184 provides that non-compliance with the rules shall not render a proceeding void but it may be set aside or amended or otherwise dealt with as may seem just. Under

[10]*Gareau v. Montreal Street Ry. Co.* (1899) 8 Q.B. 409; *Dubois v. Horsfall* (1900) 18 S.C. 138, Mathieu J.; *Adams v. Prêjent* (1901) 3 R.P. 516, Bélanger J.; *Belair v. Dominion Textiles* (1909) 15 R.L.n.s. 264, Davidson J.; *M.L.H.P.Co. v. Outremont* (1932) 35 R.P. 364, Stackhouse J.; *Dion v. Lessard* [1951] R.P. 49, Casgrain J.; *Phoenix Assurance Co. v. Montreal* [1952] R.P. 313, Garneau J.; *Beaudet v. Bédard* [1955] R.P. 87, Smith J.

this rule, some matters are disposed of which are dealt with in the province of Quebec as preliminary exceptions. The new Code of Civil Procedure of Louisiana which came into force in 1960 contains 14 Articles on preliminary exceptions which do not differ greatly from those in Quebec.

Preliminary exceptions do lead to a great deal of unjustified delay and it is probably for this reason that one hears from time to time suggestions that they be done away with. A little reflection indicates that this is not possible. For instance, it would seem illogical to proceed to the merits in an action taken against a minor not a commerçant and not represented by a tutor, and it is much better to dispose of the matter of minority by preliminary exception.

At the present time, there are four classes of preliminary exceptions and there is much to be said for reducing the number to three as in Louisiana, namely: declinatory exceptions, exceptions to dismiss the action and dilatory exceptions.

Among the suggestions that one hears from time to time which merit serious consideration, are the following:

1. Oblige all exceptions to be urged together and in the same proceeding; deciding the declinatory exception first and then, if it is not maintained or there is no declinatory exception, deciding all the other exceptions at the same time.

2. Extend the delay for filing preliminary exceptions. The present three day delay appears to be totally insufficient and it has been recommended that the delay should be six days or even ten days from the return of the action.

3. Abolish the deposit provided by art. 165 C.C.P. which causes many complications which are not compensated by other advantages.

4. Abolish art. 167 to 169 which permit the plaintiff to insist on the filing of a plea to the merits if he believes that the exception has been made merely for delay. This article is very rarely invoked and there are substantially no reported cases on the matter.

5. Abolish the fifth ground for an exception to the form under art. 174 C.C.P. namely "the fact that a statement of the causes of action is not contained in the writ or the declaration". If there is no statement of the grounds of action, a total inscription in law will lie and if there is only a partial description, the matter can be cured by a motion for particulars or a motion to amend.

6. The matter of irregularities in the writ, declaration or service presently found in art. 174-1 makes no distinction between matters of form which are indispensable, the failure to fulfil which leads inevitably to nullity, and informalities which can be rectified. It has been suggested that indispensable formalities should be dealt with separately from less serious formalities.

7. The third ground of art. 177 that the plaintiff has contravened the rule that the parties must remain in their respective positions, has been raised only

once in the many years covered by the annotated Codes of procedure.[11] A recent study of preliminary exceptions recommended[12] that this paragraph be dropped.

8. Res Judicata is a ground of exception in the new Louisiana Code and some people believe that it could, with advantage, be made a ground of exception in Quebec.

9. A preliminary exception that demands the filing of a power of attorney appears to some observers to be an unnecessary proceeding. The mandate of the attorney of a Quebec resident cannot be questioned by third parties and one wonders why different rules should apply to non-residents. The important thing is to oblige a non-resident to post security for costs.

10. No provision is made, except by implication, for motions for particulars, motions to produce documents, or motions to strike. There is a very vague reference in the third paragraph of art. 165 which merely states that no deposit is required upon such motions, thereby implying that they are not treated as preliminary exceptions. It may be well that all these matters should be added to dilatory exceptions.

11. Finally it has been suggested by some that the dilatory exception is not an appropriate method to call in warrantors and that this subject could be advantageously dealt with under interventions.

Amendments

Art. 522 which provides that no amendment may change the nature of the action is a mischievous provision which should be repealed. The rule is based upon a misunderstanding of English law.[13] Jurisprudence[14] by some mysterious process has concluded that an allegation in a declaration that an automobile was negligently driven by the driver cannot be amended to allege negligence on the part of the préposé of the owner.

The necessity of a substantial broadening of the field of amendments is illustrated by the recent case of *Dalpé v. Benoit*,[15] where due to an oversight, a defendant was served with a writ but no declaration. An exception to the form was maintained, the action dismissed and permission to serve the declaration later refused on the ground that the right of action was prescribed when permission was sought.

---

[11]*Edwards v. Le Petit Séminaire de Ste-Marie de Monnoir* (1910) 12 R.P. 24, Lafontaine J.

[12]Bergeron, T. L., "Traité de Procédure Civile, — Exceptions Préliminaires" [1960] R.L. 401, at p. 423.

[13]Lemay, "La demande en justice — sa structure, son amendement, au siècle dernier et en 1960", (1961) 4 Les Cahiers de Droit, at p. 86.

[14]*Racicot v. Cartier* [1961] Q.B. 596; *Dion v. Gosselin* (1937) 62 K.B. 149; *Vaillancourt v. Quebec City Flying Club* [1954] Q.B. 766.

[15][1961] Q.B. 683.