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STATUS OF THE ALBERTA RULES OF COURT

INTRODUCTION

This study is being conducted pursuant to the letter of the Honourable Mr. Justice G. H. Allen, Chairman of the Rules of Court Advisory Committee, dated February 25, 1974. The decision in Schanz and Schanz v. Richards (1970), 72 W.W.R. 401, raises the possibility that some of the Alberta Rules of Court are ultra vires in that they may infringe upon the substantive law. Hence, the basic purpose of this study is to assess the status of the Rules of Court, determine which types of rules might be deemed ultra vires and suggest ways in which greater certainty could be given to the validity of the Rules.

Section I of this paper discusses and analyses the powers delegated to the Lieutenant Governor in Council in this regard by statute in 1968, when the new Rules of Court were promulgated, and at present.

Section II attempts to establish the differences between procedural and substantive laws.

Section III discusses some of the arguments which might be used to attack the validity of the Rules and suggests some parts of the Alberta Rules of Court which may be ultra vires. This is not intended to be an exhaustive list of such Rules, but only to demonstrate the possible force and application of the arguments.

Finally, Section IV summarizes the status of the Rules of Court and makes recommendations as to ways in which their validity could be given greater certainty.

I

STATUTES

The Alberta Rules of Court were introduced by Regulation 390/68 and made under the authority of sections 38 and 38(a) of the Judicature Act, R.S.A. 1955, c. 164; sections 36, 39 and 57 of the District Courts Act, R.S.A. 1955, c. 87; section 23 of the Surrogate Courts Act, R.S.A. 1967, c. 357; section 8 of the Reciprocal Enforcement of Judgments Act, S.A. 1958, c. 33; section 190 of the Municipal Election Act, R.S.A. 1968, c. 66; section 55 of the Mechanic's Lien Act, S.A. 1960, c. 64; sections 46(1) and 47 of the Seizures Act, R.S.A. 1955, c. 307; and section 49(1) of the Execution Creditors Act, R.S.A. 1955, c. 103.

A. JUDICATURE ACT

1. Status of the Consolidated Rules of Court in 1968

The introduction to s. 38 of the Judicature Act, R.S.A. 1955, c. 164, read:

> 38. The Consolidated Rules of Court authorized and promulgated by order of the Lieutenant Governor in Council and dated the twelfth day of August, 1914, which came into force on the first day of September, 1914, are declared to be and to have been in full force and effect since the first day of September, 1914, and as altered and amended since that date are hereby continued as the rules of practice and procedure of the Court. . . .

It would appear that the rules which came into effect in 1914 were given legislative sanction by the phrase ". . . are declared to be and to have been in full force and effect. . . ."

It would also appear that the amendments made to those rules before 1955 were given legislative sanction by the phrase ". . . and as altered and amended since that date are hereby continued as the rules of practice and procedure. . . ." Although they were called "rules of practice and procedure", they were not necessarily limited to such. As Robertson J.A. said in Bell v. Klein #1 (1954), 12 W.W.R. (N.S.) 273 (B.C.C.A.):

> The fact that the legislature includes a substantive civil right in the rules described by it as relating to practice and procedure does not affect the question. Having been so described in the Act above mentioned, they are rules of practice and procedure.

A similar conclusion was reached by Idington J. in Taylor v. B.C. Elc. R. Co. (1912), 8 D.L.R. 724 (S.C.C.) and by Bird J.A. in Collins v. B.C. Motor Transportation Ltd., [1952] 4 D.L.R. 439 (B.C.C.A.).

By granting the Lieutenant Governor in Council the power to "amend, alter or repeal the same [Consolidated Rules of Court]", it would seem that the Legislature gave sanction to such even though they were made after 1955. If the 1914 Consolidated Rules and the amendments made between 1914 and 1955 were not limited to procedure, there would seem to be no reason to think that the power to "amend, alter or repeal the same" would be so limited. To amend a rule which infringes upon the substantive law would almost as a matter of course affect that law.

Also, section 37 of the Judicature Act, R.S.A. 1942, c. 129, contained the same introductory clause as section 38 of the 1955 Act. If that were interpreted as giving statutory sanction to all the alterations and amendments

made both before and after 1942, the 1955 revision would simply have served to restate the existing law. If it were interpreted as giving sanction to only those amendments made prior to 1942, the 1955 revision would have served to have given sanction to the amendments made between 1942 and 1955. This would clearly have been beyond the powers of the Legislative Counsel under the Revised Statutes 1955 Act, S.A. 1956, c. 45.

Section 38 of the 1955 Judicature Act granted the power to the Lieutenant Governor in Council to

> . . . make and authorize the promulgation of other rules governing
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> (i) the practice and procedure in the Court,
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> (ii) the duties of the officers thereof,
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> (iii) the cost of the proceedings therein, and
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> (iv) the fees to be taken by officers of the Court, . . .

This power would seem to have been restricted to procedural matters,[1] so that a new rule (i.e., a rule made after 1914 and therefore not included in the Consolidated Rules) could be considered ultra vires the Lieutenant Governor in Council if it infringed upon the substantive law. In the case of Werley v. Rowe, [1936] 1 D.L.R. 653, the Supreme Court of Alberta, Appellate Division, considered a rule made in 1932. Speaking for the court, Harvey C.J.A. stated at p. 654:

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[1]For a discussion of whether costs are procedural or substantive see p. 29 following.

> The objection was that the Rule is not a Rule of Procedure as it deprives a litigant of a substantive right and there is no doubt that its validity can be upheld only if it can be properly considered as a matter of procedure.

Section 38(b) of the 1955 Judicature Act granted the Lieutenant Governor in Council the power to ". . . amend, alter or repeal any rules and make new rules instead thereof . . . ." It would seem a reasonable rule of interpretation that words in a statute are not to be mere surplusage. If section 38(b) is interpreted as granting powers to make new rules relating to practice and procedure, this would seem to be a repetition of section 38(a). Hence, it might be considered that the powers granted by section 38(b) were not so limited.

This position, however, would appear to be contrary to the case law. For example, Addy J. in Kimball v. Windsor Raceway Holdings, [1972] 3 O.R. 307 stated at p. 317:

> The granting, by the Legislature, of a power to regulate does not imply a power to change, modify or abrogate substantive or basic common law rights. Any such power has to be expressly granted.

In interpreting this section of the Judicature Act, Quigley, Master stated in Schanz & Schanz v. Richards (1970), 72 W.W.R. 401 at 404: "No authority is given to make, amend, alter or repeal any existing substantive law."

The alternate interpretation of section 38(b), and the one which would be in line with the case law is that the powers granted were to deal with the rules promulgated under section 38(a). As there was no mention of a power to influence the substantive law, it may be assumed that such was not granted.

Hence, it would seem that prior to 1968, the Consolidated Rules and the amendments made thereto had statutory sanction and could therefore not be found ultra vires on the basis of infringing upon the substantive law. Rules made after 1914 were valid only insofar as they related to practice and procedure.

Contrary to this interpretation is the case of Paitson v. Rowan & Cuthill (1919), XV A.L.R. 74, where the Supreme Court of Alberta, Appellate Division, considered s. 5(3) of the Statute Law Amendment Act, S.A. 1918, c. 4:

> 5. The Judicature Ordinance, being chapter 21 of the Consolidated Ordinances of the Territories, 1898, is amended as follows:
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> . . .
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> 3. By adding after section 22 the following section 22a:
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> 22a. The provisions of the Rules of Court continued in force by the preceding section hereof, as altered and amended are repealed as of the 1st day of September, 1914 and The Consolidated Rules of the Supreme Court authorized and promulgated by order of the Lieutenant Governor in Council dated the 12th day of August, 1914, and which came into force on the 1st day of September, 1914, as altered and amended, and the provisions thereof are substituted and declared to have been in force on and since the said 1st day of September, 1914.

With regard to this amendment, Stuart J. speaking for the court stated: ". . . the subsequent confirmation of the Rules by the recent Act of the Legislature seems to me to confirm them, and to be intended to confirm them, simply as rules of procedure."

This case was considered and approved by O'Halloran J.A. in dissent in Betsworth v. Betsworth, [1942] 1 W.W.R. 445 (B.C.C.A.):

> The Court Rules of Practice Act in confirming The Divorce Rules, 1925, confirmed them simply as rules of practice and procedure as was said by Stuart, J.A. in delivering the judgment of the Appellate Division of Alberta in Paitson v. Rowan & Cuthill [supra] concerning the Court Rules in that province (p. 453).

However, in delivering the decision of the majority McDonald C.J.B.C. stated without reference to the Alberta case:

> By an amendment to the Court Rules of Practice Act, R.S.B.C. 1924, c. 224, passed in 1925, c. 45, the Divorce Rules above referred to having been approved by order in council, it was enacted that such Rules should regulate the procedure and practice in the Supreme Court in the matters therein provided for. Hence, the Rules were given legal effect, if there had been any previous doubt about it (p. 447).

It would therefore seem that the majority of the court indirectly disapproved of the Alberta decision.

Oddly, although the status of the Consolidated Rules was considered again by the Appellate Division of the Supreme Court of Alberta one year after Paitson v. Rowan & Cuthill, supra, in the case of Smith v. Christie et al, [1920] 3 W.W.R. 585, there was no mention of the former case and a contrary position was reached. The court was called upon to consider the status of a rule setting a six month limitation period for bringing actions aginst public officers. Stuart J. concurred with by Harvey C.J. and Ives J., determined that although such a rule infringed upon the substantive law,

it was valid as it had statutory approval. The Rules of Court had been sanctioned by the Supreme Court Act, S.A. 1907, c. 3. Stuart J. considered that the 1918 amendment to the 1898 Judicature Ordinance had not repealed the sanction granted by the 1907 Act and that Alberta had in existence two sets of rules.

On the other hand, he reasoned, if the 1918 amendment was given a liberal interpretation, an equally liberal interpretation would grant statutory sanction to the Consolidated Rules:

> When the Legislature declares a Rule 'to have been in force' from a certain date it seems to me to be rather too refined a treatment of language to suggest that it was only intended that it should be in force qua Rule, and (sic) if it could validly have been originally enacted by the rule-making authority. (p. 591)

In a separate judgment, Beck J. also found that the rule in question infringed upon the substantive law. He considered the 1918 amendment, saying:

> I think its intention was to deal with Rules in their quality as Rules and not to validate or bring into effect as Rules provisions properly the subject-matter of legislative enactment. (p. 593)

He then went on to agree with the proposition of Stuart J. that two sets of rules were at that time in existence in Alberta.

It should be noted that by section 59 of the Judicature Act, S.A. 1919, c. 3: "The Judicature Ordinance, being chapter 21 of the Consolidated Ordinance 1898, and the

Supreme Court Act, being chapter 3 of the Acts of 1907, and all amendments of the said Ordinance and Act, are hereby repealed." As this Act was not proclaimed until August 15, 1921, it in no way infringed upon the validity of Smith v. Christie, supra, at the time it was decided. It did, however, have the effect of ensuring that only one set of Rules applied in the province.

The Consolidated Rules were promulgated under powers granted by the 1907 Act, and the statute which gave sanction to the rules was an amendment to the 1898 Act. However, this sanctioning section was not repealed, as it was repeated as section 38 of the repealing statute. It might be noted as an aside that although the Consolidated Rules purported in the Alberta Gazette, Volume 10, Number 16, page 4, to be promulgated under the authority vested by section 24 of the 1907 Supreme Court Act and section 24 of the 1907 District Courts Act, the reference should have been to section 34 of the District Courts Act.

The status of the Consolidated Rules remains to be determined in the light of these cases. Three judges in Smith v. Christie, supra, felt the Rules might be valid even if they infringed upon the substantive law if the 1918 amendment were given a liberal interpretation. Three judges in Paitson v. Rowan & Cuthill, supra, and one judge in Smith v. Christie, supra, felt that the Rules were valid only insofar as they related to practice and procedure. Stuart J. delivered the judgments in both cases and his decisions seem to conflict. Hence, no clear position arises out of the Alberta case law as to the status of the Consolidated Rules.

2. Effect of the Promulgation of the Rules of Court in 1968

The Lieutenant Governor in Council used the power granted by section 38(a) of the 1955 Judicature Act to repeal

the Consolidated Rules of Court: R. 2(2): "The Consolidated Rules of Court, being Alberta Regulation 561/57 are hereby rescinded." As has already been discussed, the delegated power to make new rules was limited to practice and procedure. However, if the Consolidated Rules were not so limited, the effect of their repeal and repromulgation under the title Supreme Court Rules is uncertain.

One interpretation is that such rules would continue to have statutory sanction. The Manitoba Court of Appeal considered a similar issue in Osachuk v. Osachuk, [1971] 2 W.W.R. 481. In that province, the Rules of Court were printed as part of the King's Bench Act until 1931. In that year, the King's Bench Act, 1931 (Man.), c. 6, was enacted and, although the Rules ceased to be printed as part of the Act, the delegated rule making powers remained unchanged. For the purposes at hand, these powers were very similar to those granted by the 1955 Alberta Judicature Act, with two exceptions.

The first was that the Manitoba Act contained no section equivalent to the introductory clause of section 38 of the Alberta Act. This would seem to have made little difference in the application of the case to the Alberta Rules of Court.

The second exception is that the Manitoba statute contained a section stating:

> Subject to the provisions of this Act, the rules of practice and procedure and all forms, tariffs and schedules amended thereto at present in force are declared to have the same force and effect as if they were embodied in this Act. (s. 101(4))

Of the section Smith C.J.M., in delivering the judgment of the court, stated: ". . . the effect of section 101(4), just quoted, was to continue all such rules in full force." (p. 498)

As the Alberta statute undoubtedly sanctioned rules relating to practice and procedure, the fact that an equivalent section was not contained in it would seem to make no difference to the application of this case to the Alberta Rules of Court. If Smith C.J.M. interpreted the phrase "rules of practice and procedure" to mean all the rules in existence at that time (as one might interpret "Rules of Court", "Supreme Court Rules", or "Consolidated Rules of Court" in Alberta) then this section would undoubtedly be significant. However, the rules in Manitoba are known as the "Queen's Bench Rules" so that such an interpretation would be unlikely.

After considering this section, Smith C.J.M. went on to say:

> The Rule making powers of the judges under what is now s. 103 of the Queen's Bench Act are not unlimited, but where, in making a rule they merely continue a Rule which has been in effect for many years and which rests upon direct statutory enactment, it cannot be said that what they do is ultra vires. (p. 498)

If this analysis is applicable to the Alberta Judicature Act, it would appear that the repeal and repromulgation of the rules in 1968 had no effect on the status of the rules.

Between 1968 and 1970, the power to amend the Consolidated Rules remained in the Judicature Act. If the

status of the Consolidated Rules did not change in 1968, it would be consistent to assume that the amendments made to them in that period would also be valid.

Smith C.J.M. said in Osachuk v. Osachuk, supra, that although the statute giving sanction to Rules of Court was repealed, the Rules might continue to be valid. This would seem to be contrary to an earlier decision of the same court in the case of MacCharles v. Jones, [1939] 1 W.W.R. 133. There, a right to garnishment proceedings in respect of money paid into court was provided by statute and supplemented by the Rule of Court in question made pursuant to the statute. When the statute was repealed, the Rule was held to be ultra vires as, by itself, it attempted to create a substantive right.

Similarly, Angers J. said in Blakey & Co. v. The King, [1935] 4 D.L.R. 670 (Ex. Ct.) at p. 675: "Orders-in-Council, regulations and by-laws are subordinate to the act and when the act is repealed, the Orders-in-Council, regulations and by-laws made thereunder, unless otherwise expressly provided, lapse." The validity of the decision in Osachuk v. Osachuk, supra, is therefore called into question

A second interpretation of the effect of the repromulgation of the rules upon their status is that the statutory approval was terminated by the repeal of the rules. As the power to make new rules was limited to practice and procedure, any of the rules which infringed upon the substantive law could be ruled ultra vires.

3. Effect of the 1970 Revision on the Status of the Rules of Court

The Revised Statues (1970) Act, S.A. 1970, c. 98, provided power to the Legislative Counsel to "omit any enactment

that is not of general application or that is obsolete, expired or otherwise ineffective" (s. 4(a)). Section 9 provided:

> The Revised Statues shall not be held to operate as new laws but they shall be construed and have effect as a consolidation of the law contained in the enactments for which the Revised Statutes are substituted.

Finally, section 9(3) read:

> If upon any point the provisions of the Revised Statues are not in effect the same as the previous enactments for which they are substituted, then as respects all transactions, matters and things on and subsequent to the day upon which the Revised Statutes came into force, the provisions contained in them prevail . . . .

In the revision, section 38 of the 1955 Act became section 39 of the revised Act and the introduction to the section giving sanction to the Rules of Court was dropped. If the sanction was lost by the repeal and repromulgation of the Rules in 1968, then the introduction was obsolete and correctly omitted under the powers granted by section 4(a) of the Revised Statutes (1970) Act. If the sanction remained, as suggested by Osachuk v. Osachuk, supra, the introduction would not be necessary as it would only serve to restate the existing law.

Also in the revision, the power to amend, alter and repeal the Consolidated Rules was dropped. As the Consolidated Rules were no longer in existence, this would seem to have been within the powers of the Legislative

Counsel under section 4(a). If, in 1968, the Lieutenant Governor in Council ceased to have the power to make amendments which had automatic statutory sanction, or if this power never existed, this omission could be construed as a mere consolidation of the law as required by section 9. If, however, the Lieutenant Governor in Council continued to have such power between 1968 and 1970, the elimination of the section without a corresponding promulgation of an equivalent section with reference to the "Alberta Rules of Court" would have effected a major change in the law, beyond the powers of the Legislative Counsel. It might be remembered that, in order to be consistent, if the latter interpretation is incorrect it would also be incorrect to assume that the Rules of Court had legislative sanction after 1968.

Finally, the power to amend, alter and repeal "any rules", section 38(b) of the 1955 Judicature Act, was dropped by the 1970 revision. As a result, there remains no power delegated to the Lieutenant Governor in Council to amend, alter or repeal the Rules of Court, although he is still delegated the power to authorize the judges to do so. Whether section 38(b) conferred powers as to the substantive law or merely as to procedure, a major change was effected by the elimination of this section. However, by section 9(3) of the Revised Statutes (1970) Act, the provisions of the revised Act prevail despite this change. Hence, it would appear that all amendments which have been made since 1970 by the Lieutenant Governor in Council are ultra vires.

4. Other Provisions of the 1970 Judicature Act with Regard to Rules of Court

Section 26(b) of the 1970 Judicature Act reads:

> The Appellate Division . . . has jurisdiction and power, subject to the provisions of the Rules of Court, to hear and determine
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> (i) all applications for new trials,
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> (ii) all questions or issues of law,
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> (iii) all questions or points in civil or criminal cases,
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> (iv) all appeals or motions in the nature of appeals respecting a judgment, order or decision of
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> (A) a judge of the Supreme Court, or
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> (B) a judge of a court of inferior jurisdiction where an appeal is given by any other Act,
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> and
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> (v) all other petitions, motions or matters or things whatsoever that might lawfully be brought in England before a Divisional Court of the High Court of Justice or before the Court of Appeal.

There would seem to be two possible interpretations of this section. The first is that the Appellate Division has jurisdiction and power to hear and determine various issues and that the procedure is to be determined by the Rules of Court. The second, and perhaps more literal interpretation is that the jurisdiction and powers of the court are themselves subject to Rules of Court with regard to a number of matters, including appeals. It has been held that altering the jurisdiction of the court and denying a right of appeal are beyond practice and procedure.[1] As already discussed,

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[1]See p. 41, following.

the Rules of Court were made under the authority vested by the Judicature Act, R.S.A. 1955, c. 164, and perhaps are limited to matters of practice and procedure. Hence, such an interpretation of section 26(b) might be in conflict with section 38 (now section 39 of the Judicature Act, R.S.A. 1970, c. 193).

By section 45(3) of the 1970 Judicature Act: "The master in chambers has such jurisdiction, power and authority as may be assigned to him by the Rules of Court." This would clearly seem to assign a function to the Rules beyond practice and procedure.

Section 45(4) reads: "Subject to Rules of Court, an appeal lies from the decision of a master in chambers to a judge in chambers." This could be interpreted as either providing that the Rules may determine if an appeal will lie or that the Rules will merely set out the procedure by which an appeal will lie. Again, the former interpretation might be contrary to the rule making powers set out by section 38 of the 1955 Act.

Section 40(2) grants to the Lieutenant Governor in Council the power to make conditions, restrictions and prohibitions for agreements with regard to contingency fees. Section 47 provides that the Judicature Act shall not affect procedure in criminal matters or other matters not within the cognizance of the Alberta Legislature. Clearly, a Rule which infringes on these areas is ultra vires.

Finally, section 23 provides that the jurisdiction of the court with regard to practice and procedure shall be exercised in the manner provided by the Act or by the

Rules and orders of the court made pursuant to the Act. This ~~clearly~~ gives the Lieutenant Governor in Council the authority to make Rules regulating practice and procedure and by the lack of a corresponding phrase as to powers with regard to substantive law, might implicitly exclude such.

B. DISTRICT COURTS ACT

The District Courts Act was not changed by the 1970 revision of the Statutes of Alberta with regard to the subject at hand so that an analysis of both the 1955 Act and 1970 Act is not necessary.

Section 37 of the District Courts Act, R.S.A. 1970, c. 111, provides:

> The provisions of the Judicature Act and the provisions of any Act or rules that are passed or promulgated in substitution therefor or any amendment thereof and the several rules of law enacted and declared therein are in force and shall receive effect in all district courts in Alberta so far as the matters to which the provisions and rules relate are respectively cognizable by the district courts.

It would therefore seem that the discussion of the relevant provisions of the Judicature Act would apply in the District Courts and any amendment made to the Judicature Act would have effect in both the Supreme and District Courts.

Section 36(1) delegates the power to the Lieutenant Governor in Council to make Rules of Court and sections 36(1)(b)(i), (ii) and (iii) are clearly limited to matters

of procedure. By section 36(1)(b)(iv), he is delegated the power to make Rules regulating "every other matter deemed expedient for better attaining the ends of justice, advancing the remedies of suitors and carrying into effect the provisions of this Act and of all other Acts. . . ."

In The Zamora, [1916] 2 A.C. 77, Lord Parker of Waddington, in discussing the power to make such orders as might be necessary for the better execution of an act, stated at p. 96:

> Their Lordships are of the opinion that the latter power does not extend to prescribing or altering the law to be administered by the Court, but merely to giving such executive directions as may from time to time be necessary.

It would therefore seem that the power is restricted to practice and procedure.

The provision as to "every other matter deemed expedient for better attaining the ends of justice" might appear to include substantive matters. A similar provision was considered in the case of MacCharles v. Jones, [1939] 1 W. W. R. 133, (Man. C.A.). Section 13(e) of the Manitoba County Courts Act, S.M. 1934, c. 5, provided powers to make rules for ". . . every other matter deemed expedient for advancing the remedies of suitors and carrying into effect the provisions of this or any other Act relating to proceedings in County Court." The Manitoba Court of Appeal felt that this conferred powers relating only to practice and procedure. However, this statute could be distinguished from the District Courts Act in that the latter contains no such limiting words as "relating to proceedings".

The Manitoba Court of Appeal again had the opportunity to consider a similar section in the case of Montreal Trust v. Pelkey & Lusty, supra. Section 101(1)(h) of the Queen's Bench Act, R.S.M. 1954, c. 52, provided the power to make rules for ". . . every other matter deemed expedient for better attaining the ends of justice, advancing the remedies of suitors . . . ." Smith C.J.M. stated at p. 14: "They [the words] should be viewed as having the same general purpose as the preceding clauses and the Act itself. That purpose is purely adjectival, not substantive in character." From this, it would appear that as section 36 of the District Courts Act has an adjectival character, this section would grant only procedural powers.

Section 54 grants the power to make Rules "necessary or expedient to give effect to this Act". This is similar to section 36(1)(a)(iv), granting the power to make Rules for "carrying into effect the provisions of this Act" and would seem to have no broader scope.

By section 43, a District Court judge

> . . . has, subject to the rules of court, concurrent jurisdiction with and the same power and authority as a judge of the Supreme Court to do and perform all such acts and transact all such business in respect of matters and causes in the Supreme Court as he is by statute or the rules of court empowered to do. . . .

It would therefore seem that Rules of Court are authorized to some extent to regulate the jurisdiction of the court and to establish the powers of the judges. If, by sections 36 and 37 of the District Courts Act, Rules are authorized only as to practice and procedure, this section would appear to legislate to the contrary.

Section 45 is more ambiguous, stating:

> A party to a cause or matter in a district court may, subject to the rules of court in that behalf, appeal to the Appellate Division of the Supreme Court. . . .

This could be interpreted as saying that Rules of Court may regulate whether an appeal will lie or as saying that a party must follow the procedure set out in the Rules of Court in order to appeal. If the right to appeal is substantive, the latter interpretation would be more consistent with sections 36 and 37.

Finally, section 47 provides that Rules of Court may govern the proceedings in appeals from the District Courts as they do the proceedings in appeals from the Supreme Court.

C. OTHER ACTS ESTABLISHING RULES OF COURT

Section 190 of the Municipal Election Act, R.S.A. 1970, c. 244, clearly grants only procedural powers.

Section 47 of the Execution Creditors Act, R.S.A. 1970, c. 128, provides for the applicability of the Rules of Court formulated under the Judicature and District Courts Acts, so that the arguments as to the status of the Rules under those Acts would presumably apply also to this statute. Section 49(1)(a) provides powers to make rules relating to procedures and forms.

Section 23 of the Surrogate Courts Act, R.S.A. 1970, c. 357, provides powers to the Lieutenant Governor in Council to make Rules for that court, which clearly are only procedural.

Section 17(1) of the Act reads:

> Except as otherwise provided by this Act or the Rules, the practice, procedure and rules of the Supreme Court, including the course of proceedings and practice in chambers so far as they are applicable and consistent with this Act and the Rules, apply to proceedings in a surrogate court."

This would seem to have an effect similar to that of section 37 of the District Courts Act so that any amendment to the Judicature Act with regard to Rules of Court would apply in the surrogate courts.

Section 55(1)(b) of the Mechanics' Lien Act, S.A. 1960, c. 64, provided procedural powers only for the setting of tariffs. However, section 55(1)(a) granted the powers to: "make general rules not inconsistent with this Act to expediate and facilitate the business before any court under this Act and to advance the interests of suitors therein." Again, this might be given an interpretation beyond practice and procedure. However, following the analysis of section 36(1)(b)(iv) of the District Courts Act, it seems unlikely that this section would be given such a wide interpretation, especially in light of the phrase "not inconsistent with this Act".

The Mechanics' Lien Act was repealed and superceded by the Builders' Lien Act, S.A. 1970, c. 14. Section 55 of the Builders' Lien Act is essentially the same as section 55 of the Act which it replaced, with a few minor changes. The phrase "not inconsistent with this Act", which might have been important, was dropped, the power to authorize judges of the Supreme Court to make Rules was eliminated, while the power to prescribe forms to be used under the Act was

introduced. It would not seem that the powers of the Lieutenant Governor in Council were substantially changed by this revision. Section 50 of the Builders' Lien Act provides: "The Alberta Rules of Court apply in all actions brought under this Act except where and to the extent that they are inconsistent with this Act or the rules prescribed under this Act."

Section 49(2) of the Seizures Act would appear to be somewhat unique in relation to the other sections authorizing powers to make Rules. Upon publication they are to have the same form and effect as if they had been enacted as part of the Act. However, section 49(1) clearly limits such power to procedure and forms.

Finally, section 8 of the Reciprocal Enforcement of Judgments Act, R.S.A. 1970, c. 312, reads:

> Rules of Court may be made respecting the practice and procedure, including costs, in proceedings under this Act and, until rules are made under this section, the rules of the registering court, including rules as to costs, mutatis mutandis, apply.

Hence, although the rule-making powers under this Act are procedural (except possibly as to costs), if the Alberta Rules of Court validly contain substantive laws, it would appear that such would apply to this Act.

Section 9 of the same Act provides that: "Subject to the Alberta Rules of Court any of the powers conferred by this Act on a court may be exercised by a judge of that court." This is somewhat ambiguous and could be interpreted as meaning that the powers are to be exercised according to the procedures set out in the Rules of Court or as meaning

that the granting of powers to the judges may be regulated by the Rules of Court. The first interpretation would be procedural, but the second would surely be beyond procedure.

D. DEGREE TO WHICH A RULE MAY INFRINGE UPON THE SUBSTANTIVE LAW

If it is assumed that there is no power delegated to the Lieutenant Governor to make substantive laws, it remains to be considered to what extent the Rules may, without being invalid, infringe upon the substantive law. As the basis of procedural law is to establish the means by which the substantive law is carried out, infringements to some degree must be common.

In Circosta v. Lilly, [1967] 1 O.R. 398, Kelly J.A. said of the rule in question:

> While it may be said that the enactment is procedural in a broad sense in that it attempts to deal only with evidence and to declare whether that evidence shall be submitted to the Court, nevertheless the Rule clearly purports to affect an alteration of the substantive law. (at p. 401)

Hence, by this reasoning, even if a rule is procedural and rules of procedure are authorized by statute, it may be deemed ultra vires if it also infringes upon the substantive law. With regard to the equivalent rule in Alberta, Quigley, Master said in Schanz & Schanz v. Richards, supra: "No authority is given to make, amend, alter or repeal any existing law" (at p. 404) and therefore found it to be ultra vires.

However, the leading cases in Manitoba and British Columbia have both recognized that the procedural law may

affect the substantive law without being ultra vires. In Montreal Trust v. Pelkey & Lusty (1970), 73 W.W.R. 7, Smith C.J.M., said at p. 14: "Rules designed for the purposes of practice or procedure may, of course, have some incidental or indirect effect upon substantive rights". In Bell v. Klein #1, supra, Sloan C.J.B.C., (in dissent) said: "It is true, I think, that by the very nature of the procedural processes in our courts, Rules do in some cases indirectly affect substantive rights . . . ." (p. 276). The judges, however, took somewhat different positions on the effect of such infringements.

In Montreal Trust v. Pelkey & Lusty, the rule in question provided that upon a motion to dismiss for want of prosecution, a plaintiff must show that there was no unreasonable or unnecessary delay or give an adequate explanation. Smith, C.J.M. felt that the rule was ultra vires because it:

> . . . [interfered] with the substantive right of a plaintiff to have his action adjudicated upon by the court and that it [did] so to a substantial degree and in a manner which in some instances [might] by the elimination of judicial discretion, actually prevent essential justice being done. (p. 18)

In other words, he was proposing a double-barrel test of infringement to a substantial extent and in a manner preventing essential justice from being carried out.[1]

In Bell v. Klein #1, supra, Sloan C.J.B.C. dissented on the issue of whether a party being examined on discovery was a "witness". He felt that the rule in question was an

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[1]For a discussion of "essential justice", see p. 36, following.

attempt to legislate with regard to the substantive civil right not to answer incriminating questions and therefore was ultra vires. In other words, if the delegated power is only to make rules of practice and procedure, an attempt to make substantive law under the guise of rules of court is invalid.

In summary, then, the three positions are:

(1) any infringement upon the substantive law is invalid, whether or not the rule is procedural,

(2) some infringements are allowed, but those which infringe to a substantial degree in a manner which prevents justice from being carried out are invalid,

(3) infringements are allowed, but attempts to make substantive laws are invalid.

As the Judicature and other Acts do not state the extent to which the rules may infringe upon the substantive law, it is necessary to turn to the case law. Each of the three positions has been supported by a provincial Court of Appeal, and hence it would appear that any of the positions could be argued with some chance of success in Alberta.

II

PROCEDURAL v. SUBSTANTIVE LAW

> 'When I use a word', Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean, neither more nor less.'
>
> 'The question is,' said Alice, 'whether you can make words mean different things.'
>
> 'The question is,' said Humpty Dumpty, 'which is to be master--that's all.'

> (Quoted by Lord Atkin in Liversidge v. Anderson, [1941] 3 All E.R. 338 at p. 361; Sloan C.J.B.C. in Bell v. Klein #1 (1954), 12 W.W.R. (N.S.) 273 at p. 275; Green, "To What Extent May Courts Under the Rule Making Power Prescribe Rules of Evidence?" (1940) 26 A.B.A.J. 482 at p. 482. From Lewis Carroll, Through the Looking Glass, c. VI).

An attempt to delinate between substantive and procedural law was made by Struckmeyer J. in State v. Birmingham (1964), 392 P. 2d 775 (S.Ct. Ariz.) where he said at p. 776:

> . . . the substantive law is that part of the law which creates, defines and regulates rights; whereas the adjective, remedial or procedural law is that which prescribes the method of enforcing the right or of obtaining redress for its invasion. It is often said that the adjective law pertains to and prescribes the practice, method, procedure or legal machinery by which the substantive law is enforced or made effective.
>
> (the emphasis is the author's)

In formulating the definition, he relied upon some 16 American authorities, but within it may be seen the difficulty of distinguishing between procedural and substantive laws. It would be very difficult in practice, for example, to distinguish between a law which "regulates rights" and one which "prescribes the method of enforcing the right".

One area in which the difficulty of distinguishing between procedural and substantive law is evident is that of evidence. In Re Grosvenor Hotel, London, [1964] 3 All E.R. 354, Denning L.J. stated: "What then are the powers of the Rules Committee? They can make rules for regulating and

prescribing the procedure and practice of the Court, but they cannot alter the rules of evidence. . . ." (p. 360). Similarly, in Andrews v. Andrews & Roberts, [1945] 1 D.L.R. 595, Gordon J.A. of the Saskatchewan Court of Appeal said at p. 600: "That the rules of evidence are distinct from practice and procedure is recognized by the Matrimonial Causes Act, 1857, itself. . . ."

However, the majority of cases on this issue appear to take the opposite position. For example, in delivering the judgment of the Supreme Court of Canada in Livesley v. Horst Co., [1924] S.C.R. 605, Duff J. stated: "The concept of procedure, too, is in this connection a comprehensive one, including process and evidence. . . ." Sidney Smith J.A. stated in Bell v. Klein #1, supra: "I do not think it has ever been questioned that the law of evidence is adjectival and 'adjectival' is merely another name for procedural law" (p. 290). Trueman J.A. in Brown v. Keele, [1934] 4 D.L.R. 508 (Man. C.A.) stated: "It [procedure] includes all legal remedies, and everything connected with the enforcement of a right. It covers, therefore . . . the whole field of evidence. . . ." (p. 512). In R. v. Murphy, Ex Parte Belisle & Moreau, [1968] 4 C.C.C. 229 (N.B.S.C.A.D.), Hughes J.A. stated: "Evidence has been defined as the part of procedure which signifies those rules of law whereby it is determined what testimony is to be admitted and what rejected in each case, and what weight is to be given to the testimony admitted" (p. 232). Finally, Chisholm J. stated in R. v. Bingley, [1929] 1 D.L.R. 777 (N.S.S.C.): "The term 'procedure', we are told is seldom employed as a word of art, but it includes in its meaning whatever is embranced by the three technical terms, pleading, evidence and practice" (p. 779).

There seems to be similar confusion among the American authorities on this issue. Black's Law Dictionary

(4th Ed. West's, 1968) says of procedure: "It is also generally distinguished from the law of evidence", relying on Sackheim v. Pigueron (1915), 109 N.E. 109 (N.Y.C.A.) and Cochran v. Ward (1892), 29 N.E. 795, 31 N.E. 581 (Ind. C.A.). However, in Sackheim v. Pigueron, Hogan J. in delivering the judgment of the court, relied on Bishop's Criminal Procedure: "Evidence is part of the procedure. . . ." In Cochran v. Ward, 29 N.E. 795, Crumpacker J. stated: "'Procedure', in this connection, applies to . . . the rules of pleading and evidence. . . ." The Supreme Court of Connecticut compromised to some extent in Downer v. Chesebrough (1869), 36 Conn. R. 39 by stating: "Cases may be supposed where perhaps evidence may be so connected with the terms of a contract that it may be difficult to separate them, and perhaps in such cases a distinction should be made. . . ."

A similar problem arises with regard to enforcement of substantive rights. In McKee v. Lavary, [1923] 3 W.W.R. 727 (Sask. C.A.), Martin J.A. stated: "The word 'procedure' denotes the mode by which a legal right is enforced. . . ." However, Crumpacker J. said in Cochran v. Ward, supra: "It is impossible to consider a contract separately from the remedy given by the law for its enforcement, because it is this that supplies it with legal vitality. . . . A right without a remedy for its enforcement is a mere fiction." This would indicate that the enforcement of a right is part of the substantive law.

In the case of British South Africa Company v. Companhia de Mocambique, [1893] A.C. 627, Lord Herschell held at p. 628 that: "The rules relating to venue did no more than regulate the manner in which the right was to be enforced" and therefore found them to be procedural. In reaching his decision, Lord Herschell relied upon Kendall

v. Hamilton (1878-1879), 4 A.C. 504 where Earl Cairns said at p. 516:

> I cannot think that the Judicature Acts have changed what was formerly a joint right of action into a right of bringing several and separate actions.

Although it would seem that a Rule regulating whether one may bring an action jointly or separately would be one which regulates the manner in which the right is to be enforced, this was held to be a substantive law. Similarly, Cook in his article "'Substance' and 'Procedure' in the Conflict of Laws" Yale L.J., Volume 42, (1932-1933), p. 333 pointed out that while Anson and Browne felt the Statute of Frauds to be procedural, Corbin and Lorezen felt it to be substantive.

In Upper Canada College v. Smith (1920), 61 S.C.R. 413, the Supreme Court of Canada recognized the difficulty of distinguishing between laws which affect rights and laws which relate only to procedure. Duff J. pointed out that, with regard to a statute which gave the judge the power to deprive a plaintiff of costs, one case (Wright v. Hale 6 H & N 227) felt it to be procedural while another (Kimbray v. Draper, [1868] L.R. 3 Q.B. 160) considered it to be beyond procedure.

Even if a clear distinction could be drawn between procedural and substantive laws another set of problems remain. It would appear that the word "procedure" has different meanings in different areas of the law and that it can be given a narrow or broad interpretation.

In Smith v. Christie, supra, Beck J. discussed statutes which place a limitation on a right of action and said:

> Such statutes are undoubtedly considered matters of procedure in private international law, but not matters of practice and procedure of or in the Court. . . . (p. 593)

In Ross Plumbing & Heating Co. v. Orbeck, [1943] 1 W.W.R. 548 (Alta. D. Ct.), Bury D.C.J. said:

> The use of the phrase 'practice and procedure' in the Saskatchewan Rules . . . in the judgment of Haultain C.J.S. cited, in our own rules and in s. 38 of our Judicature Act all combine to show that the phrase is used and intended to be used in a context requiring a narrower sense to distinguish between the several elements composing it in its general sense. (p. 551)

So long as "procedure" as opposed to "substantive law" remains the test as to whether a rule is valid, uncertainty will persist in determining the status of the Rules of Court.

III

WAYS IN WHICH THE COURTS HAVE FOUND RULES OF COURT TO BE ULTRA VIRES

A. INFRINGEMENT UPON A STATUTORY RIGHT

This would seem to be one of the clearest ways in which a Rule of Court could be deemed to be ultra vires. For example, in MacCharles v. Jones, supra, a right to garnishment proceedings in respect of money paid into court

was provided by statute and supplemented by a Rule of Court. When the statute was repealed, the Rule was held to be ultra vires as, by itself, it was attempting to create a right which would properly have to be created by statute.[1]

In the case of Trans-Canada Pipe Lines Limited v. Provincial Treasurer of Saskatchewan (1968), 63 W.W.R. 541, the Lieutenant Governor was empowered to define terms used in the Education and Health Tax Act. By section 6 of that Act, natural gas was exempted from taxation. The order in question defined "natural gas" as "natural gas used for fuel in homes and buildings", and hence attempted to subject natural gas used for other purposes to taxation. The order was ruled ultra vires as it was contrary to a statutory provision. By analogy, it would seem that a similar argument could be used against Rules of Court.

In the case of Steen v. Wallace, [1937] 3 W.W.R. 654 (S. Ct. Alta.), the Lieutenant Governor in Council made a Rule of Court which established that the Clerk of the Court was not to file certain documents. This was in conflict with a section of the Judicature Act which established the duties of the Clerk of the Court. In presenting his judgment, Ives J. stated:

> It in effect is legislation amending other legislation, which is section 44 of the Judicature Act, R.S.A. 1922, c. 72. That is in effect what it does. The executive arm of the government cannot do it, it requires the Legislature to do it.
>
> (p. 656)

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[1] For a further discussion of this case, see p. 12 above.

Although it is likely that if a rule attempted to amend or repeal statutory provisions this would have been noticed and adjudicated upon, it may still be that several of the rules might be found ultra vires on this basis. If the case of MacCharles v. Jones, supra, was correctly decided and garnishment should properly be dealt with by statute, the Garnishee Rules, Part 36, Rules 470 through 484 may be ultra vires.

B. INFRINGEMENT UPON A COMMON LAW RIGHT

This would appear to have been the most common basis for finding Rules of Court to be ultra vires the Lieutenant Governor in Council and an analysis of some such cases might be helpful.

In the case of Circosta v. Lilly, supra, the Ontario Court of Appeal considered the validity of a Rule which provided that all medical reports obtained by or prepared for a party that were relevant to the issues at hand were to be produced to the other party. It held that such a Rule attempted to abrogate the common law privilege that: "the communications and the documents prepared for the use of the solicitor should not be subject to disclosure against the will of the party" (p. 400) and was therefore ultra vires as an infringement on the substantive law.

Schanz & Schanz v. Richards et al, supra, considered the equivalent Rule in Alberta. Quigley, Master, held the Rule to be ultra vires as it attempted to abrogate the "common law privilege of a litigant with respect to the disclosure of professional communications prepared or received for the purpose of instructing counsel". (p. 404)

In the case of Bell v. Klein, supra, the British Columbia Court of Appeal considered a Rule which purported to compel a person being examined on discovery to answer incriminating questions. Sloan C.J.B.C. held in dissent that this was an attempt to abrogate the common law right to refuse to answer questions tending to criminate and that the Rule was therefore ultra vires.

By these cases, it would appear that if a right could be established as existing at common law, an infringement upon it by a Rule of Court could be sufficient to render the rule invalid. Certain American cases, however, cast some doubt on this line of logic. In Union Pacific R.R. Co. v. Botsford (1890), 141 U.S. 250, 11 S.C. 1000, Gray J. speaking for the majority of the Supreme Court of the United States said in relation to a court order for a physical examination of a plaintiff seeking damages for physical injuries:

> No right is held to be more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. (p. 1001)

In Sibbach v. Wilson & Co. (1940), 312 U.S. 1,655, 61 S.C. 422, the same court considered the validity of a Rule of Court providing for court orders for physical examinations. The rule was promulgated under the authority of the Act of June 19, 1934 (c. 651, 48 Stat. 1064; 28 U.S.C. § 723 b, c) which read:

> Be it enacted . . . That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district

> courts of the United States and for the Courts of the District of Columbia, the forms of process, writs, pleadings and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant . . . .

It would seem that as the court considered such an order an infringement of the most sacred right under common law and as rules were expressly precluded from infringing upon the substantive law, the rule would have been held to be ultra vires. However, by a 5-4 majority, the court held it to be valid. This would seem to be another example of the confusion attaching to the distinction between substantive and procedural laws.

One of the definitions of procedural law is that it is legal machinery by which the substantive law is carried out. If a plaintiff does not follow the procedural law, he will be deprived of his right to have his action adjudicated upon. In Smith v. Christie, supra, the court considered a rule which established a six month period in which an action against a public officer was to be brought. Stuart J. said:

> I have very little doubt at all that the Legislature never intended to delegate to a subordinate authority, viz., the Lieutenant Government in Council the power to impose a limitation of time within which an individual may bring a particular complaint into court and to destroy in effect his legal right entirely if he fails to seek enforcement within that time. A legal right which cannot be enforced in a Court of law approaches very closely, if not entirely, to a contradiction in terms.

The court in Montreal Trust v. Pelkey & Lusty, supra, considered a Rule of Court which required that an action should be dismissed due to delay unless the plaintiff established to the satisfaction of the court that the delay

was not unnecessary or unreasonable and that the defendant had not been prejudiced thereby. Although the majority did not find it necessary to consider the validity of the rule, Smith C.J.M. said in dissent:

> The conclusion to which I have come is that R. 284A(1) . . . interferes with the right of a plaintiff to have his action adjudicated upon by the court, ...

Recognition of this right as part of the substantive law could, in effect, destroy the validity of virtually all the Rules of Court if a narrow interpretation were given to the degree of infringement which may be allowed before a rule will be deemed invalid.

On a lesser scale, if Smith v. Christie, supra, was correctly decided, those Rules of Court which set out limitation periods may be ultra vires. This would include, among others, Rules 243, 327, 355 and 647. If the matter of costs is part of the substantive law, Part 47 as well as the other Rules dealing with the subject might be invalid (Schanz & Schanz v. Richards, supra). On the same basis, it would seem that Rule 194 might suffer a similar fate.

Those rules which confer a status upon a person which did not exist at common law might also be deemed ultra vires. For example, Rule 15(2)(b) reads: "Personal service is effected on a corporation . . . by leaving a true copy of the document to be served with the . . . . cashier . . . ." Similarly, Rules 17, 18 and 19 provide for service upon a person other than the party involved in an action and Rules 41 and 42 allow one person to sue or be sued on behalf of others.

As this argument--infringement upon common law rights--is very broad, an analysis of all the Rules which might be deemed ultra vires on this basis would be lengthy, and these examples are intended to demonstrate only some of the ways in which the argument could be used.

C. CONTRARY TO NATURAL JUSTICE

A Rule of Court cannot infringe upon the substantive rights of parties, and it has been determined that this includes both statutory and common law rights. Does it also include rights under natural justice?

In R. v. Ontario Racing Commission, [1970] 3 O.R. 509 the Ontario High Court considered a rule which denied the defendant horse trainer the defence of no negligence. It reviewed the American case law and found that a similar rule had been held invalid as contrary to "due process of law". The court went on to say:

> While there is no similar written constitution against which a rule such as rule 128 may be tested in Ontario, a rule which does in fact prevent a person from interposing reasonable and legitimate defences does, in my view, trespass upon the exclusive preserves of the Legislature.

In Shura v. Silver (1963), 40 D.L.R. (2d) 383 (Man. C.A.), Freedman J.A. said:

> I think there is no disagreement upon the basic principle that, in applying the rule to the facts of any given case, essential justice should be done. All other considerations must yield to the priority of that. What represents essential justice will, of course, depend on the facts of the particular case.

Smith, C.J.M. in dissent in Montreal Trust v. Pelkey & Lusty found that, because of the mandatory nature of the rule in question,[1] essential justice might not be able to be carried out. On this basis, as well as those already discussed, he found the rule to be invalid. While the relationship between "essential justice" and "natural justice" is uncertain, the terms would seem to be somewhat synonymous.

> It is clear that non-judicial bodies clothed with judicial or quasi-judicial functions and powers must not exercise these functions and powers arbitrarily and that they must conduct their proceedings in a manner consistent with the rules of natural justice.
>
> (Lieberman, J., Strathcona (County) No. 20 & Chemcell Limited v. Prov. Planning Board, Edmonton (City) & Terra Developers Ltd. (1970) 75 W.W.R. 629, relying on Korytko v. Calgary (City) (1964), 46 W.W.R. 273.)

It would seem reasonable to characterize the Lieutenant Governor in Council when making Rules of Court as a body clothed with judicial functions, so that, by this judgment, the Rules of Court must be in line with natural justice.

A rather circular line of logic using the judgment in Upper Canada College v. Smith, supra, could also give support to the view that Rules of Court must not be contrary to natural justice. Rules of Court are retroactive. It would be contrary to natural justice to have a substantive law acting retroactively, and hence a substantive Rule of Court would be contrary to natural justice.

> . . . the rule that statutory enactments generally are to be regarded as intended

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[1] See pp. 34, 35 above.

> only to regulate the future conduct of persons is, as Parke B. said in Moon v. Durdon, in 1848 [2 Ex. 22] 'deeply founded in good sense and strict justice' because speaking generally it would not only be widely inconvenient but 'a flagrant violation of natural justice' to deprive people of rights acquired by transactions perfectly valid and regular according to the law of the time. (p. 417)

It is difficult to say with any certainty which principles compose natural justice. Lieberman J. in Strathcona (County), etc., supra, relying on Marshall, Natural Justice found it to include the principles that: "no one shall be judge in his own cause and that both sides shall be heard" (p. 632). Oster J. in R. v. Ontario Racing Commission, [1970] 3 O.R. 509 (H. Ct.) found it to include the right of a defendant to adequate notice and to formulate a defence. Similarly, Denning L.J. in Lee v. Showmen's Guild, [1952] 1 All E.R. 1175 (C.A.) said at p. 1180:

> The tribunal must, for instance, observe the principles of natural justice. They must give the man notice of the charge and a reasonable opportunity of meeting it. Any stipulation to the contrary would be invalid.

In Kennedy v. Gillis, [1961] O.R. 878, McRuer C.J.H.C. said at p. 886:

> I think natural justice demands that the defendants must be given an opportunity to be heard with respect to any allegation made against them. . . .

One section of the Alberta Rules of Court which might be considered ultra vires as being contrary to natural justice is Part 3, dealing with service of documents. Actual personal service upon a defendant would seem to be sufficient to comply with the right to adequate notice. However, a

Rule providing for anything less than this, especially Rule 23 which allows the court to dispense with service, might be invalid.

D. INFRINGEMENT UPON A RULE OF EVIDENCE

If evidence is considered to be substantive rather than procedural, a Rule of Court affecting evidence could be considered ultra vires (see the discussion regarding evidence under Procedural v. Substantive Law). Hence, it may be that Part 26, including Rules 261 through 314, is invalid. In addition, several of the Discovery Rules, such as Rules 195 and 214(3) and other Rules, such as 65, 129(2), 159(3), 218, 247, 254, 407, 518(b) and 628(a) might have a similar status.

E. ALTERING THE JURISDICTION OF THE COURT

In 1923, the Saskatchewan Court of Appeal determined in the case of McKee v. Lavary, [1923] 3 W.W.R. 727 that to alter the jurisdiction of the court was beyond procedure:

> The word 'procedure' denotes the mode by which a legal right is enforced; it is akin to the word 'practice', and means the rules that are made to regulate the classes of litigation within the Court itself, and does not involve or imply anything relating to the extent or nature of the jurisdiction of the Court. (p. 734)

The court repeated its position in Andrews v. Andrews & Roberts, supra, stating at p. 600:

> A power to regulate practice and procedure cannot avail to limit the jurisdiction or to alter its extent or nature. A.G. v. Sillem 10 H.L. Cas. 704. Such limitation or alteration can only be effected by statute.

Following these cases, it would seem that to try to extend the ambit of the court to foreign jurisdictions would be beyond practice and procedure. This was recognized in British South Africa Co. v. Companhia De Mocambique, supra:

> . . . the grounds upon which the Courts have hitherto refused to exercise jurisdiction in actions of trespass situate abroad were substantial and not technical, and that the rules of procedure under the Judicature Act have not conferred a jurisdiction which did not exist before.
>
> (p. 629)

However, in Black v. Dawson, [1895] 1 Q.B. 848 (C.A.), the court considered an ex parte application to a judge at chambers for leave to serve a writ of summons out of the jurisdiction to be procedural.

It should be noted also that, as already discussed, sections 26(b) and 45 of the Judicature Act and section 43 of the District Courts Act may confer certain powers with regard to jurisdiction, although the Rules of Court do not purport to be made under such.

If an alteration of the jurisdiction of the court is beyond practice and procedure, it may be that Part 4 of the Alberta Rules of Court, dealing with service ex juris is ultra vires. Similarly, those Rules which attempt to grant additional powers to the court may be invalid. This might include, for example, Rule 183 which purports to give the court powers with regard to money recovered on behalf of a person of unsound mind and Rule 495 which grants a power of sale of real estate to the court.

F. INTERFERENCE WITH A RIGHT OF APPEAL

In the case of Colonial Sugar Refining Co. v. Irving [1905] A.C. 369, the Privy Council considered whether an Act which affected a right to appeal was substantive or procedural. Lord MacNaughten, speaking for the court, stated:

> Was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belongs to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal.
> (p. 372)

Hence, if the Lieutenant Governor in Council is restricted to rules as to practice and procedure, a new rule or an amendment which deprives a party of an appeal or transfers the appeal might be regarded as ultra vires at least with regard to a suitor with a pending action.

This case was approved of by the Supreme Court of Canada in Doran v. Jewell (1914), 49 S.C.R. 88 and again in Upper Canada College v. Smith, supra. In 1922, Dennistown J.A. of the Manitoba Court of Appeal said in Bilsland v. Bilsland, [1922] 1 W.W.R. 718 at p. 729: "It is well settled that a right of appeal is a matter of substance. It must be conferred by legislative authority", relying upon A.G. v. Sillem, supra; Colonial Sugar Refining v. Irving, supra; and Doran v. Jewell, supra.

Finally, the Supreme Court of Alberta Appellate Division expressed its agreement with this proposition in R. v. Rivet, [1944] 2 W.W.R. 132, when Harvey C.J.A. stated: "It is equally well established that the legislation creating or abolishing a right of appeal does not relate merely to procedure" (p. 134).

Hence, if a Rule of Court is limited to practice and procedure, but attempts to abolish a right of appeal, as, for example, by setting out a time limit within which an appeal must be brought, such would be ultra vires. However despite the strength of authority to the contrary, some cases have held that an appeal is merely a matter of procedure.

For example, in 1894, the Court of Appeal decided In Re Oddy, [1895] 1 Q.B. 392, in which Lindley L.J. stated: ". . . an appeal from chambers as to taxation comes within the words 'practice and procedure' . . . ." (pp. 393, 394). Two years later, the Queen's Bench Division decided Hockley v. Ansan 44 W.R. 666, the headnote to which reads: "An appeal from an order of the judge at chambers affirming an order of the master making absolute a garnishee order is a matter of practice and procedure. . . ." Finally, in Nelson v. Dep't of Labour & Industries (1941), 115 P. 2d 1014, the Supreme Court of Washington decided that a statute granting a right to a jury trial on appeal to a superior court related only to procedure.

If the right to appeal is substantive and the rule-making powers of the Lieutenant Governor in Council are restricted to practice and procedure, it would appear that several of the Alberta Rules of Court are ultra vires. Parts 38 and 39, including Rules 499 through 543 deal with appeals from a local judge or masters in chambers and

appeals to the Appellate Division. In addition, Rules 210, 451, 592, 655, 656, 704(5), 740 and 741 influence such a right.

IV
CONCLUSION

A. SUMMARY

In 1968, the Lieutenant Governor in Council used his power to repeal and repromulgate the Consolidated Rules, the status of which at that time was uncertain. If the Consolidated Rules had legislative sanction, it may or may not be that by such a move, the sanction was lost. Amendments were not made to the 1955 Judicature Act to compensate for the change of name of the rules from "Consolidated Rules of Court" to the "Supreme Court Rules" and in the 1970 revision, all references to the "Consolidated Rules" were dropped. As a result, it would seem that the power of the

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Richards, supra, an Alberta rule may be considered ultra vires if it infringes upon the substantive law. However, there is no clear distinction between procedural and subs

As a result of all these factors, the status of the Alberta Rules of Court is uncertain, and so long as the distinction between procedural and substantive law is used as the test of validity, it will remain uncertain. If it is accepted that certainty of the Rules of Court is desirable, reform is necessary.

B. RECOMMENDATIONS

The legislature should give statutory sanction to the Rules of Court and the alterations and amendments made thereto. It would seem, despite case law to the contrary, that statutory sanction was given to the Consolidated Rules and their amendments by the amendment to the 1898 Judicature Ordinance in 1918 and that such continued until the repeal of the Rules in 1968. Hence, granting statutory sanction to the present rules would not be inconsistent with the history of the legislation in this province. In addition, the Rules were reviewed in 1968 and presumably are acceptable in their present form.

Granting sanction to each of the present rules which infringe upon the substantive law would be a less desirable reform. In order to ensure certainty for the Rules, considering the vagueness of the distinction between procedural and substantive law and the extent of the arguments which might be used, it would be necessary to grant sanction to many rules. The research required to designate such rules and the legislation required to grant them sanction would be detailed and complicated. The end result of the two approaches would be identical, but granting sanction to all the rules would be a simpler procedure.

A more difficult problem arises with regard to new rules, or rules made after legislative sanction has been granted. One approach would be to limit the Lieutenant Governor in Council to making new rules as to practice and procedure. The advantage of this approach is that it avoids the necessity of delegating wide-sweeping powers. However, if the approach was adopted, future rules infringing upon the substantive law would be ultra vires. In order to determine the validity of a rule, it would be necessary to find when the rule was made. A substantive rule made before the arbitrary date when sanction was granted would be valid; one made after would be invalid.

A second possible approach would be to sanction all future rules. This would ensure certainty for all the Rules of Court regardless of when they were made, but would require granting wide powers to a non-legislative body.

A third approach, and the one favoured by this paper, would be to institute a procedure for legislative scrutiny of all new rules. For example, a rule could be placed before all M.L.A.s and, unless decided to the contrary in the meantime by the Legislature, would be given automatic sanction after fifteen sitting days. This position combines the advantage of certainty with that of preventing abuse of delegated power. As new rules are promulgated infrequently, such a procedure would not be burdensome or time consuming for the Legislature.

To institute these reforms, it is recommended that section 39 of the Judicature Act, R.S.A. 1970, c. 193, be repealed and the following section be adopted in its place. The wording of this section is based upon the introduction to section 38 of the 1955 Judicature Act to show that what

is proposed is not a major reform, but is in line with the history of the statute. The phrase "notwithstanding that the said rules . . . contain substantive law as well as procedural law" is borrowed from section 4(5) of the Court Rules of Practice Act, R.S.B.C. 1960, c. 83, in order to clearly deliniate the status of the rules.

> The Supreme Court Rules, authorized and promulgated by order of the Lieutenant Governor in Council and dated the third day of December, 1968, which came into force on the first day of January, 1969, are declared to be and to have been in full force since the first day of January, 1969, and as altered and amended since that time are hereby validated and confirmed as the rules of practice and procedure of the Court notwithstanding that the said rules, alterations and amendments contain substantive law as well as procedural law.

If it is accepted that the Lieutenant Governor in Council should have the power to make new rules relating to substantive law without a procedure for legislative scrutiny, it is recommended that the following section be added.

> The Lieutenant Governor in Council from time to time
>
> (a) may amend, alter or repeal such rules or make and authorize the promulgation of other rules, notwithstanding that the said rules, alterations and amendments contain substantive law as well as procedural law,
>
> and
>
> (b) may authorize the judges of the Court to
>
> (i) amend, alter and repeal any of such rules, or
>
> (ii) make additional or other rules.

If it is accepted that the Lieutenant Governor in Council should have the power to make new rules relating only to practice and procedure, the following wording is recommended.

> The Lieutenant Governor in Council from time to time
>
> (a) may amend, alter or repeal such rules, notwithstanding that the said amendments and alterations contain substantive law as well as procedural law,
>
> (b) may make and authorize the promulgation of other rules relating to practice and procedure in the court, and
>
> (c) may authorize the judge of the Court to
>
> (i) amend, alter and repeal any of such rules, or
>
> (ii) make additional or other rules.

If it is accepted that the new rules should be subject to a procedure of scrutiny by the Legislature, it would seem reasonable not to allow a sub-delegation of rule-making powers to the judges. The following wording is therefore recommended.

> The Lieutenant Governor in Council from time to time
>
> (a) may amend, alter or repeal such rules, notwithstanding that the said amendments and alterations contain substantive law as well as procedural law,
>
> (b) may make and authorize the promulgation of other rules, notwithstanding that such rules contain substantive law as well as procedural law. Such rules shall be distributed to all Members of the Legislative Assembly while the Legislature is in session and, unless decided to the contrary by the Legislature, shall have the force of law fifteen sitting days after such time.

As the Rules of Court were made under the authority of the District Courts Act, Surrogate Courts Act, Reciprocal Enforcement of Judgments Act, Municipal Election Act, Mechanics' Lien Act (now Builders' Lien Act), Seizures Act and Execution Creditors Act as well as the Judicature Act, it is necessary to analyze the changes which may be required to ensure certainty for the Rules under these statutes. As already discussed, changes in the status of the Rules of Court would automatically be reflected with regard to most of the statute by sections contained therein. These include section 37 of the District Courts Act, section 17(1) of the Surrogate Courts Act, section 50 of the Builders' Lien Act, section 47 of the Execution Creditors Act and section 8 of the Reciprocal Enforcement of Judgments Act. It is recommended that both the Seizures Act and Municipal Election Act be amended by the addition of the following section in order to bring them into line with the other statutes. The wording is borrowed from the Execution Creditors Act and Builders' Lien Act:

> The provisions of the Judicature Act and the Alberta Rules of Court apply to proceedings under this Act except where inconsistent with this Act or any regulation made under this Act.

It is hoped that the adoption of these amendments to the Judicature Act, Seizures Act and Municipal Election Act, would give certainty to the Rules of Court without any major changes in the laws of Alberta.