Correspondence

The County Judge in Ontario

TO THE EDITOR:

I have just read again the letters to the editor[1] following the publication in the Canadian Bar Review of my article on the County Judge in Ontario,[2] as well as the editorial in the May issue of Chitty's Law Journal.[3] I was a little surprised, to be frank, that the article provoked such considered comment and gratified that leading members of the profession would take the time and make the effort involved in putting into print their favourable comments on the main subject matter and their constructive criticisms of my random suggestions for reform. The unexpected response compensates in large measure for the time and effort put into the preparation of the article. Naturally, I did not expect complete agreement on my recommendations, which were made to stress our constant need to keep the machinery of justice in satisfactory working order. That it provoked a response seems to me a good omen.

I was particularly pleased to learn from the letter of the Hon. Dana Porter, the Attorney General of Ontario, in your last issue that the important question of reform in the county courts in Ontario is being studied in his department. Even though the restoration in September of the system of rotating the judges in each judicial district, referred to in Mr. Porter's letter, may have been coincidence, it did implement one of the most important recommendations in my article and was a change greatly desired by the county bench. I was also pleased to hear the suggestion made during the Association's last annual meeting at Winnipeg, by the Section on the Administration of Civil Justice, that surveys similar to mine be prepared in the other provinces. It would be of the greatest value to the administration of justice in Canada to be able to compare what is being done in all the provinces. It might be a surprise to many in this province to find that Alberta may be progressing more quickly than Ontario in the matter of reform at the

[1] (1954), 32 Can. Bar Rev. 480, 589, 698, 699, 811.— EDITOR.
[2] *Ibid.* 21, 127.
[3] (1954), 4 Chitty's Law Journal 109.

county court level. There is no longer any place for the traditional complacency of the lawyer over the status quo. Necessary reforms in the administration of justice will depend on a realization of that fact and come as the result of informed discussion.

I would not have Mr. A. A. Macdonald who wrote in your April issue, or Mr. Edson L. Haines, writing in June-July, think that I favoured abolishing jury trials at the supreme court level. I meant only to raise the question of the advisability of dispensing with the jury in civil cases in the county court. I quote from page 156 of my article:

> The cost of juries to the public is therefore heavy enough to raise the question whether trial by jury should be abolished completely in civil actions in the county court or whether, in the alternative, the English method of requiring a judge's order should be adopted.

Perhaps I confused the issue by not repeating the words "in the county court" in the last sentence of the second paragraph on page 156. It would then have read:

> The advisability of abolishing jury trials in civil actions *in the county court* should receive prompt and careful consideration.

In considering any such change, special thought should be given, however, to those cases ordinarily within supreme court jurisdiction but entered and tried in the county court.

I have a very high regard for juries and believe that there is no greater challenge to counsel and judge alike than a jury trial. May I point out that, even if trial by jury in civil cases in the county court were abolished, the county judge would still have the even greater challenge provided by a jury in the regular criminal courts of General Sessions of the Peace? It is not from any desire to relieve the county judge of responsibility that I suggest a consideration of the subject, but merely on the ground of practical efficiency.

Figures provided by Mr. Leighton B. Holmes, the county treasurer, show that the cost of the last petit jury panel for Haldimand was as follows. The first day 52 jurymen attended at $6.00 each, or a cost of $312.00, and mileage came to $99.75, making $411.75 in all. The second day 50 attended at $6.00 each, making $300.00, and the mileage was $93.45, for a total of $393.45. The grand total for the two days was thus $805.20. The mileage depends on chance and might easily have been more. Consider the hypothetical case mentioned in the May issue by Mr. Stuart Ryan of a claim in the county court of $250 and a counterclaim of the same amount, in which the plaintiff's claim was allowed in full and the counterclaim dismissed, and assume that the action was tried by a jury. The action would have cost the plaintiff, for his solicitor's account, $50.00; the defendant, for the costs of the plaintiff taxed against him, $209.00, and for his own solicitor's taxed costs,

$179.00; and the county, for the cost of the jury panel for one day, $411.75—a grand total of $849.75, and all for a net benefit to the plaintiff of about $200.00. It is not often that the cost to the county of providing a jury can be reduced to fees for twelve jurors and mileage as Mr. Ryan's letter might suggest. Even if the parties think it worth while to have their day in court at that price, how fair is it to the county to saddle it with the cost of a jury trial in such a case, particularly when an alternative, adequate tribunal has been provided out of the public purse?

I thank Mr. Cecil W. Robinson, writing in the June-July issue, for stating the case much better than I had done for elevating county courts to the superior court level and trust that his statement may convince Mr. Macdonald that more is involved in the suggestion than a mere change of name. Mr. Macdonald advances a sound argument, however, against setting up appeal courts of three county judges in each district and it may be that the suggested change in this case would create more problems than it would solve.

May I remind Mr. R. M. Willes Chitty, whose editorial dealt with my article so comprehensively, that I was careful in the reference at page 149 of my article to the Austrian experiment not to say that I approved it? I tried to point out that it appears to have been profitable to that country to overhaul its system and that we might find it profitable, too, to tackle our problems with the same vigour and despatch, not losing sight however of the sound principles on which our administration of justice is based. I agree wholeheartedly with Mr. Chitty "that reform here must lie along lines that are not the same as those of the Klein Code".

I understand that the Canadian Bar Association has set up a committee to look into the question of legal research with a view to ensuring it both moral and financial aid. This is good news. Research in Canada appears to have been done so far on individual initiative, and by the very few. It is to be hoped that the initial step taken by the Association in setting up this committee will culminate in a contribution by Canada to legal research and scholarship equalling that of other common-law countries.

HELEN KINNEAR*

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Reform of the Law

TO THE EDITOR:

Every once in a while the public, and sometimes the profession, are shocked when a judge or court reluctantly concludes that a

*Her Honour Judge Helen Kinnear, LL.D., County Court Judge for Haldimand County.

case must be decided according to some common-law rule which is inconsistent with modern social conditions and ideas of justice. Until such a case arises the rule is forgotten or presumed to have been abrogated. There is, however, only one way of being sure that it will no longer be applied, and that is legislation. The object of this letter is to suggest that some systematic method of removing such deadwood should be devised and established—the present haphazard method leads to the situations just referred to. A judge with sufficient prestige or great independence of character may take it upon himself to depart from an obsolete rule, but a courageous judge always runs the risk of being over-ruled by a timid appellate court which adheres slavishly to stare decisis.

Do I hear some reader who retains an unqualified admiration for the Common Law (the kind of admiration which used to find expression in sententious and platitudinous orations at bar dinners) suggest that our common law is beyond all criticism? Undoubtedly its basic principles, which protected the liberty of the individual and personal rights, cannot be too highly praised—they deserve even more than ever before to be lauded today, when we must maintain a constant guard against the aggressions of self-satisfied and arrogant bureaucrats and statutory boards. An English barrister who recently settled in Canada said that apparently the only thing not regulated and taxed in that now regimented country is a beard.

The kind of rules referred to are not such never-to-be-abandoned (we hope) principles, but such former or not yet entirely abolished developments of the common law as the fellow-servant doctrine, the maxim *actio personalis moritur cum persona*, the contributory negligence principle, the right of a testator to leave nothing to his wife or children, a father's almost exclusive rights to a child's custody, the obligation of a tenant to pay rent even though the premises burned down, the unrealistic extensions of the doctrine of domicile in matrimonial causes. Many such rules have been removed or reformed by legislation in the more enlightened jurisdictions, but there are still many anachronisms and anomalies which remain untouched and will continue so until a case arises which requires, or is held by a too timid court to require, their application, with the consequences of a shocked public and insistent demands for immediate legislation—a situation which often results in legislation too hastily drafted.

What seems to be needed in each province and, perhaps, at Ottawa is a permanent Law Revision Council whose duty will be (1) to collect such legal relics; (2) to hear representations from persons engaged in businesses and pursuits affected by them; (3) to keep abreast of public opinion; (4) to suggest, draft and urge the enactment of appropriate remedial legislation. Such a body should

consist of legal scholars and practitioners whose minds are not hide-bound or literal; and should also, perhaps, include at least one layman, one person of experience in public life and one woman. A council of six or even five members would be large enough to be representative.

As a starter, may I suggest a question for investigation and report? Why should the law impose on a man who proves that he has been damaged by a breach of contract or a tort the burden of proving that *he* has done everything reasonably possible to minimize the quantum of his damages? Why should not the burden be on the offending party to prove that the wronged party has not taken the steps that might have been taken? In this and many other situations the common law seems unreasonably tender towards the wrongdoer. Hence the present public impatience with and fear of "The Law". The public, with no little justification, are often under one or both of two contrary impressions, both wrong: They think the law should be, and can be, synonymous with or coincident with abstract justice in every respect, or they look upon it as unreasonable abracadabra, unrelated to justice, and developed by the legal profession to serve their own ends. Moreover, the public also think that the law consists solely of legislation; and that the only function of the courts is to interpret and apply legislation—the common law if ever thought of is regarded as a misty realm which has been left, purposely, without guide posts or warning signs. Hence the profession suffers in public esteem and the law is not looked upon with the respect it should command.

W. KENT POWER*

To Encourage Legal Research

I said earlier that one of the tasks of those immediately responsible for the Canadian Bar Review is to encourage legal research in Canada by every means open to them. Let no one think that legal research is only for long-haired academics in ivory towers; like the mines, the power plants and the other material developments we hear so much about, it is of the greatest practical importance for the future of the legal profession and of Canada. The practitioner who smiles at scholarly research, or looks down his nose at those engaged in it, is being merely stupid; he should be, not practising the profession of law, but plying some honest trade

The books say that the judges of England, in the days of old, developed the common law They could do so because the range of problems they

*W Kent Power, Q.C., of Calgary, is editor-in-chief of Western Weekly Reports, the author of "Power on Divorce" and of the Western Index-Practice Digest (now in its second edition) and an editor of and contributor to the Canadian Encyclopedic Digest (Western and Ontario editions), the Canadian Abridgment, Corpus Juris, and other works.

were called upon to consider was much more restricted than it is today. To a degree now impossible to them, they were able to master the law in all its facets. The contemporary judge in Canada, by a process of drawing on the intellectual capital of the past, and borrowing from the contributions of other countries, may be able, still, to do a sort of ready justice between the parties immediately before him. But what proportion of the judgments now being reported, even of our highest court, can honestly be said to clarify the existing law—to make it more certain for prospective litigants and their advisers—or to adapt an outmoded rule to meet a new need? My own impression is that the law in Canada (and in some other countries too) is on balance becoming each year more confused—less certain—and more out of step with the requirements of the times.

To say this is to imply no criticism of the bench of Canada. The task of rationalizing the vast bulk of modern law looks to be beyond its unaided efforts. The modern counsel, harried from client to client, cannot be as helpful to the courts as he was once; the modern judge, very often overworked, no longer has time to fill in the gaps left by counsel or to go beyond the effects of his judgment on the parties and adequately consider its form or its long-term implications.

The courts and counsel in all common-law countries will be forced to turn more and more to scholars for help. The trend grudgingly enough in some quarters, is already under way. The countries of the civil law learned the lesson many generations ago—not the only respect in which the civil law has been ahead of the common law—and it never seems strange for a judge of a civil-law jurisdiction to acknowledge publicly his debt to juristic writing. Unfortunately you cannot wave a wand and produce a scholar overnight; you cannot go out into the marketplace and buy scholarship just when you happen to want it.

If the flame of legal research burns low in Canada today—and it does—the reason is at bottom that the atmosphere of the Canadian legal profession, reflecting perhaps the atmosphere of the country at large, is not sympathetic to research. This is not an indirect way of suggesting that every Canadian practitioner ought himself to be writing articles for the Canadian Bar Review! What I mean is that the prevailing indifference of a substantial part of the legal profession to research naturally inhibits effort by those whose interest and capacity lie in that direction No one realizes better than your editor, from the hard experience of several years, that only the unrealistic expect suddenly to reform the hearts of men. But it has long seemed to me that the Canadian Bar Association, in the practical interests of its members, their sons and grandsons, might consider how it can turn its resources to encourage the cause of legal research in Canada. I am glad to learn that a suggestion of mine has been adopted and that the special responsibility of the Association in this field will be acknowledged by setting up immediately a strong committee, with the necessary financial backing, to investigate among other things the rôle of legal research in Canada, what in fact the Canadian contribution has been to constructive legal thought, and what precise steps might be taken, by the Association as well as other agencies, to further legal research (From the Editor's Report to the 36th Annual Meeting of the Canadian Bar Association at Winnipeg, Sept. 4th, 1954)