THE DIVORCE ACT, 1930.

The doubt and obscurity arising from legislation by reference to other legislation has often been pointed out in the past with corresponding force and lucidity.

Although perhaps legislation by the making of rules by Judges was not one of the abuses aimed at by Lord Hewart in his recent book, yet the principle which he so stoutly defended applies just as much to rules so made as to regulations which are issued by a department of the Government.

The Divorce Act passed by the Federal Parliament at the last session and the Rules recently passed by the Judges of the Supreme Court of Ontario together seem an illustration of both these thorns in the sides of litigants.

The Act itself makes no effort to lay down the law of Ontario in detail or to perpetuate the system administered by the Senate but simply enacts that:

> the law of England as to the dissolution of marriage and as to the annulment of marriage as that law existed on the 15th day of July, 1870, in so far as it can be made to apply in the Province of Ontario . . . shall be in force in the Province of Ontario.

The English Matrimonial Causes Act of 1857 and amendments down to 1870, along with amendments made by the Federal Parliament and as affected by the general law of Ontario in matters indirectly touching divorce, is therefore the law of Ontario today in the matter of divorce.

Both under the Matrimonial Causes Act and under the Judicature Act of Ontario the Judges of the Supreme Court of Ontario acquire jurisdiction to pass rules governing the practice and procedure to be followed in carrying out the Divorce Act in Ontario. Their jurisdiction, however, in this regard is strictly limited to questions of procedure within the terms of the law as described above.

It follows, therefore, that a rule passed by the Judges which alters or enlarges the statute law of England up to 1870 and the statute law passed by the Federal Parliament must find its jurisdiction in other Acts of the Province of Ontario, or must be based on some provision of the common law which is applicable under the circumstances, and in either case the Ontario enactment or prece-

dent must be of such force, clarity and authority that the English law is not merely "inapplicable" but cannot "be made to apply."

Consequently one would not expect to find in the Rules passed by the Judges of the Supreme Court of Ontario provisions which differ in any important particular from the English law, and one experiences something rather more than surprise at finding provisions the authority for which does not appear to rest in the English Act nor in the general conception of what is the law of Ontario.

A careful comparison of the Ontario Rules with the English Act and corresponding Rules reveals many small departures unimportant and to be upheld on the ground of the fundamental difference between English and Ontario practice. In some other respects there are departures from the general scheme which reveal an effort rather to legislate than to administer.

While avoiding a full discussion of all the Rules attention may well be directed to some interesting provisions, such as:

(a) The plaintiff's solicitor must file an affidavit of his own *bona fides* and faith in his client's case and is to be disciplined should, at the trial, his affidavit prove incorrect.

(b) The trial judge may make a judgment absolute at the hearing of a cause.

(c) The Attorney-General is drawn into some and has the right to take part in all proceedings.

(d) No matrimonial cause may be tried by a jury.

It is not intended to hazard any guess as to the particular abuse or abuses at which these provisions are aimed nor to suggest the difficulties which may arise out of them.

It would perhaps be presumptuous to suggest that in laying upon the solicitor the duty of swearing an affidavit of his own *bona fides* it is hardly fair to discriminate between plaintiff and defendant. Surely, the solicitors for both parties should be expected to have equal confidence in their client's truthfulness and the same obligation should be imposed upon both? Perhaps also the same opportunity should be afforded to each solicitor of placing on the record his own evidence in support of his client's case by an affidavit skilfully drawn, in which his enthusiasm is held in check only by the necessity of avoiding the unpleasant consequence of inaccuracy. It is also too early to discuss the shifts and schemes which may be adopted to avoid the scope of the Rule, and the possible wrangles in open Court arising out of cases where a junior in a firm has sworn an affidavit which, on the trial conducted by counsel, in the absence of the junior, proves to have been based on inaccurate information.

In any case it is pretty certain that the incidence of the penalty will depend less upon the iniquity of the individual than upon the skill employed in drawing the affidavit and in presenting the explanations.

There is no intention of criticising a rule which tends to bring litigation of this nature to the earliest possible conclusion or of upholding the sanctity of a finding of fact by any twelve good men and true. The Attorney-General may safely be left to consider his own convenience, and solicitors may to that extent expect little unwarranted interference.

But, to a greater or less extent, these provisions differ from the law as laid down by the statutes already referred to and so, it is submitted, may not be supported if challenged.

It is entirely an academic question of jurisdiction which can be so discussed without impropriety.

a.

The English Act provides for commencement of proceedings by petition verified by affidavit and also for an affidavit from the Respondent.

Section 41 reads as follows:

> Every person seeking a decree of nullity of marriage, or a decree of judicial separation, or a dissolution of marriage, or a decree in a suit of jactitation of marriage, shall, together with the petition or other application for the same, file an affidavit verifying the same so far as he or she is able to do so, and stating that there is not any collusion or connivance between the deponent and the other party to the marriage.

The Ontario Rules provide for a writ and a statement of claim verified by the plaintiff and also for an affidavit from the defendant. Rule 6 reads as follows:

> Every statement of claim shall be accompanied by an affidavit made by the plaintiff verifying the facts of which he or she has personal cognizance and disposing to belief in the truth of the other facts alleged in the statement of claim, and further stating that no collusion or connivance exists between the plaintiff and the other party to the marriage or any third person.

So far the distinction is not very material but the Ontario Rules continue. Rule 7 reads as follows:

> The statement of claim shall also be accompanied by an affidavit made by the plaintiff's solicitor (if any) stating that he has carefully investigated the facts upon which the plaintiff relies and the evidence in support thereof and that in his opinion the facts charged will be supported by credible evidence. The solicitor shall also state that as the result of his investigation he believes that no collusion or connivance exists between the plaintiff and defendant or any third party that the action is brought in good faith.

Of course no solicitor would allow his client to swear the affidavit required by Rule 6 if he had any reason to believe that the facts were otherwise.

On the other hand, it is not hard, having in view the very nature of the facts and the possibility that the whole case might depend upon the testimony of one person believing him or herself deeply wronged, to conceive of a case where a solicitor, while ready to further his client's cause without fear of any charge of misconduct, might well hesitate to swear the affidavit required by Rule 7. In such a case this rule would deprive an honest litigant of those services of a solicitor to which he or she is entitled.

There is in the English Act provision for the taking of proceedings *in forma pauperis* and a requirement in the English Rules for evidence of the legality and justice of the claim to be supplied by counsel or solicitor, but that is required in support of an application for special privilege, and it is not a general condition the non-observance of which will destroy a substantial right.

There is no other provision in the English Act similar to this, so if the Court does possess the jurisdiction to enforce this rule it must be inherent in the Court or peculiar to Ontario. Furthermore, it must extend to each and every type of litigation, but it can hardly be suggested that the Judges could pass a rule which would result in the refusal of the Registrar to issue a writ in an action based upon a bill of exchange unless with it were filed an affidavit of a solicitor proving the signature of the bill. Such a rule would, by its operation, alter the law of negotiable securities.

It is submitted that this rule as imposing an unauthorised obstacle in the path of a litigant is beyond the jurisdiction of the Judges of the Supreme Court of Ontario.

In many cases the rule would have no ill effect on the administration of the law. Yet there is a further objection to it. Notwithstanding its guarded language and apparently restricted scope, there is no doubt that it does result in the solicitor taking the responsibility of personally guaranteeing the *bona fides* of his client's case. It is the solicitor's duty to conduct his client's case. It is the duty of the Court to judge of the truth of the facts alleged.

Section 29 of the English Act reads as follows:

> Upon any such petition for the dissolution of a marriage, it shall be the duty of the Court to satisfy itself so far as it reasonably can, not only as to the facts alleged, but also whether or not the petitioner has been in any manner accessory to or conniving at the adultery, or has condoned the same, and shall also inquire into any countercharge which may be against the petitioner.

No one can contest the jurisdiction of the Court over solicitors as officers of the Court, but, on the other hand, there is no jurisdiction in the Court to control or discipline a solicitor in any of his actions save such as are those of a solicitor.

The question therefore is: Is it part of the duty of a solicitor of the Supreme Court of Ontario to take the responsibility of personally guaranteeing in any degree the truth of his client's story?

If it is not, then there is no more jurisdiction in the Judges to enact Rule 7 than to require that all solicitors must have red hair.

In Ontario there is no hard and fast line drawn between the barrister and solicitor. Practically every lawyer who will be affected by these Rules carries on his practice in Ontario in the dual capacity.

As a solicitor, when he is admitted he takes the oath of allegiance and adds as follows:

> I also do sincerely promise and swear that I will truly and honestly demean myself in the practice of a solicitor of the Supreme Court of Judicature for Ontario according to the best of my knowledge and ability.

On his being called to the Bar as a barrister he also takes the oath of allegiance and the officer administering it continues:

> You are called to the degree of Barrister to protect and defend the rights and interest of such of your fellow-citizens as may employ you. You shall conduct all cases faithfully and to the best of your ability. You shall neglect no man's interest nor seek to destroy any man's property. You shall not be guilty of champerty or maintenance. You shall not refuse causes of complaint reasonably founded, or shall you promote suits upon frivolous pretences. You shall not pervert the law to favour or prejudice any man, but in all things shall conduct yourself truly and with integrity. In fine, the King's interest and your fellow-citizens' you shall uphold and maintain according to the Constitution and Law of this Province.
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> All this I swear to observe and perform to the best of my knowledge and ability—so help me God.

It is always a solicitor's duty to observe the confidence and trust of his client and there is no power in any Court in the land which can compel him to divulge such confidential communications. He must, of course, observe due respect for the Court and any failure in that regard will make him at once liable to appropriate penalties, but there is no power in the Court, by enlarging his duties out of their proper sphere, to make any solicitor liable for unusual penalties, or to expose him to charges made in a forum which is not designed for that purpose.

The very idea of swearing in a client's case is definitely and undoubtedly opposed to the conception of what is a lawyer's duty in Canada whether he act as barrister or solicitor.

The canons of legal ethics approved by the Canadian Bar Association at the 5th Annual Meeting at Ottawa on the 2nd September, 1920, contain the following provisions, particularising the duties of a lawyer in all the various relations of his professional life:

To the Court.

Section 3:

He should not offer evidence which he knows the Court should not admit. He should not, either in argument to the Court or in address to the jury, assert his personal belief in his client's innocence, or in the justice of his cause, or as to any of the facts involved in the matter under investigation.

To the Client.

Section 11:

He should not appear as witness for his own client except as to merely formal matters, such as the attestation or custody of an instrument, or the like, or when it is essential to the ends of justice. If he is a necessary witness with respect to other matters, the conducting of the case should be entrusted to other counsel.

There does not seem to be any statutory definition of what is a true and earnest demeanour in the practice of a solicitor, but, from the above quotations, it would seem that in the opinion of the Canadian Bar Association the suggestion that it include the duty imposed by these Rules would not be received with enthusiasm.

Upon the validity of Rule 7 depends Rule 14, which reads as follows:

If upon the hearing it shall be established that the affidavit made by the plaintiff's solicitor, as required by Rule 7, is untrue in any material particular, the trial judge shall hear any explanation which the solicitor may offer and in default of any satisfactory explanation shall report the solicitor to the Senior Registrar under the provision of this Rule, and thereafter no affidavit in any matrimonial cause sworn by the said solicitor shall be received or filed unless and until the said report shall have been vacated by the Chief Justice of Ontario upon application made to him for that purpose.

In addition to the question of the validity of Rule 7 there also arises out of this rule the question as to the extent to which the Court may summarily pass on the conduct of one of its officers. The Court, of course, has jurisdiction to deal with its officer in his conduct of a case before it, and also in matters arising out of a case, such as his handling of moneys affected by some proceedings, but the jurisdiction surely cannot extend to the right to impose a penalty, which becomes effective (if at all) in relation to some future litigation.

The Law Society Act while it does not override the inherent

jurisdiction of the Court within its proper sphere contains provisions properly applicable to cases of professional misconduct. It provides certain procedure on the part of the Benchers, a regular tribunal, and appropriate penalties, and it is submitted that it is before this forum and this forum alone that charges of professional misconduct against a solicitor are properly to be laid.

b.

The Matrimonial Causes Act of 1857 provided for judgment absolute, but amendments made in 1860 and 1866 required that a decree nisi shall be given to be made absolute at the end of six months with power to the Court (perhaps to increase and certainly) to reduce that to three months, and

during that period any person shall be at liberty, in such manner as the Court shall by general or special order in that behalf from time to time direct, to show cause why the said decree should not be made absolute by reason of material facts not brought before the Court; and, on cause being so shown, the Court shall deal with the case by making the decree absolute, or by reversing the decree nisi, or by requiring further inquiry, or otherwise as justice may require; and at any time during the progress of the cause or before the decree is made absolute any person may give information to Her Majesty's Proctor of any matter material to the due decision of the case, who may thereupon take such steps as the Attorney-General may deem necessary or expedient; and if from any such information or otherwise the said Proctor shall suspect that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case, he may, under the direction of the Attorney-General and by leave of the Court, intervene in the suit, alleging such case of collusion, and retain counsel and subpœna witnesses to prove it.

Now by Rule 15 it is provided:

Unless the Attorney-General satisfied the trial Judge that there is reason for making a judgment nisi in the first instance, a judgment absolute may be pronounced at the hearing. Where a judgment nisi is pronounced at the hearing a judgment absolute shall be pronounced at the expiration of three months unless the Attorney-General, or some other person who has obtained the right to intervene, shall have applied for a further hearing for the purpose of establishing collusion or connivance.

So the question at once arises is this extension of the English Act one merely of procedure or is the abolition of the three months period an interference with a substantive right. In many cases no harm would be done, and the plaintiff would doubtless welcome the abridgment of time for final judgment, but from the point of view of a defendant, who may from lack of evidence have failed, the

effect is to take away a chance that persons who, from the absence of publicity or natural timidity, have not come forward would, on realization that his cause was going against him, though not yet irrevocably lost, take the opportunity so provided of assisting the course of Justice. It is submitted that the three-six months period provided for by the English Act is intended for definite important purposes, and the retention of the right of the Attorney-General to apply for a decree nisi is not sufficiently within the scope of the Act to justify the rule.

c.

Similarly the provisions of the Rules which lay upon the Attorney-General the duty of perusing all papers where no co-respondent is named, giving him the right of his own volition at any time to take an actual part in the conduct of the proceedings, and indicating him as the only person who can apply for the granting of a decree nisi, go far beyond the English Act.

Rule 9 provides that if the name of the alleged adulterer be unknown the cause may only proceed by leave and is followed by Rule 10 in these terms:

> The Attorney-General of Ontario shall also be made a party defendant in any such action, but it shall not be necessary for him to appear or plead. Notice of trial shall in all cases be served upon him. He shall be entitled to attend all examinations and to take part in all proceedings in the action.

In England the practice is to leave it to persons interested to inform the King's Proctor, as indicated in the section quoted above, with of course the right to the Court to direct papers to be sent to the King's Proctor. But these Rules lay upon the Attorney-General duties which seem far outside his proper sphere, and the persons who, as taxpayers, or cost-paying litigants are to be called upon to foot the bill, may well ask, "by what right do the Judges lay this burden upon the Attorney-General, and by what right does he accept it?"

d.

Rule 17 reads as follows:

> All matrimonial causes shall be tried by a Judge without a Jury.

There is no need to quote authority for the proposition that a litigant has the right to have questions of fact determined by a jury unless such right be abridged or taken away by Statute.

The English Act contains provisions for trial by jury, the effect of which along with the Rules being that cases where damages are not claimed are to be tried without a jury, but for the assessment

of damages a jury is necessary *but* any party to a petition for dissolution of marriage may insist on having contested matters of fact tried by a jury.

The Ontario Rules are silent on the question of damages, but explicit on the question of a jury.

The right to damages in an action for divorce is conferred by Section 33 of the English Act and the provisions are in substitution for the damages which would be awarded in an action for criminal conversation. This latter action has been abolished in England, although it still exists in Ontario, under the jurisdiction contained in a general act now R.S.O. 1927, Chapter 130, and if, as seems probable, the provisions of the Divorce Act operate so as to abolish in effect the action for damages for criminal conversation in Ontario then the claim for damages can hardly be excluded from an action under the Divorce Act of 1930, and if Rule 3 reading as follows:

> No cause of action, save for alimony or the custody of children, shall be joined with a claim for the dissolution of marriage or for the annulment of marriage.

is intended so to do the jurisdiction for it is doubtful.

In any event the Ontario Judicature Act expressly provides that an action of this nature shall be tried by a jury so that it seems quite clear by analogy that if the right to damages exists the question of fact should be tried by a jury.

With regard to the right to a jury to decide other material questions of fact, no doubt the provisions of the Judicature Act will be held to apply rather than those of the Matrimonial Causes Act, but beyond the provisions of the Judicature Act the Rules may not go and the Judicature Act, Sections 55 and 56, while giving the judges some discretion in deciding whether an issue of fact is to be tried or damages assessed with or without a jury yet stops a long way short of total and absolute abolition of trial by jury.

There are, it is true, certain classes of cases which may not be tried by juries just the same as there are classes of cases which must be tried by juries, but these classes are all decided by Statute and the cases which do not fall within one or the other of these two classes are to be tried as the Judicature Act provides.

But the Judicature Act, while leaving it to the judge to decide whether a jury is necessary in these cases does not confer upon the Judges any jurisdiction to decide that no case under the Divorce Act is to be tried with the intervention of a jury.

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