Act, they would be unable to do so. This is especially so since the Act provides that the adjudication be of a summary nature with the determination of the trial judge as a *persona designata* being final, thereby precluding consideration by appellate courts and the Supreme Court of the question. Thus they could not be expected to change the present law and the possibility of judical comment thereon and the greater weight attached to dictums of the higher courts would not be possible here.

Only Parliament can provide the remedy and this it is unlikely to do, the Minister of National Revenue being not likely to be favourably disposed to voluntarily giving up one of his investigative tools. Both the Canadian Institute of Chartered Accountants and the Canadian Tax Foundation are considering making recommendations to the government in this respect. Unfortunately, their prospects of success appear to be dim.

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THE EX-PARTE INJUNCTION IN MATRIMONIAL CASES

It is becoming increasingly frequent in suits for Divorce or Judicial Separation, where the claim is based on allegations of cruelty, for the wife, who is Plaintiff or Petitioner in such proceedings, to apply for and obtain an Ex-Parte Injunction immediately the Statement of Claim or Petition has been issued and for the Injunction to be served on the Defendant or Respondent husband with the originating process. The form of the Injunction, in the Judicial District of Calgary at least, is usually as follows—

(i) The husband is restrained from entering or visiting the matrimonial home.

(ii) The husband is restrained from molesting or interfering with the wife (and sometimes the children as well).

(iii) It is further ordered that "any Police Officer to whom any breach of the terms of this order by the Defendant or anyone acting on his behalf is indicated" shall arrest the Defendant or any such person and cause him to be brought before the court (or, in at least one case I have seen "a Judge of the Appropriate Court") to be dealt with according to law.

(iv) Leave is given for the Defendant or Respondent to apply on forty-eight hours notice to vary or set aside the order.

Oliver Wendell Holmes once defined law as "nothing more than a prediction of what the courts or judges will do in any given set of circumstances." If this is a correct definition, it seems that many of the text books commonly used by students and practitioners are inaccurate, so far as they relate to this branch of the practice of law. For example, both Maitland, the classical student's text book on equity,[1] and Atkin's Encyclopedia of Court Forms,[2] state that the Ex-Parte Injunction, when

1 Maitland, *Equity* (2nd ed.), 1936.
2 Atkin, *Encyclopaedia of Court Forms in Civil Proceedings* (2nd ed.), 1963.

granted, is always limited to a few days, usually until the next motion day and then "the Defendant has the opportunity of saying what he has to say against the continuation of the Injunction until trial" to use Maitland's words. This is obviously not the law (as defined by Holmes) in Alberta, or at least (in the author's observation) in the Judicial District of Calgary. The common form of Injunction, as above quoted, is not limited to the next return day for motions, nor even until the trial of the action; it is unlimited in time, subject only to the possibility (which exists in any event, even if it were not mentioned in the order) of the Respondent or Defendant successfully applying to have the order varied or set aside. In this connection, also, it should be noted that the rules of court do not correctly set out the law, as defined by Holmes. Rule 287(2)[3] provides that an Ex-Parte Order may be varied or discharged by any judge on motion, but in practice the judges are very reluctant indeed to hear applications to vary or discharge orders made by other judges, and usually if an application is made on motion to Mr. Justice A to vary or set aside an Ex-Parte Order made by Mr. Justice B, Mr. Justice A will refuse to hear it and will direct the applicant's solicitor to take out a new motion before Mr. Justice B.

Another point on which the text books are obviously at variance with practice is in stating, as Maitland does without any qualification whatever, that while an Injunction can be obtained against most torts, Injunctions will not be granted against assault and battery, because there is another remedy, namely applying to have the offending party bound over to keep the peace (this remedy, of course, also exists in Canada and is set out in Section 717 of the Criminal Code). It is apparent that, in this respect also, Maitland's teaching is no longer good law.

The practise of making such orders appears to have grown up in England slowly and cautiously and its growth can be traced in such reported cases as *Boyt* v. *Boyt,* in which the English Court of Appeal stated that the jurisdiction to restrain a husband from entering any premises is one which must be exercised with great care, especially where it involves breaking up the matrimonial home; and *Silverstone* v. *Silverstone,*[5] where Mr. Justice Pearce, in making such an order, stated that it could only properly be made in a case where refusing to make the order was equivalent to driving the wife out of the home. It should be noted that both the cases above cited were cases where an Ex-Parte Injunction was first made, in accordance with Maitland and Atkin, to last only until the next motion day, and the reported case involved either the hearing of the motion or (in the *Boyt* case) an appeal from the order made on the motion. In Alberta, however, the practice appears to have sprung into existence fully grown a few years ago and, so far as the author knows, there are not reported cases on it in this jurisdiction. It is to be hoped that before too long this practice will be reviewed by the Appellate Courts, and when this happens, it will be interesting to see whether they consider that a jurisdiction is exercised with great care when an order is made breaking up the matrimonial

3 Alberta Rules of Court (1969), 387(2).
4 [1948] 2 All E.R. 436.
5 [1953] 1 All E.R. 556, [1953] p. 174.

home without hearing both sides, without limitation of time, and with the burden of challenging the validity of the order thrown upon the party who was not present when it was made.

The large and generalized language often used in such orders also appears to indicate that Atkin was wrong when he stated in Volume 9 of his Encyclopedia of Court Forms "The terms of the Injunction should be so clear that doubts can not arise as to the true scope of the Injunction, or whether or not there has been a breach of its terms." Certainly a Police Officer who is called upon to decide, at short notice, whether what the Respondent is doing amounts to "molesting or interfering in any way with the Petitioner" or, still more, to decide whether a person other than the Respondent is "acting on the Respondent's behalf" might pardonably feel, as the police in some American jurisdictions are said to feel at the present time, that he needs a lawyer at his elbow to help him discharge his duties correctly. This aspect of these orders, incidentally, reveals another inaccuracy in the text books, in this case none other than our old friend The Canadian Encyclopedic Digest, Volume 5[6] of which states[7] that "no one should be punished for the offence (of contempt of court) unless the specific charge is distinctly stated and opportunity of answering it is given to him before sentence is passed" and that "as the liberty of the subject is involved, the utmost strictness in procedure is required on such applications."

From the above observations, it will be clear that the present writer does not like the new practice. Undoubtedly there can be no objection to Ex-Parte applications in such matters as substituted service, service out of the jurisdiction, or other matters strictly procedural; but when one considers the elaborate precautions embodied in the law and practice of the Criminal Courts to insure that no person is punished without being given a full opportunity to be heard in his own defence, it seems wrong in principle that an order expelling a man from his home, and threatening him with imprisonment if he tries to return, should not only be made behind his back, but should be made in such a form that the onus is cast on him to show cause against it, and that the order remains effective until such cause has been effectively shown. This is punishment in substance if not in form, and, as the English Court of Appeal said in *Boyt,* this jurisdiction should be exercised with the greatest care, and not as a matter of routine, as if such orders were of no more moment than orders for substituted service.

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6 *C.E.D. (Western)* (2nd ed.), 1958, n. 5.
7 *Id.*, at 30-31.
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