DONALD McLENNAN ..... APPELLANT;

AND

FLOSSIE McLENNAN ..... RESPONDENT.

1939
* Oct. 19.
1940
* Feb. 26.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Husband and wife—Divorce—Alimony—Jurisdiction of New Brunswick Court of Divorce and Matrimonial Causes—Allowance of permanent alimony upon divorce—Matters to be considered—Discretion of trial judge—Review by appellate court.

Per curiam: The New Brunswick Court of Divorce and Matrimonial Causes has jurisdiction, upon the granting of a decree for divorce *a vinculo matrimonii,* to award permanent alimony or maintenance.

The legislation, and its history, with regard to or affecting the Court's jurisdiction, discussed. *MacIntosh* v. *MacIntosh,* 54 N.B. Rep. 145, and *Hyman* v. *Hyman,* [1929] A.C. 601, at 614, cited.

Respondent, who had been granted a decree of divorce from her husband on the ground of adultery, petitioned for an order for permanent alimony. This was refused by the trial judge (Judge of the Court of Divorce and Matrimonial Causes) on the ground that the facts did not justify it. His judgment was reversed by the Supreme Court of New Brunswick, Appeal Division, which awarded permanent alimony (13 M.P.R. 524); and its judgment was now upheld by this Court (*per* the Chief Justice and Kerwin and Hudson JJ.; Rinfret and Crocket JJ. dissenting as to said award in this case).

*PRESENT:—Duff C.J. and Rinfret, Crocket, Kerwin and Hudson JJ.

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Per Kerwin J.: Respondent was entitled to alimony unless some legal ground may be found upon which to base a refusal. Any discretion that may have been vested in the trial judge is a judicial discretion and the mere fact that he determined not to grant alimony does not absolve appellate courts from examining the record to see if that discretion was properly exercised. On the facts shown by the evidence, respondent was not disentitled to alimony.

Per Hudson J.: Plaintiff is entitled to alimony on the grounds stated by Le Blanc J. in the Appeal Division (13 M.P.R. 524, at 545-552).

Per Rinfret and Crocket JJ. (dissenting): The Judge of the Court of Divorce and Matrimonial Causes has the right to refuse to award alimony to a wife upon a decree of divorce on the ground of her husband's adultery; and an appellate court is not justified in interfering with his discretion unless it plainly appears that that discretion was not judicially exercised. In the present case the trial judge's discretion was properly exercised in refusing upon the evidence to make an order for permanent alimony, and the Appeal Division was not justified in reversing his decision. (As to consideration of wife's earnings or means, especially where the parties have long lived apart, *Goodheim* v. *Goodheim,* 30 L.J. (P. M. & A.) 162, *Burrows* v. *Burrows,* L.R. 1 P. & D. 554, *George* v. *George, ibid,* p. 554, *Holt* v. *Holt, ibid,* p. 610, and *Bass* v. *Bass,* [1915] P. 17, cited. As to what does or does not justify in law a wife in leaving her husband's home, *Currey* v. *Currey,* 40 N.B. Rep. 96, *Hunter* v. *Hunter,* 10 N.B. Rep. 593, *Evans* v. *Evans,* 1 Hagg. Cons. 35, and *Russell* v. *Russell,* [1897] A.C. 395, cited).

APPEAL from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), which (Baxter C.J. dissenting), reversing the judgment of Grimmer J., Judge of the Court of Divorce and Matrimonial Causes, awarded to the present respondent (who had been granted a decree of divorce) permanent alimony to be paid by her husband, the present appellant. Special leave to appeal to the Supreme Court of Canada was granted (subject to terms) by the Appeal Division.

C. J. Jones K.C. for the appellant.

J. J. F. Winslow K.C. for the respondent.

THE CHIEF JUSTICE—I would dismiss the appeal with costs.

The judgment of Rinfret and Crocket JJ. (holding that there was jurisdiction in the New Brunswick Court of Divorce and Matrimonial Causes to award permanent alimony, but dissenting on the ground that the judgment of

(1) 13 M.P.R. 524; [1939] 2 D.L.R. 622.

the judge of that court in refusing to grant it in this case should not have been reversed by the Appeal Division) was delivered by

CROCKET J.—On December 6th, 1937, Mr. Justice Grimmer, sitting as Judge of the Court of Divorce and Matrimonial Causes of the Province of New Brunswick, at the suit of the respondent granted a decree dissolving the respondent's marriage to the appellant, which had been solemnized on July 10th, 1907, on the ground of adultery, the appellant not having appeared or defended the action.

Thereupon she filed a petition for an order for permanent maintenance or alimony, which, after an answer had been filed by the appellant, came on for hearing before the learned judge in May, 1938. The appellant himself gave no evidence on this hearing; only the respondent and one other witness in her behalf gave evidence. His Lordship, having taken the matter under consideration, later gave judgment refusing the prayer of the respondent's petition on the ground that no cruelty, force or coercion had been exercised by her husband to justify her in leaving him, as she did, in 1928, and that she was quite able to support herself, as she had done for more than eight years before she brought her action for divorce.

The respondent appealed from this judgment to the Appeal Division of the Supreme Court. On the hearing of this appeal, the Appeal Division remitted the case to the trial judge "for hearing of evidence that might have been adduced at the trial." In pursuance of this order the case again came before the learned trial judge when both parties were represented by counsel. His Lordship, commenting upon the terms of the order of the Appeal Court, said he did not know what his position was exactly. "There is a judgment," he said,

> which is *res judicata*. Whether that is to be wiped out and we are to go on *de novo* or just where I am at I do not know. There is nothing in the order of the Court—it is remitted to the judge to hear evidence that might have been adduced at the trial and evidently was not adduced. What I am to do is to take evidence; whether we are to begin in the middle of the previous proceedings, at the beginning of it or at the foot of it, revoke or cancel the judgment and begin *de novo* I do not know.

Counsel for the respondent then proceeded to examine the respondent, who was subjected to a long cross-examination by counsel for the appellant. The appellant was then

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sworn and examined by his counsel and cross-examined by counsel for the respondent. Two other witnesses were also examined. No further judgment appears to have been given in the Court of Divorce, but the evidence taken on the further hearing before the trial judge, having been reported to the Appeal Division, the case was re-argued there in February, 1939, with the result that the appeal was allowed and judgment entered (*per* LeBlanc and Harrison, JJ., Baxter, C.J., dissenting) for the appellant, ordering the respondent to pay to the appellant the sum of $40 per month during the lifetime of the appellant.

It is from this judgment that the appeal now comes before us.

Two main grounds were urged in support of the appeal: first, that the New Brunswick Court of Divorce and Matrimonial Causes possesses no jurisdiction on the granting of a decree for divorce *a vinculo matrimonii* to award permanent alimony or maintenance; and, second, that, if it does possess such jurisdiction, it lies entirely in the discretion of the judge of that court to award or to refuse it on granting a decree at the suit of the wife, and that there is nothing to indicate that in refusing it in the present case he did not exercise that discretion judicially.

As to the first ground, the origin of the jurisdiction of the New Brunswick Court of Divorce and Matrimonial Causes is found in an Act of the General Assembly of that province, cap. 5, 31 George III (1791), intituled "An Act for regulating Marriage and Divorce, and for preventing and punishing Incest, Adultery, and Fornication." Sec. 5 of that Act provided that

> all causes, suits, controversies, matters, and questions, touching and concerning Marriage, and contracts of Marriage, and Divorce, as well from the bond of matrimony, as divorce, and separation, from bed and board, and alimony, shall, and may be heard, and determined, by, and before the Governor, or Commander in Chief of this Province, and His Majesty's Council,

and constituted the Governor or Commander in Chief and Council aforesaid or any five or more of the said Council together with the Governor or Commander in Chief as President, "a Court of Judicature, in the matters and premises aforesaid, with full authority, power, and jurisdiction, in the same."

Sec. 9 of that Act provided that the causes of divorce from the bond of matrimony and of dissolving and annulling marriage are and shall be frigidity, or impotence, adultery, and consanguinity within the degrees prohibited in and by an Act of Parliament made in the thirty-second year of the reign of Henry VIII, intituled "An Act for marriages to stand, notwithstanding precontracts," and no other causes whatsoever.

Shortly after this Act came into force the Court of the Governor and Council promulgated a number of practice and procedure rules, applying to all citations, libels, answers, their service, filing, etc. These rules applied to all divorce suits alike, whether for dissolution of the bond of matrimony, for separation from bed and board, or for annulment. The Court of the Governor and Council continued to exercise the jurisdiction vested in it by this Act until the year 1860, when an Act was passed by the Legislature of the Province, cap. 37 of 23 Vict., constituting a new Court of Record under the name of the Court of Divorce and Matrimonial Causes, and transferring to it "all jurisdiction now vested in or exercisable by the Court of Governor in Council" under the authority of the first-mentioned statute

in respect of suits, controversies and questions concerning marriage, and contracts of marriage, and divorce, as well from the bond of matrimony as divorce and separation from bed and board, and alimony.

The Act of 1860 was intituled "An Act to amend the Law relating to Divorce and Matrimonial Causes." It provided that the Governor in Council should appoint one of the Judges of the Supreme Court to be the judge of the newly established court, and that he should have power and authority to hear and determine all causes and matters cognizable therein, subject to appeal to the Supreme Court, whose decision should be final. It provided by sec. 10 that the practice and proceedings of the said court should be

conformable as near as may be to the practice of the Ecclesiastical Court in England, prior to an Act of Parliament made and passed in the year 1857, intituled *An Act to amend the Law relating to Divorce and Matrimonial Causes in England,* subject however to the provisions of this Act, and the existing rules, orders and practice as now established in the Court of Governor and Council in this Province.

The court was empowered to make rules and regulations concerning the practice and procedure, and the forms to be

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used under the Act, and to regulate the fees payable on all proceedings, and to alter or revoke the same or any of them as may from time to time be considered necessary. It also provided that all parts of the original Act, cap. 5 of 31 George III, 1791, as were inconsistent with the provisions of the new Act should be repealed as soon as the latter came into operation on July 1st, 1860.

In 1869 further rules of practice were promulgated by the then Judge of the Court. Like those formerly promulgated by the Governor and Council, these later rules made no distinction between suits for divorce, whether for dissolution of the bond of matrimony or for divorce and separation from bed and board or for annulment, though No. 5 of these rules provided that every libel containing a claim for alimony shall state the property or income of the husband. The forms of the citation and libel will be found at pp. 249 and 250 respectively of Earle's Supreme Court Rules and it will there be observed that both the citation and the libel are made to apply to suits of divorce from the bond of matrimony for adultery.

This last Act was re-enacted as cap. 50 of the Consolidated Statutes of New Brunswick (1877) without any substantial change in any of the provisions I have quoted. The only alteration made in the Consolidation of 1877 which could have any possible bearing upon the point now under review will be found in sec. 3 requiring the practice and proceedings in the court to conform to the practice of the Ecclesiastical Court in England, whereby different words are substituted for the concluding words of sec. 10 of the original Court of Divorce and Matrimonial Causes Act. For the words

> subject however to the provisions of this Act and the existing rules, orders and practice as now established in the Court of Governor and Council in this Province

the words

> subject however to the provisions of this chapter, and such rules and orders as are now in force in the said court, and consistent with the provisions of this chapter, whether such rules and orders were made by the said court or by the Court of Governor and Council

were substituted. In addition to this change, cap. 50 of the Consolidation of 1877 did away with the declaration contained in the original Act of 1860 that the decision of the Supreme Court from any decision of the Divorce Court

should be final, and by sec. 17 declared that from any decision of the Supreme Court of the Province in such a suit an appeal

> may be made to Her Majesty in Her Majesty's Privy Council, under such rules and regulations as Her Majesty may prescribe, or to any other Court of Appeal having jurisdiction.

The provisions of both ss. 3 and 17 of the Consolidation of 1877 were re-enacted in cap. 115 of the Consolidated Statutes of the Province in 1903 and again in the Revised Statutes of 1927, without any change whatever, as were all of the provisions of the original Court of Divorce and Matrimonial Causes Act of 1860, in so far as those provisions related to the jurisdiction or powers of that court, and these enactments are still the recognized law of the Province.

Having regard to the jurisdiction of the Governor and Council in respect of the subject of Marriage and Divorce, as defined in cap. 5 of 31 George III, 1791, and the transfer of that entire jurisdiction to the Court of Divorce and Matrimonial Causes, as constituted by cap. 37 of 23 Vict., and to the fact that this jurisdiction has been exercised by the latter court under rules of practice and procedure, promulgated by the judge thereof as well as by the original Court of the Governor and Council, for now nearly 80 years, both in suits for dissolution from the bond of matrimony, as well as for divorce from bed and board, without any distinction being discoverable either in the provisions of the original Act or of the Act of 1860 and its re-enactments as to the application of the court's express jurisdiction over alimony to both classes of divorce, I find it impossible to assent to the contention that it was the intention of these Acts that the court should not have the power to award alimony except upon a decree for divorce *a mensa et thoro* as in the Ecclesiastical Courts of England prior to the enactment of the English Court of Divorce and Matrimonial Causes Act of 1857. Prior to the last mentioned Act the Ecclesiastical Courts had no power to grant any decree for a divorce *a vinculo matrimonii*. This could be done only by a special Act of the Parliament of Great Britain and Ireland, which, of course, possessed the power to grant or withhold permanent alimony or maintenance to a petitioning wife in its discretion, according to the circumstances of the particular case dealt with.

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When "The Court for Divorce and Matrimonial Causes" was established in England in 1857 and invested by 20 & 21 Vict., c. 85, with jurisdiction to dissolve marriages upon any of the grounds specified in sec. 27, as well as with jurisdiction to pronounce decrees for judicial separation (but not for divorce *a mensa et thoro,* though providing that a decree for a judicial separation should have the same force and the same consequences as a divorce *a mensa et thoro* then had), and all other jurisdiction formerly exercisable by the Ecclesiastical Courts of England, except in respect of marriage licences, the newly established court was empowered, "if it shall think fit, on any such decree" to order that the husband should to its satisfaction

> secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable,

and also upon any petition for dissolution of marriage to make interim orders for payment of money by way of alimony or otherwise as it would have in a suit instituted for judicial separation. (See sec. 32 of 20 & 21 Vict., c. 85).

It is pointed out in Browne & Watts on Divorce (10th ed.), 1924, in its chapter on Alimony and Maintenance that the English Divorce Court as established in 1857 derived its power to order alimony—whether *pendente lite* or permanent—in cases other than suits for dissolution, from sec. 6 of 20 & 21 Vict., ch. 85, by which all jurisdiction then vested in the Ecclesiastical Courts in respect of all causes, suits and matters matrimonial, including suits of nullity of marriage, was transferred to the Divorce Court. So that it would appear that even the Ecclesiastical Courts, before the transfer of their jurisdiction to the English Divorce Court, were empowered to award alimony, not only to the petitioning or respondent wife on decreeing a separation from bed and board in the case of a still subsisting marriage, but to award alimony to the *de facto* wife upon a decree declaring her marriage to have been null and void *ab initio,* and that this jurisdiction passed to the English Court for Divorce and Matrimonial Causes in virtue of sec. 6 of the Act of 1857. How then can it be held that "alimony" as used in the New Brunswick Acts of 1791 and 1860 must be confined to an award

made to a woman who still maintains her status as wife in a suit for a divorce *a mensa et thoro*? Assuming, however, that that is the true interpretation of the word "alimony," as applicable to the Ecclesiastical Courts of England, or to the English Court for Divorce and Matrimonial Causes, it is quite another matter to say that the word carries the same meaning in the New Brunswick Acts referred to. If that were so, the New Brunswick Court would be without jurisdiction upon or after pronouncing a decree either for dissolution or nullity of any marriage to make provision in any circumstances for the support or maintenance of the petitioning or respondent wife. As I have already pointed out, the existing New Brunswick Court of Divorce and Matrimonial Causes derives its jurisdiction to dissolve or annul marriages, as well as to decree separation from bed and board, and alimony, from the original Act of 1791, which makes no reference whatever to the Ecclesiastical Courts of England, and the requirement of the present Act that the practice and proceedings of the Court shall be conformable as near as may be to the former practice of the Ecclesiastical Court in England before the enactment of the English Divorce Act has no application where the provisions of the New Brunswick Act or any rules or orders, whether made by the existing Court or the original Court of Governor and Council, otherwise provide.

The jurisdiction of the New Brunswick Court of Divorce and Matrimonial Causes to award alimony upon the granting of a decree for the dissolution of marriage on the ground of adultery was never questioned until it was challenged in the Appeal Division upon an appeal from a decree dissolving the marriage of one MacIntosh, at the suit of his wife. That case was tried before me during my term of office as Judge of the Court of Divorce and Matrimonial Causes. While granting the petitioning wife the decree prayed for, I refused to grant permanent alimony to her in the special circumstances of the case (1). In the Appeal Court the respondent's counsel, among other grounds, raised the point that the trial court had no jurisdiction to grant permanent alimony or maintenance in cases brought for the dissolution of marriage. The Appeal

(1) *MacIntosh* v. *MacIntosh*, (1927) 54 N.B. Rep. 145, at 145-151.

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Court (1) unanimously refused to interfere with the discretion exercised by the trial judge in refusing alimony, but, in view of the far-reaching effects which a decision sustaining the contention of the respondent's counsel that the Divorce Court possessed no power to grant permanent alimony in any suit for the dissolution of marriage would have, not only upon future litigation, but upon cases where alimony had been granted in actions of divorce for adultery, decided to give judgment upon that question. White, J., in delivering the judgment of the court said (2):

> It is difficult to suppose that the Legislature, in enacting that adultery should be a ground for dissolution of the matrimonial bond, intended to leave the guilty husband in the full enjoyment of the property obtained from his wife by marriage, and at the same time to relieve him from all liability to provide by alimony for his wife's maintenance. If that was the intention of the Legislature, the result would be that the wife could only obtain a divorce for adultery by completely impoverishing herself. I cannot believe that such was the intention of the Act.

Such being the construction which the New Brunswick Court of Divorce and Matrimonial Causes has consistently placed upon the enactment from which it derives its jurisdiction ever since its constitution in the year 1860, as an examination of its records by a former registrar of the court disclosed before the unfortunate destruction of many of them in the year 1936, and the pronouncement of the Appeal Division in the *MacIntosh* case (1) in 1927 having been since accepted as deciding the question of the jurisdiction of the New Brunswick Divorce Court to award permanent alimony or maintenance in suits for dissolution from the bond of matrimony on the ground of adultery, we should hesitate, even if the language of the enactment in question in connection with other relevant provisions of the Act and the rules of court made thereunder were such as to make the point doubtful, to now place a different construction upon it. So far as I am concerned, I cannot perceive how any other construction than that upon which the New Brunswick Divorce Court has always acted could reasonably be placed upon the jurisdiction, which the Legislature conferred upon it in respect of suits for divorce from the bond of matrimony. As Lord Hailsham, L.C., considering an appeal from a judgment of the Court of Appeal to the House of Lords in the case of *Hyman* v.

(1) (1927) 54 N.B. Rep. 145. (2) 54 N.B. Rep. at 162.

Hyman (1), in which a decree for dissolution of marriage had been granted by the English Court for Divorce and Matrimonial Causes on the ground of the husband's adultery, said (2):

> The power of the Court to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree such a dissolution.

Lord Buckmaster in the same case, said that the phrase "alimony or maintenance," as used in the English Divorce Act of 1857 and its amendments, was in his opinion "a legal pleonasm rather than a legal exactitude."

As to the second ground, it cannot, I think, be questioned that the Judge of the Divorce Court has the right, if he sees fit to exercise it, to refuse to award alimony to a wife upon a decree dissolving her marriage on the ground of her husband's adultery, and that an Appeal Court is justified in interfering with the trial judge's discretion only when it plainly appears that that discretion was not judicially exercised. As already pointed out, the English Court for Divorce and Matrimonial Causes was empowered by sec. 32 of 20 & 21 Vict., cap. 85, to order alimony or maintenance on such a decree only "if it should think fit," and, if it should choose to award any alimony at all, it was required to have regard to the fortune and ability of the husband, as well as to the conduct of the parties, in fixing the amount it should deem reasonable in the circumstances It was in no way fettered in suits for dissolution by the principles or rules upon which the Ecclesiastical Courts had formerly acted, even with regard to interim orders for the payment of alimony *pendente lite,* as it was in all other suits, in respect of which the jurisdiction of the Ecclesiastical Courts was transferred to it, and whose decisions were consequently supposed to be binding upon it.

In 1861, however, in *Goodheim* v. *Goodheim* (3), Sir Cresswell Cresswell, sitting in the Court for Divorce and Matrimonial Causes as Judge Ordinary, and dealing with a petition for alimony *pendente lite* and the contention put forward in behalf of the petitioning wife that her earnings ought not to be taken into consideration in awarding alimony, inasmuch as the Ecclesiastical Courts never

(1) [1929] A.C. 601. (2) At p. 614.
(3) (1861) 30 LJ. (P. M. & A.) 162.

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did so, pointed out that in questions of alimony the Ecclesiastical Courts always acted on the assumption that the wife had nothing and the husband everything. "Such a principle," he said,

> is inapplicable where the wife is actually earning money, as alleged in the answer to the petition. If the husband were earning a salary of £100 a year as a tutor in a family, and the wife were earning an equal salary as a governess in another family, it would be absurd to hold that alimony should be awarded to her, without taking her income into consideration.

On these grounds he declined to make any order for alimony *pendente lite*. And this, notwithstanding the express provision of sec. 22 of the *Divorce and Matrimonial Causes Act* of 1857, that in all suits and proceedings, other than proceedings to dissolve any marriage, the said court

> shall proceed and act and give relief *on principles and rules* which in the opinion of the said court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act.

It should be noted in this connection that sec. 12 of the New Brunswick Court of Divorce Act, as it now appears in cap. 115 of the R.S.N.B., 1927, under the heading of "procedure," that that section does not require the New Brunswick Court to "proceed and act and give relief on principles and rules," which shall be conformable as near as may be to the *principles and rules* on which the Ecclesiastical Courts of England formerly proceeded and acted, but that

> the *practice and proceedings* of the court shall be conformable, as near as may be, to the practice of the Ecclesiastical Court in England prior to the enactment of the English *Divorce and Matrimonial Causes Act,* and then,
>
> subject however to the provisions of this chapter, and such rules and orders as are now in force in the court, and consistent with the provisions of this chapter, *whether such rules and orders were made by the court or by the said Court of Governor in Council.*

Rule 66 of the rules of that court expressly provides that the Judge upon an application for maintenance shall make such order *as he shall think fit,* though the Judge of the court before the promulgation of the said rule had always had the right to grant or refuse alimony or maintenance, either *pendente lite* or permanent, in virtue of the transfer

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to it of the "full authority, power and jurisdiction" of the Court of Governor and Council, and of the provisions of the Act of 1860, constituting the present court, as has already appeared.

The principle laid down by Sir Cresswell Cresswell in the *Goodheim* case (1) in 1861 has ever since been consistently followed by the courts of England in respect of alimony *pendente lite*.

In *Burrows* v. *Burrows* (2)—a case in which the parties had been living separate for several years and the wife admitted that she lived with her son and acted as his housekeeper and that he allowed her £30 a year—Lord Penzance, sitting as Judge Ordinary, refused to make an order for alimony *pendente lite* in a suit by a wife for judicial separation on the grounds of adultery and cruelty.

In *George* v. *George* (3), in the same volume of the Law Reports, in which it was proved that the wife, who was suing for dissolution of marriage, had been living separate and apart from her husband for several years, was in service and received £14 a year wages, besides being provided with board and lodging, Lord Penzance said:

> The wife is able to support herself by means of her own exertions, and she has long lived apart from her husband without an allowance. If I were to allot alimony, I should be placing her in a better position than she was in before she instituted this suit. I shall therefore make no order for alimony.

In the same volume of the Law Reports at p. 610 will be found another case, *Holt* v. *Holt* (4)—where the husband was suing for dissolution of marriage—in which Lord Penzance said:

> I think the husband ought not to be called on to pay alimony for the time during which the wife had other means of support. * * * The ground upon which the court proceeds is, that she was living in such a manner that she had means of support independent of her husband.

In *Bass* v. *Bass* (5)—which was an appeal from an order of Bargrave Deane, J., suspending an order for alimony made by the registrar of the court, and giving the husband leave to cross-examine the wife on her affidavit in support of an application for alimony *pendente lite* in

(1) 30 L.J., P.M. & A. 162. (2) (1867) L.R., 1 P. & D. 554.
(3) (1867) L.R. 1 P. & D. 554.
(4) (1868) L.R. 1 P. & D. 610. (5) [1915] P. 17.

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a suit brought by her husband for divorce on the ground of her adultery, Kennedy, L.J., in his reasons in the Court of Appeal said:

> Turning now to the question of alimony, it appears to me to be also clear that this question depends upon the possession or non-possession by the wife of sufficient means of support; and it is only right that, if the husband is called upon to provide maintenance by way of alimony, it should be open to him to prove, if he can, that the wife has no need of that alimony, the quantum of which, if granted, will depend on such considerations as the income of the husband. The question whether the wife has sufficient means of support is the main issue on which the grant of alimony depends. * * * It may be that this source [the respondent's means of support] is the co-respondent, but it is impossible not to accede to the argument that the husband must have an opportunity before the registrar to show that his wife has sufficient support.

Swinfen Eady, L.J., said he was of the same opinion. "The husband," he added,

> objects to paying it [alimony *pendente lite*] on the short ground that the wife has sufficient means of support independently of him. It cannot be disputed that, if that be so, it would not be proper to order the husband to pay alimony *pendente lite*, and the authorities have gone so far as to decide in terms in *Madan* v. *Madan* (1), a case stating the practice of the court and decided so long ago as 1867, that "if the husband can prove that his wife has sufficient means of support independent of him, even although they be derived from the co-respondent, she will not be entitled to an allotment of alimony," the principle being that maintenance should be provided by the husband for his wife, but that if she has it already, whether from the co-respondent or any one else, the husband ought not to be ordered to pay alimony.

Browne & Watts (10th ed., 1924, at p. 148) cites these and other cases as authority for its statement that:

> In allotting alimony *pendente lite* the wife's earnings and power of maintaining herself must be taken into consideration, especially where the parties are very poor.
>
> Where the husband and wife have been living apart for many years, and the wife has been supporting herself, and is still able to do so, alimony *pendente lite* will not be allotted, except under special circumstances.
>
> Where the wife has sufficient means of support independent of the husband, even although they be derived from the co-respondent, she will not be entitled to an allotment of alimony.

That this long established principle of the English courts was one of the reasons of the learned trial judge's refusal to award permanent alimony or maintenance in the case at bar cannot be doubted. He explicitly found upon the petitioner's own evidence that she lived separate and apart from her husband for a very long time—nearly nine years—and was quite able to support herself and was still

(1) (1867) 37 L.J. (P. & M.) 10.

quite able to do so, and that no special circumstances were presented by her disclosing any change in her condition or position in life, and added that, while he might be in error, and subject to correction, he understood

> the rule of this Court that has been followed for a very long time is that when husband and wife have been living separate and apart for many years and the wife has been supporting herself and is still able to do so, that help such as is asked for in this case will not be allotted except under special circumstances.

In fact he cited *George* v. *George* (1), above referred to.

This, however, was not his only reason. He coupled with it the fact that the petitioner had unnecessarily and unjustifiably left her husband's home in November, 1928, without any cruelty, force or coercion having been exercised by her husband to compel her to leave him and that she lived quite independently of him without even asking for any aid or assistance from him during the nearly nine years which intervened before filing her petition for divorce.

His Lordship, in finding that the petitioner was not justified in separating herself from her husband in 1928, undoubtedly was acting upon the authority of two well known decisions of the Supreme Court of New Brunswick, which firmly established in that Province the long recognized rule of the Ecclesiastical Courts of England, as well as of the House of Lords, that no conduct, which falls short of legal cruelty, will be recognized by the courts as justifying the separation of husband and wife, and that to constitute such legal cruelty there must be "either actual bodily hurt or injury to health or such acts or circumstances as are likely to produce an apprehension of such hurt or injury." See judgment of Barker, C.J., in *Currey* v. *Currey* (2), where he said: "This is substantially the rule acted upon by this Court in *Hunter* v. *Hunter*" (3).

In both these New Brunswick cases there was evidence, not only of hopeless incompatibility, of mutual dislike, aversion and hatred between the parties and of rude and abusive language, but of actual physical violence used by the husband against the wife in the heat of passion, though not causing actual bodily harm; yet the court in the first case unanimously held that in the circumstances, as it and the trial judge viewed them, there was no such cruelty as would justify a court in decreeing separation.

(1) (1867) 37 L.J. Mat. 17. (2) (1910) 40 N.B. Rep. 96, at 139.
(3) (1863) 10 N.B. Rep. 593.

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In the *Currey* case (1), nearly fifty years later, the New Brunswick Supreme Court, while dividing 3-3 upon the question of whether the husband's conduct was such as to be likely to produce an apprehension of such bodily hurt or injury to health, if the wife continued to live with him, unanimously held that the learned trial judge (McKeown, J.) was right in accepting *Russell* v. *Russell* (2), in holding that the judgment of Lord Stowell in *Evans* v. *Evans* (3) correctly laid down "the rule by which the Divorce Court must be governed as to what in point of law constituted legal cruelty."

For my part, in view of these decisions, by which he was bound, I cannot perceive how it can properly be said that the learned trial judge in the present case, in finding that upon the evidence adduced before him there was no necessity or justification for the petitioner leaving her husband's home and continuing to live quite independently of him for a period of nearly nine years before the institution of her suit for divorce, did not judicially determine that question.

The principles so firmly established by the powerful reasoning of Lord Stowell, sitting as the judge of the Consistory Court of London in the *Evans* case (3) in 1790, that there must be danger to life, limb or health, bodily or mentally, or a reasonable apprehension of it, is still the recognized law of England, as it is of the Province of New Brunswick. Hard and inhumane as it may appear to the modern mind, the Courts of England have to this day consistently rejected repeated appeals to change it for the sake of the happiness of the parties in particular suits. More than one hundred years later the House of Lords, by a majority of the Law Lords (Lords Herschell, Watson, Macnaghten, Shand and Davey) in the celebrated *Russell* case (2) distinctly reaffirmed it, notwithstanding the passage of the Divorce Act of 1857, by which it was urged a new ground for separation and a new practice had been created, and refused to accept the proposition that the long recognized rule should be enlarged so as to include such conduct, either on the part of the wife or on the part

(1) (1910) 40 N.B. Rep. 96 at 139. (2) [1897] A.C. 395.
(3) (1790) 1 Hagg. Cons. 35.

of the husband, as renders their future marital cohabitation hopeless and impossible. Lord Herschell in his reasons said (1):

> But in laying down a proposition of law on such a subject as that with which your Lordships are dealing, it is necessary to keep in view the consequences, and not to contemplate only its operation in the particular case.

And further, that the extension of the rule in the direction contended for

> would afford no sort of guide, but would, in my opinion, unsettle the law and throw it into hopeless confusion. Views as to what is possible, or in this sense would differ most widely. Though in some instances most men would, no doubt, concur in their opinion, yet, speaking generally, the determination of the case would depend entirely upon the particular judge or jury before whom it might chance to come. Not a few would think that the discharge of the duties of married life was impossible whenever love had been replaced by hatred, when insulting and galling language was constantly used, when, in short, the ordinary marital relations no longer prevailed. * * * I have no inclination towards a blind adherence to precedents. I am conscious that the law must be moulded by adapting it on established principles to the changing conditions which social development involves. But marital misconduct is unfortunately as old as matrimony itself. Great as have been the social changes which have characterized the last century in this respect, there has been no alteration —no new development. I think it is impossible to do otherwise than proceed upon the old lines.

In my opinion, the learned judge of the Court of Divorce and Matrimonial Causes properly exercised the discretion, which the law vested in him, in refusing upon the evidence adduced before him to make an order for permanent maintenance, and the Appeal Division was not justified in ignoring his decisison and itself directing the order prayed for.

The appeal, while failing on the first ground, should be allowed on the second, the judgment of the Appeal Court set aside and that of the trial judge restored.

No order should be made as to costs.

KERWIN J.—I agree with my brother Crocket that the New Brunswick Court of Divorce and Matrimonial Causes possesses jurisdiction to award permanent alimony (or maintenance) when granting a decree of divorce *a vinculo matrimonii*. This being so, I am of opinion that the petitioner, respondent, was entitled to alimony unless some

(1) At p. 460.

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legal ground may be found upon which to base a refusal. Any discretion that may have been vested in the trial judge is a judicial discretion and the mere fact that he determined not to grant alimony does not absolve appellate courts from examining the record to see if that discretion was properly exercised.

The evidence in the present case is not very satisfactory because, in my view, the trial judge refused to permit certain questions, put by counsel for the petitioner, to be answered by her. I agree, however, with the majority of the Appeal Division of the Supreme Court of New Brunswick that there is sufficient evidence to show that the petitioner is not disentitled to alimony. On the point as to her means, the evidence is ample to show that the petitioner really managed to subsist through the assistance, if not the charity, of her relatives, and the mere fact that for some years she did not ask the appellant to maintain her surely cannot disentitle her to the support she now requires. The evidence is also sufficient to show that the petitioner did not desert the respondent; on the contrary, to my mind, it shows that she was justified in leaving him even though she would not at that time be entitled to a divorce.

The appeal should be dismissed with costs.

HUDSON, J.—I have had the privilege of reading the judgment in this appeal prepared by my brother Crocket and agree with his view that the Court of Divorce and Matrimonial Causes of New Brunswick has jurisdiction to grant alimony under the circumstances of this case.

After carefully perusing the evidence and the record of the other proceedings in the action, I have come to the conclusion that the plaintiff is entitled to alimony on the grounds stated by Mr. Justice LeBlanc in the Court below (1).

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Jones & Jones.*

Solicitor for the respondent: *D. R. Bishop.*

(1) 13 M.P.R. at 545-552.