G. (HUSBAND) (COUNTER-PETITIONER)..... APPELLANT; 1943

AND *May 17, 18. *Oct. 5.

G. (WIFE) (RESPONDENT)..... RESPONDENT.

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

Husband and wife—Divorce—Law of New Brunswick—Divorce sought on ground of respondent's adultery—Decree granted, notwithstanding petitioner's adultery—Exercise of trial judge's discretion.

Under the law of New Brunswick (Statutes of New Brunswick, 1791, c. 5, and 1860, c. 37, mainly referred to), the Court of Divorce and Matrimonial Causes of that Province has jurisdiction to grant a divorce from the bond of matrimony on the ground of adultery of the petitioner's spouse, and the fact that the petitioner has himself (or herself) committed adultery is not an absolute, but only a discretionary, bar to granting the decree. (The law relating to divorce, in England and in New Brunswick, historically discussed, with regard particularly to the latter point.)

The judgment of Baxter C.J., Judge of the said Court (16 M.P.R. 191), granting a husband's cross-petition for divorce on the ground of his wife's adultery, notwithstanding an act of adultery by the husband (subsequent to his wife's adultery), which judgment was reversed by the Appeal Division, N.B. (16 M.P.R. 405), was restored; this Court holding that the law was as stated above; and that there appeared to be no error in principle in the considerations underlying the exercise by the trial Judge of his discretion, and therefore there was no justification for reversal of his decision.

*PRESENT:—Duff C.J. and Davis, Kerwin, Hudson and Rand JJ.

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APPEAL by the cross-petitioner (husband) from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), allowing (Grimmer J. dissenting) the appeal to that Court of the present respondent (wife) from the judgment of Baxter C.J., Judge of the Court of Divorce and Matrimonial Causes (2), granting the prayer of the counter-petitioner (husband) and a decree *nisi* for dissolution of marriage.

The present respondent (wife) petitioned in the Court of Divorce and Matrimonial Causes, Province of New Brunswick, for divorce from her husband, the present appellant. The latter counter-petitioned for divorce. The ground in each case was alleged adultery of the other party. The parties were married in and were domiciled in said province.

The trial Judge, Baxter C.J., dismissed the wife's petition but granted the husband's counter-petition. He found that the wife committed adultery, which was prior to an admitted act of adultery by the husband. Under all the circumstances in question and in the exercise of his judicial discretion, which he held he had the power to exercise, he gave judgment to the effect above stated.

The wife appealed to the Supreme Court of New Brunswick, Appeal Division, from that part of the judgment of the trial judge whereby decree *nisi* was ordered to be entered in favour of the husband on his counter-petition.

The said appeal was allowed by the Appeal Division, which ordered that the decree *nisi* for the dissolution of the marriage, entered for the husband, be set aside. Fairweather J. held that, the adultery of both parties having been proved, the trial judge had no jurisdiction to grant a divorce to either; and further that, assuming that a discretion was vested in the trial judge enabling him, while refusing to grant relief to a guilty wife, to grant relief to an admittedly guilty husband, the discretion had not been properly exercised upon the facts proved; that the evidence did not support the trial judge's finding that a distinction could be drawn between the parties; they were equally at fault and neither was deserving of the relief prayed for. LeBlanc J. agreed with Fairweather J. in the result. Grimmer J., dissenting, held that the trial

(1) 16 M.P.R. 405; [1942] 4 D.L.R. 451.
(2) 16 M.P.R. 191; [1942] 1 D.L.R. 633.

judge had the power of judicial discretion; that he had properly exercised his power; and that the Appeal Division should not interfere; he also agreed with the trial judge's reasons.

Leave to appeal to the Supreme Court of Canada was granted to the husband by the Supreme Court of New Brunswick, Appeal Division.

J. J. F. Winslow K.C. and *H. F. G. Bridges* for the appellant.

W. P. Jones K.C. for the Attorney-General of New Brunswick.

R. D. Mitton for the respondent.

The judgment of the Chief Justice and Rand J. was delivered by

RAND J.—The question raised in this appeal is whether, under the law of New Brunswick enacted in 1791, in a suit for divorce *a vinculo* on the ground of adultery, a recrimination of that offence is an absolute bar to a decree. Baxter C.J. at the trial held that it was not. On appeal, Fairweather J., with LeBlanc J. concurring, took the contrary view. Grimmer J., dissenting, agreed with the Chief Justice. The point has not arisen before and it calls for an examination of both the law of divorce as it was in England at the time of the settlement of New Brunswick and the extent and form, if at all, in which the plea is to be presumed now to be in force in that province.

Historically, the regulation in England of the personal rights and obligations arising out of marriage, from the Norman Conquest until the middle of the nineteenth century, was in large measure accepted as lying within the moral and spiritual discipline of the church. It was part of the wider administration of that discipline by the ecclesiastical courts throughout Europe, in the course of the development of which there had been built up a system of rules and practices based upon the Scriptures, the civil law, the pronouncements of church councils, and papal decretals. This, in England, became the body of Canon law, not as it was generally accepted on the continent, but as it was adopted and carried into practice by her spiritual tribunals, and from time to time amended or otherwise

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dealt with by the English Parliament. It was the law administered by an ecclesiastical judiciary, but dealing with civil rights of the people of England and, to the extent recognized by the civil courts or Parliament, constituting a part of the public law of that country.

From the end of the sixteenth century, that law, as it had to do with the control and severance of matrimonial cohabitation, can be considered as being clearly settled. Expressed in terms of the jurisdiction exercised by the church courts, there were the remedies of declaration of nullity, restitution of conjugal rights, and divorce *a mensa et thoro*. The first was based upon the assumption of an impediment to the formation of the vinculum of marriage; the second arose from a conception of the duty of married persons to cohabit and the inherent right of the church, in its pastoral responsibility, to enforce that duty even to the extent of coercive sanctions; and the third involved, under the same view of responsibility, an intervention designed to meet those special cases in which a temporary or indefinite interruption of cohabitation became necessary.

It is the last of these with which we are concerned. A divorce *a mensa et thoro,* so called, was a sentence of the court, made upon proof of adultery or cruelty, suspending the duty of cohabitation in the interest of the innocent party. The marriage vinculum remained unaffected. The decree in its usual form and certainly in intent looked to a reconciliation of the parties and, upon that happening, the decree, with or without such a provision, became *functus* (*St. John* v. *St. John* (1); Bishop on Marriage & Divorce, 6th Ed., Vol. 2, p. 228). There was no effect at law upon the general property rights of either party. Under the Canon law of the continent, upon the adultery of the petitioner, the decree was vacated and restitution of rights ordered.

In a suit for such a form of relief, the ecclesiastical law, in addition to absolute defences of connivance, collusion and condonation, admitted what was known as *compensatio criminis* or, as it is now called, recrimination, as a plea in bar to the petition. The rule was taken from the civil law, but its precise legal principle is not clear. To a suit based on adultery, a recrimination only of adultery was allowed; neither cruelty, which itself was a ground for

(1) (1805) 11 Vesey Jr. 525.

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a decree, nor wilful desertion was admitted. In a suit based on cruelty, recrimination of adultery was allowed. There could also be recrimination against recrimination, or to any such plea condonation might be set up. From its background of an *a priori* logic, this procedure inevitably took on a mechanical characteristic. It tended to disregard the actual elements of conduct involved and to make use of categories of behaviour as if the controversy were a contest between concepts rather than a problem between human beings: *Constantinidi* v. *Constantinidi* (1).

The cases contain many references to the nature of the recriminatory plea. It is a "set-off"; it is "*eodem delicto*"; it is "*par delictum*"; it is analogous to a breach of contract; it is a spiritual offence, and the suitor should come into court with clean hands. But in its application there was no weighing of the moral force or strength of the act upon which it was based, nor any examination of that act as it was part of an interplay in the common life of two persons. In the language of *Lempriere* v. *Lempriere* (2):

> And the more so because this doctrine of *compensatio criminis* is not a wholly satisfactory one, or capable of being logically adopted as a guide in giving or refusing relief. It is said that the cruelty of the husband will not justify the adultery of the wife; but so neither will his own adultery, and yet this latter has ever been held a bar. Again, what is *par delictum?* What standard has the Court for the measure of matrimonial offences, except the punishment with which they are visited, or the relief to which they give a title?

Underlying this, as well as the entire law of divorce as administered by the ecclesiastical tribunals, were two fundamental conceptions: that marriage was a sacrament and that it was indissoluble. From the former came principally associations of criminality with moral transgressions. From the latter arose the necessity in actual experience for the device of an impediment *ab initio* leading to annulment; and from it also in part came the justification for both the notion of episcopal supervision of the marital state and the means adopted to compel the observance of its duties.

From this sketch of the background in doctrine and practice of the ecclesiastical law of divorce, we get a view of the function played by recrimination in its administra-

(1) [1903] P. 246, at 254.

(2) (1868) L.R. 1 P. & D. 569, at 571.

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tion; and the question is to what extent, if any, should that practice and the principles on which it is based be admitted in this case.

The enactment of 1791 rejects the doctrine of the indissolubility of marriage. By it, marriage (apart from the fact of mutual promises) is assumed to be a social status subject to such incidents as the law may ascribe to it. The rule of recrimination was applicable in the procedure of a mechanism of legalized separation within the marriage conceived to be indissoluble and subject to an episcopal discipline. It is contended that we are bound to apply that same rule in all its rigidity to a new remedy differing both in effect and in the assumptions upon which it is based. There is no doubt that the first settlers of New Brunswick brought with them generally as their laws the established customs and usages of the common law of England. It would be difficult to exclude from this the rules and principles regulating marriage and divorce so far as they had been accepted by and incorporated into that law. The statute itself, by its resort to the vocabulary and specific remedies of that administration, impliedly imports whatever of the adopted practice may be necessary to its full scope and intent. But whether it is considered in the former or in the latter sense, the incorporation of the common law into the life of the newly settled country must be only so far as that law may be suitable to the new conditions and as specific circumstances do not imply the requirement or freedom of modification.

Now the Act of 1791 is significant by two circumstances: it creates a new general civil right to a divorce *a vinculo* not committed to the judicature of England until sixty years later; and it omits any reference to the body of rules and practices so long established in the ecclesiastical courts as those according to which the new enactment should be administered. From the fact that, early in the establishment of both the Provinces of Nova Scotia and of New Brunswick, among the first legislative measures to be passed were laws dealing with divorce, it may be assumed that this subject was among the matters of substantial public interest, and that it was so recognized by the legislature. It is, therefore, seen that not only is the doctrinal basis of the previous law rejected and the jurisdiction transferred from an ecclesiastical to a civil tribunal, but

that, by the introduction of a new and fundamentally different remedy and the significant omission of any reference to a specific juridical setting in which the law should be administered, the statute can only be taken to imply an intent that the court should be untrammelled by any other than the general rules and principles, ecclesiastical as well as civil, constituting the unwritten law of the new province.

In this conclusion I am excluding from the scope of implied adoption, either of law carried by founders or by legislative enactment, the rules and procedure more or less uniform of the British Parliament in legislative divorce. What the statute of 1791 did was to add to the body of public law of the province positive rights and remedies to be enforced by tribunals established by public law and bound by public duty. Parliament was not such a tribunal, nor was it administering, in any sense, public law. Each divorce bill ran the gamut of parliamentary vicissitude. Whatever was conceived desirable in any case, whether embodied in the bill itself or required as a collateral arrangement—such as a property adjustment or allowance —was made part of a legislative settlement. Parliament was bound by no precedent. It was at liberty at any time to change its usual practice, as it did, among other instances, in the allowance in 1886, in an Irish case, of divorce to a woman on the grounds of adultery and cruelty (Gemmill, p. 15). It was not always consistent in its requirements. From 1669 to 1749, when the first governor of Nova Scotia was commissioned, forty such bills had been passed and they were appropriately termed *privilegia*. At the highest, a petitioner could claim only a moral right to a relief that others had been accorded. The "law" of that right, and the practice in general followed, did not, therefore, constitute law which could be held to be the subject of adoption by implication from the statute of 1791 or by attraction of colonial settlement.

There are decisions of the courts of New Brunswick in which, in proceedings for divorce *a mensa* under the Act, it has been laid down that the rules of the ecclesiastical courts must be taken as governing. For instance, in *Currey* v. *Currey* (1), on appeal, Barker C.J. used the following language:

(1) (1910) 40 N.B. Rep. 96, at 139.

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As to the first point we all agree in thinking that the learned judge was right in accepting *Russell* v. *Russell* (1), as holding that the judgment of Lord Stowell in *Evans* v. *Evans* (2) correctly lays down the rule by which the Divorce Court must be governed as to what in point of law constitutes *legal cruelty,* and that if the evidence fails in establishing it the separation must be refused. According to that decision, by which we are also bound, the evidence must satisfactorily establish 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. This is substantially the rule acted upon by this Court in *Hunter* v. *Hunter* (3). And of course each case must be governed by its own circumstances.

But there the court was dealing only with the application, in a case of divorce *a mensa,* of the law of the ecclesiastical courts relating to that precise remedy.

We are then to determine from the conventions of the common law of New Brunswick what, in the light of present-day circumstances, a rule of the nature in question should be. That some such rule should be maintained seems to follow from the general principles underlying legal remedies. Although its basis has not been formulated with precision, it is essentially a refusal, by a court, of relief from obligations which a suitor has himself flouted and a refusal to hear him complain of a consequence to which his own conduct has contributed; inherent in it, also, is a recognition of the fundamental interest of the state in the maintenance of the marriage unity.

It is pertinent to observe the conceptual as well as psychological elements involved in the determination of that question as it was treated in the ecclesiastical administration. These are well indicated in the following excerpt from a pronouncement of the greatest expositor of this field of law, Sir William Scott (as he then was) (4):

> I do not find any express text, that applies to the particular case of granting a legal separation to a husband, who had remained constant to his marriage bed till after he had detected the infidelity of his wife, and retired from her society. No such favourable distinction is intimated anywhere in that system, as far as I recollect. There can be no doubt that the Canon Law acknowledged none such; the contrary flowed naturally from its peculiar doctrine of the absolute indissolubility of marriage. For the *vinculum* remaining perfectly unaffected by the adultery of either party, or by a private separation consequent thereon, the parties *remanent conjuges,* and an adultery then committed, was as direct and gross an infraction of that *vinculum* as if committed at any other period, and as such, was held equivalent to it. It was a *par delictum,* subject to the same rule of compensation, which leaves the parties to find their com-

(1) [1897] A.C. 395.
(2) (1790) 1 Hagg. C.R. 35.
(3) (1863) 10 N.B.R. 593.
(4) *Proctor* v. *Proctor,* (1819) 2 Hagg. Cons. Rep. 292, at 298.

mon remedy in common humiliation, and mutual forgiveness. It provides against the mischiefs to which a husband might be exposed by such a wife living apart, by its known doctrine, that all separations merely voluntary are totally illegal, not to be either tolerated or presumed. It acknowledges no intermediate state between a cohabitation and a formal separation. It, therefore, presumes, when it withholds its divorce of separation, that the parties return to cohabitation; all matters return to their former course, but with increased vigour; the husband and wife live again on their former footing, and there is no anticipation of separate debts, or of the probability of a spurious offspring.

On the same point, before the Royal Commission on Divorce of 1910, Lord Desart expressed himself as follows:

I have found a great deal of difficulty in forming an opinion [as to recrimination], because as King's proctor I have felt over and over again, at any rate in a considerable number of cases, that my intervention has done more harm than good.

A glance over the course of the past century shows the unmistakable change in attitudes towards these social and individual relationships. The *Divorce and Matrimonial Causes Act* of 1857, notwithstanding its asserted purpose of creating only a new jurisdiction, modified from an absolute to a discretionary bar the plea of recrimination of adultery and introduced discretionary bars for cruelty, desertion and other misconduct. The course of the exercise of divorce jurisdiction by the Canadian Parliament reflected that change in the adoption in practice of the same ground for relief for both husband and wife (Gemmill on Divorce, p. 56). In 1925 Parliament enacted *The Divorce Act,* ch. 41 of the statutes of that year, by the effect of which the plea of recrimination, even in New Brunswick, is, in the case of a petitioning wife, a discretionary bar only. In the case of *McLennan* v. *McLennan* (1), this Court held, under the law of New Brunswick, that there was jurisdiction to award alimony upon a divorce *a vinculo,* a decision which recognized the intention of the Act of 1791 to liberalize the law of divorce and to extend the field of judicial discretion. If the rule of the ecclesiastical courts were to apply unmodified, neither the grossest cruelty on the part of the husband nor his wilful desertion could be raised against his right to divorce *a vinculo: Cocksedge* v. *Cocksedge* (2); *Morgan* v. *Morgan* (3).

(1) [1940] S.C.R. 335. (2) (1844) 1 Rob. Ecc. 90.
(3) (1841) 2 Curt. Rep. 679.

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As the reasons underlying recrimination in the ecclesiastical courts in divorce *a mensa* do not obtain in the field of divorce *a vinculo,* the rule itself cannot there be held to be applicable: *Bourne* v. *Keane* (1). But, as the examination of the question has shown, the essential defect of the rule lies in its limitations and its rigidity. What is called for is a flexible means through which the relevant legal considerations can be applied; and that, in the circumstances, must be found in a judicial discretion. Such a rule, it may be added, is already the law in six provinces of the Dominion.

There still remains the question whether here that discretion was properly exercised by the trial judge. The considerations in principle, underlying that exercise, which have emerged in the course of administering the Act of 1857, in my opinion, meet the requirements of a sound judicial policy. They are indicated in the decisions mentioned in the judgment of Baxter C.J.; and in the light of them I am unable to say that the Chief Justice was clearly wrong in the view at which he arrived.

The appeal, therefore, should be allowed and the judgment of the trial Court restored without costs in this Court or in the Appeal Division.

DAVIS J.—The respondent, wife of the appellant, commenced proceedings against her husband by petition in the New Brunswick Court of Divorce and Matrimonial Causes for a divorce on the ground of adultery. The appellant counter-petitioned against his wife for a divorce on the ground of adultery. The petitions were heard together by Chief Justice Baxter, the Judge of the Court of Divorce and Matrimonial Causes, and after trial he dismissed the wife's petition but granted the husband's counter-petition. The wife did not appeal the judgment dismissing her petition but she did appeal to the Appeal Division of the Supreme Court of New Brunswick from the judgment granting her husband's petition. The Appeal Division by a majority—LeBlanc and Fairweather JJ.—Grimmer J. dissenting, allowed the appeal and set aside the decree *nisi* for the dissolution of the marriage, entered for the respondent, without costs. The husband has appealed from that judgment to this Court. Counsel for the

(1) [1919] A.C. 815.

Attorney-General of New Brunswick was heard on the argument of the appeal, as the question of the jurisdiction of the New Brunswick courts in divorce is directly in issue.

The contention of the respondent is, and it was given effect to by the majority of the Appeal Division, that the English ecclesiastical law became part of the law of New Brunswick, as well as the common law of England, and that the old ecclesiastical rule which barred the granting of a divorce where the petitioner had himself been guilty of adultery still prevails in the province of New Brunswick. The husband in this case had himself been guilty of adultery but the learned trial judge, exercising the discretion which he thought he had, granted the divorce notwithstanding. As counsel for the Attorney-General of New Brunswick pointed out, the case is of considerable importance in the province because the subject matter of divorce having by the *British North America Act, 1867,* been given into the exclusive legislative authority of the Dominion, leaves the province unable itself to deal with the matter if the majority of the Appeal Division were right in applying the old ecclesiastical rule. The main question then in the appeal is the question of the jurisdiction of the New Brunswick Court to grant the divorce without reference to the old ecclesiastical rule. A further and rather subsidiary point arises in that it is contended by the respondent that even if there was a discretion in the trial judge to grant or withhold a divorce under the circumstances, that discretion had not been properly exercised by the trial judge in this case and should have been exercised to bar the relief sought.

Mr. Justice Fairweather, who wrote the majority judgment in the Appeal Division, very carefully and at considerable length reviewed the evidence and the relevant legislation in the province of New Brunswick before and since the separation of New Brunswick from the province of Nova Scotia in 1784. He came to the conclusion that the substantive ecclesiastical law of England existing at the time the original Nova Scotia Court was constituted in 1758 for divorce must be treated in like manner as the English common law, and that both the common law and the ecclesiastical law applied to that Court; and that it followed that when New Brunswick was separated from Nova Scotia, the English ecclesiastical and the common

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law extended to the new province of New Brunswick and, except where changed by statute, have been carried down to the present time. The reasoning of Mr. Justice Fairweather was that, the ecclesiastical law being still in force in New Brunswick, the doctrine of recrimination or *compensatio criminum* of the ecclesiastical courts, which barred relief when the petitioner was himself guilty of adultery, is a valid bar in the province of New Brunswick to the granting of the divorce sought by the counter-petitioner, and that therefore the Judge of the Divorce Court of New Brunswick had no jurisdiction under the circumstances to grant the divorce to him. Chief Justice Baxter, at the trial, and Grimmer J., in the Appeal Division, took the contrary view.

In my opinion, it cannot be successfully contended that when the province of Nova Scotia was created or subsequently when the province of New Brunswick was separated from that province, the substantive law of the ecclesiastical courts of England became implanted, as did the common law of England, as part and parcel of the law of the province. But be that as it may, the ecclesiastical courts never had jurisdiction—in fact no court in England had jurisdiction until 1857—to grant a divorce *a vinculo;* prior to 1857 a decree of dissolution could only be obtained by Act of Parliament; the ecclesiastical courts were limited in this respect to suits for judicial separation or divorce *à mensâ et thoro.* When it is contended that the doctrine of the ecclesiastical courts of recrimination or *compensatio criminum* applies, it seems to me essential to recall that the doctrine did not apply to a divorce *a vinculo* because the ecclesiastical courts had no power to grant such a divorce. But in any case, in 1791 New Brunswick enacted its own local law regulating marriage and divorce, 31 Geo. III, ch. 5. By section 5 the Governor and Council were constituted, appointed and established a Court of Judicature for the province and it was enacted that suits for divorce, "as well from the bond of Matrimony, as divorce, and separation, from bed and board, and alimony, shall, and may be heard" by the court so established "with full authority, power, and jurisdiction, in the same". By section 9 of the Act, adultery was one of the causes of divorce "from the bond of Matrimony, and of dissolving, and annulling Marriage". That New Brunswick statute

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of 1791 plainly gave the court jurisdiction to grant divorces *a vinculo* on the ground, amongst others, of adultery; the jurisdiction was not restricted or qualified; and sections 5 and 9, read together, exclude the rule of recrimination. It was not until 1857 that the English Act was passed which for the first time gave the English courts jurisdiction in divorce *a vinculo*. The rule of recrimination was by that Act made applicable to divorce *a vinculo*, but it was expressly left discretionary. In 1860 New Brunswick set up its present Court of Divorce and Matrimonial Causes (ch. 37 of the Statutes of 1860) and all jurisdiction formerly vested in the court of the Governor and Council was transferred to the new court. By section 10 of that statute,

> The practice and proceedings of the said Court shall 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 one thousand eight hundred and fifty-seven, 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 important words for the present purpose are, "The practice and proceedings" of the Court are to be conformable, as near as may be, to the practice of the Ecclesiastical Court in England prior to the English Act of 1857. That section is not dealing with substantive law, but procedure, and has been dealt with by the province ever since as procedural.

In the result, in my opinion, the ecclesiastical rule of recrimination or *compensatio criminum* has no application to the law of divorce in the province of New Brunswick.

Some interesting history of the old ecclesiastical courts in England is given in the judgment of Goddard L.J., in *Blunt* v. *Park Lane Hotel* (1).

But undoubtedly the trial judge was not bound to grant the divorce sought; he had a discretionary power. That raises the second point in the appeal, whether or not the trial judge properly exercised his discretion. The majority in the Appeal Division held that the husband, appellant, on the facts of the case was not deserving of the relief prayed for and, assuming, contrary to their view, that a discretion was vested in the trial judge to grant relief,

(1) [1942] 2 K.B. 253, at 257.

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such discretion had not been properly exercised upon the facts proved in the case. It is unnecessary, in view of the very recent judgment in the House of Lords in *Blunt* v. *Blunt* (1), to extend the authorities. It is plain, I think, now from that judgment that the question is whether the exercise of the discretion was erroneous and not whether we should have exercised the discretion in the same manner as the trial judge did. In the absence of some error in principle, one court is not entitled to substitute its discretion for the discretion of another court. There was no error in principle here.

The appeal should be allowed and the judgment at the trial should be restored, without costs here or in the Court below.

KERWIN J.—The Judge of the Court of Divorce and Matrimonial Causes for New Brunswick decided that in that province the adultery of the husband is not an absolute bar to his cross-petition for divorce by reason of his wife's adultery. An appeal to the Appeal Division of the Supreme Court of the Province was allowed *per* Fairweather J., with whom LeBlanc J. concurred, while Grimmer J., dissenting, agreed with the trial judge. On this question I find myself in agreement with the conclusion arrived at by the latter.

It is unnecessary to refer to any law of Nova Scotia before the erection of the Province of New Brunswick because by chapter 2 of the Fifth Session of the First Assembly of the latter, it was enacted that no such law should be of any force or validity therein. In the same session, the Assembly passed an enactment dealing with the subject of divorce, but, whether this was reserved for the signification of His Majesty's pleasure or was disallowed, it was, in any event, repealed by chapter 5 of the same session, enacted in the year 1791.

By section 5 of this Act of 1791:—

> * * * 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:

(1) (1943) 59 Times Law Reports 315.

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

Section 9 states the grounds of divorce as follows:

> IX. And it is hereby declared and enacted, 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 King Henry the Eighth, intituled "An Act, for Marriages to stand, notwithstanding precontracts", and no other causes whatsoever.

In 1860, by chapter 37, it was provided that all jurisdiction vested in or exercisable by the Court of Governor in Council under the authority of the Act of 1791 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, should belong to and be vested in a Court of Record to be called "The Court of Divorce and Matrimonial Causes". The substance of these provisions is contained in chapter 115 of the latest revision of the statutes (R.S.N.B. 1927). By section 18 of the Act of 1860, all parts of the Act of 1791 that were inconsistent with the 1860 Act were repealed. By section 19 of chapter 50 of the Consolidated Statutes of New Brunswick of 1877, section 9 of the Act of 1791 is declared to be unrepealed, and a similar provision is contained in the subsequent consolidations and now appears as section 39 of the Revised Statutes of New Brunswick, 1927, chapter 115.

Section 10 of the Act of 1860 is as follows:

> 10. The practice and proceedings of the said Court shall 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 one thousand eight hundred and fifty-seven, 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.

In my view, it never had any bearing upon the question of jurisdiction because it mentions only "the practice and proceedings" of the new Court; because "the Ecclesiastical Court in England", referred to, had no

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jurisdiction to grant a divorce *a vinculo matrimonii* and because the provision that the practice and proceedings of the new court should be conformable, as near as may be, to the practice of the Ecclesiastical Court in England prior to the Imperial Act of 1857, was specifically made subject to the New Brunswick Act of 1860. It was subsequently amended and finally, in 1934, repealed.

The result is that by these New Brunswick enactments, the Court of Divorce and Matrimonial Causes has full authority, power and jurisdiction to grant divorce from the bond of matrimony on the ground of adultery. The enactments do not state that the Court must grant a divorce and I think it follows, therefore, that a judicial discretion is lodged in the Court to refuse a decree in certain cases and, in other cases, to grant a decree even though the petitioner may have been guilty of adultery.

This jurisdiction is the same as existed from the time of the coming into force of the Act of 1791. What were the principles that governed the exercise of the discretion in the early days and what are the principles that should now govern? So far as appears, this is the first case in New Brunswick in which the point has been raised, but it is obvious that, as there was no power in England prior to 1857 to grant a divorce except by a Special Act of Parliament, no assistance could have been gained by the New Brunswick Courts from decisions in England until after that date. Such decisions are, of course, based on the provisions of the Act of 1857 and particularly section 31 by which, in certain circumstances, the Court "shall pronounce a decree declaring such marriage to be dissolved", with a proviso "that the Court shall not be bound to pronounce such decree if it shall find that the petitioner has during the marriage been guilty of adultery". Granted the legal right to divorce, these decisions may, therefore, be of assistance to a Court whose jurisdiction to exercise a discretion is unfettered by any statutory enactment.

In the present case the trial judge founded his discretion upon his conclusion as to the rules presently applicable in England according to the decisions of the Probate, Divorce and Admiralty Division of the High Court of Justice. Since then judgment has been given by the House of Lords in *Blunt* v. *Blunt* (1). There, Viscount Simon states

(1) (1943) 59 T.L.R. 315.

four chief considerations which ought to be weighed in appropriate cases as helping to arrive at a just conclusion, which considerations had been mentioned by Sir Henry Duke in *Wilson* v. *Wilson* (1), and referred to with approval by Lord Chancellor Birkenhead when he was sitting in the Divorce Court and deciding *Wilkinson* v. *Wilkinson* (2). These four points are: (*a*) the position and interest of any children of the marriage; (*b*) the interest of the party with whom the petitioner has been guilty of misconduct, with special regard to the prospect of their future marriage; (*c*) the question whether, if the marriage is not dissolved, there is a prospect of reconciliation between husband and wife; and (*d*) the interest of the petitioner, and in particular the interest that the petitioner should be able to remarry and live respectably. To these four considerations Viscount Simon added a fifth

> of a more general character, which must indeed be regarded as of primary importance—namely, the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down. It is noteworthy that in recent years this last consideration has operated to induce the Court to exercise a favourable discretion in many instances where in an earlier time a decree would certainly have been refused.

While the first three considerations do not apply in the present action, I think the case falls within the fourth and fifth, and certainly it has not been shown that the trial judge—to again quote Viscount Simon—"acted under a misapprehension of fact in that he either gave weight to irrelevant or unproved matters or omitted to take into account matters that are relevant". Applying these to the case before us, I find it impossible to say that the trial judge exercised his discretion improperly. The correspondence referred to by Mr. Justice Fairweather is certainly of importance but no doubt it was not overlooked by the trial judge and, in any event, so much would depend upon the view taken of the character and proclivities of the husband that the judge who saw him was in the best position to exercise a judicial discretion.

The appeal should be allowed and the judgment of the trial judge restored without costs here or in the Appeal Division.

(1) [1920] P. 20.
(2) (1921) 37 T.L.R. 835.

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G. v. G.

Hudson J.

HUDSON J.—I have had the opportunity of reading the judgments prepared by my brothers Davis, Kerwin and Rand, and agree with their views as to the proper disposition of this appeal. I have little to add.

The New Brunswick statute authorizes the court to grant a divorce *a vinculo* where the respondent has been proved guilty of adultery. It does not impose any limitation or condition here relevant. On the other hand, it is not in terms imperative and, therefore, on the face of the statute the court must have been given a discretion. How this discretion should be exercised would depend primarily on the facts in each particular case. The admitted misconduct of the plaintiff is a matter which the court should take into account before making a decree, but the defendant goes further and contends that such misconduct provides an absolute defence. This contention rests on a supposed analogy to the rule prevailing in the ecclesiastical courts at the time this statute was passed, by which a decree *a mensa et thoro* was never granted where the plaintiff had been proved guilty of misconduct. The analogy is not real because the ecclesiastical courts never had jurisdiction to grant a decree *a vinculo*. Here an entirely new jurisdiction was created under colonial conditions. It does not appear that the courts in New Brunswick ever accepted any such rule as absolute.

In exercising the discretion given, the court may properly take into account the prevailing social and ethical views of the country. As said by Sir Frederick Pollock, 45 L.Q.R. 295, "the duty of the court is to keep the rules of law in harmony with the enlightened common sense of the nation". Chief Justice Baxter has dealt with the present case on this basis and, in my opinion, no sufficient reason has been shown to justify a reversal of his decision.

The recent case of *Blunt* v. *Blunt* (1) supports this position. I would allow the appeal and restore the judgment at the trial.

Appeal allowed and judgment at trial restored, without costs in this Court or in the Court below.

Solicitor for the appellant: *H. F. G. Bridges.*

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

(1) (1943) 59 T.L.R. 315.