Case and Comment

NEGLIGENCE — CHILDREN'S CONTRIBUTORY NEGLIGENCE.—It is a fortunate thing that Dr. C. K. Allen, K.C., has chosen to deal lightly with the implications of the judgment of the Privy Council in *Yachuk* v. *The Oliver Blais Company Limited.*[1] At page 259 of *The Spectator* of August 26th, 1949, Dr. Allen deals with the infant plaintiff, William Yachuk, as the "Average Naughty Child" and titles his article "Puppydogs' Tails". How pleasant it would be to follow his lead and forget the serious injuries of the child; the deliberations of thirteen learned judges and the vain attention of twelve discharged jurors. But in the result the law has folded into its robes the burnt little lad of nine who plotted mischief, practised deceit, told lies and played with fire and with a careless little brother. All that is admitted to be so, but the author of his misfortune has been found to be an anxious lad of under fifteen who sold him a small pail of gasoline. And the person who must pay in full for his escapade is the morally innocent employer of the anxious lad.

It makes you think. The world is full of infant mischief-makers. It is full too of earnest plain-witted men trying to do a day's work. Of the two, the law prefers the child. Or is it as simple as that? What does the decision mean in terms of principles?

The action was tried by Urquhart J., who discharged the jury.[2] Successive appeals were then taken to the Court of Appeal for Ontario,[3] the Supreme Court of Canada[4] and the Judicial Committee. The facts are summarized by Lord du Parcq:

> In the afternoon of 31st July, 1940, the infant plaintiff, who was accompanied by a younger brother then aged seven, went to the respondent's gasoline station in Kirkland Lake. A youth named Black, who was employed by the respondent, was then serving customers. The boys bought from him five cents' worth of gasoline. It appears that the five cents were paid to Black by the younger boy, but the 'transaction' (the learned judge found) 'was with the larger boy' who twice told Black

[1] [1949] 2 All E.R. 150.
[2] [1944] O.W.N. 412.
[3] [1945] O.R. 18, at pp. 25–28.
[4] [1946] S.C.R. 1, at pp. 4–5 and pp. 9–12.

that he wanted the gasoline to put in his mother's car which 'was stuck down the street'. Black, who had been instructed that the gasoline in the pumps contained lead and ought not to be used for dry cleaning, then asked whether it was to be used for dry cleaning. The infant plaintiff replied that it was not and repeated that it was needed for his mother's car. Black repeated his question, and received the same reply. The boys had provided themselves with a lard pail with a closely fitting, but removable, lid and Black, not without 'real doubts and misgivings . . . as to the propriety of his sale' (which, in the learned judge's view, were justified) supplied them with about a pint of gasoline, half filling the pail. That Black had doubts was indicated both by his question about dry cleaning, and by the fact that before the boys had gone beyond recall he told the assistant-manager about the sale, and said: 'That's all right, isn't it?' The learned judge attached importance to the fact that the gasoline was not supplied in a 'safety container', but in a receptacle which he found to be unsafe.

The story which the infant plaintiff told to Black was untrue. The boys' mother was, in fact, ill in bed. The five cents had been provided by her for the purchase of a confection known as chocolate milk. The boys wanted the gasoline in order to make use of it in a game in which they proposed to play the part of Red Indians, and to enact a scene which they had witnessed in a moving picture. For this purpose torches were required, and it had occurred to them that by soaking in gasoline some bulrushes which they had gathered and setting them alight with matches, satisfactory torches might be made. They had failed to obtain the necessary gasoline from another station in the neighbourhood, where it had been refused at first because they brought with them a glass container, and later, when they arrived with the lard pail, because (the learned judge thought) 'they told a different story on this occasion'. It was after the latter rebuff that they visited the defendant's station and were successful.

The sequel may be told in the learned judge's own words: 'The boys took the pail of gasoline with which they started out in the general direction in which they had indicated that their mother's car was stranded. Then they went to a lane, out of sight of the gas station and some distance away from it. The infant plaintiff then sent his brother to the house for the bulrushes and some matches, and, when the brother returned, the infant plaintiff dipped one of the bulrushes in the pail of gasoline and handed the dripping bulrush to the smaller brother and then lighted it. The bulrush in the brother's hand flared up and he, being frightened, tried to beat it out on the ground. At that time, the boys were standing about four feet apart with the pail of gasoline open, midway between them. The gasoline in the pail, the boys say, caught fire from the bulrush with a swishing sound, although they say that when the bulrush was beaten on the ground there were no sparks.' The unhappy result was that 'the infant plaintiff was most painfully and seriously burned'.[5]

The essential elements seem to be a child of tender years and the delivery to him of "a dangerous substance with which a

[5] *Supra*, at p. 152.

reasonable man, taking thought, would have foreseen that the child was likely to do himself an injury". Given those essentials, the mischief, negligence and deceit of the child cannot relieve the older person who fails to discharge the duty of care these essentials create.

The case has already been discussed in this Review at each stage.[6] In these comments two approaches to the liability of the defendant were discussed. Dr. Wright at once raised the risk-duty approach.[7] He said:

> If it is once established that a defendant is negligent, i.e., that a foreseeable risk of harm is created by his conduct, the intervention of other forces which produce the resulting harm raise questions as to the extent of his liability; and, unless these forces are outside the risk created by the defendant's conduct and produce unforeseeable results, the defendant may, notwithstanding them, be held liable. . . . In other words, the 'last wrongdoer' doctrine, relied on in some of the cases, is not properly an insulation against a defendant's liability if the wrongdoing is a normal incident of the risk which the defendant set in motion.[8]

And after the Court of Appeal judgment, which the Privy Council has now restored, Dr. Wright said of the court's discussion of the ability of the infant plaintiff to foresee the consequences of his actions:

> Perhaps a simpler approach would have been to consider the case in terms of the extent of the defendant's liability; as put by Prosser on Torts, 'The risk created by the defendant may include the intervention of the foreseeable negligence of others'.[9]

Mr. Maloney's comment (*supra*), in the light of the decision of the Supreme Court of Canada, was to conclude that the liability of the defendant rested "solely on the capacity or ability of the infant plaintiff to foresee the probable consequences of his conduct". He then conceived an infant B who possessed more sense of responsibility than a normal child and less than a normal adult. He concluded that the defendant should be held liable "only to the extent of the infant's inability to foresee the probable consequences of his conduct". The judgment of the Privy Council answered Mr. Maloney by finding expressly that it was impossible to regard the plaintiff "as any more capable of taking

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[6] Dr. C. A. Wright in (1944), 22 Can. Bar Rev. 725; Dr. C. A. Wright in (1945), 23 Can. Bar Rev. 162; A. E. Maloney in (1946), 24 Can. Bar Rev. 60.

[7] Discussed by Dr. Wright in (1948), 26 Can. Bar Rev. 46, at pp. 56–68, and by myself in (1948), 26 Can. Bar Rev. at pp. 870–873 and in (1949), 27 Can. Bar Rev. at pp. 338–342.

[8] (1944), 22 Can. Bar Rev. 725.

[9] (1945), 23 Can. Bar Rev. 162.

care of himself in the circumstances in which he was placed than a normal boy of his age might be expected to be".

To a degree, the Privy Council adopt Dr. Wright's approach. Lord du Parcq says at page 153:

> The negligence of the defendant consisted in putting into the hands of a small boy a dangerous substance with which a reasonable man, taking thought, would have foreseen that the child was likely to do himself an injury.[10]

The case is further complicated by the references in the Privy Council judgment, or the Court of Appeal judgment which it approves and restores, to the doctrine of allurement,[11] to the concepts of things dangerous in themselves[12] and of *novus actus interveniens.*[13] I respectfully submit that the case is essentially an example of the risk-duty approach. The court inquires first if the defendant, through its servant, created a risk and, secondly, if the plaintiff was a person who might reasonably be expected to be damaged as a result.

In most cases these are questions which can best be answered by a jury. It seems a pity in this case that a jury did not consider them but the reason is plain. Here the real difficulty is the one resolved by the Privy Council: Can a child of nine *in these circumstances* be guilty of contributory negligence? *In these circumstances;* the decision is that the child is not guilty.

Unless *Yachuk* v. *Blais* is regarded as a decision on the facts following the risk-duty approach, it will cause bench and bar much misery. We shall have claims made that it establishes absolute liability in dealings with children, that it reinvigorates strict responsibility for things dangerous in themselves or that it has supported or destroyed the doctrine of *novus actus interveniens.*

The trouble is that the facts are hard facts. The case is a hard case. It could make bad law. It is important to remember that it is properly only a determination of fact and an example

[10] It is impossible to discuss the judgment of the Judicial Committee without dwelling on this passage. It is impossible to read this passage without respectful melancholy that Lord du Parcq considered that "a sentence ending in a preposition is an inelegant sentence". Dr. H. W. Fowler, who apparently has a more loyal following in Canada than in his native land, expresses his strong views in *Modern English Usage:* "the Dryden-Gibbon tradition has remained in being, and even now immense pains are daily expended in changing spontaneous into artificial English. *That depends on what they are cut with* is not improved by conversion into *That depends on with what they are cut;* and too often the lust of sophistication, once blooded, becomes uncontrollable, and ends with *That depends on the answer to the question as to with what they are cut.*" (Dr. Fowler's remarks under *Preposition at End* and *Out of the Frying Pan*)

[11] McRuer J.A. in [1945] O.R. 18, at p. 33.

[12] *Idem,* at p. 29.

[13] *Idem,* at p. 29; and Lord du Parcq in [1949] 2 All E.R. 150, at p. 154.

of the risk-duty approach. It is not a declaration of new law nor of new principles, although it is true that it approves an extreme example of a child being innocent of contributory negligence.

In this view Dr. Allen's light-hearted article falls into place. What has happened here is that four judges in Toronto, five judges in Ottawa and four peers in London, England, all of mature years, have applied their experience to the duty owed by one fourteen-year old boy to one nine-year old boy at a gas station in Northern Ontario some years ago. If we accept their deliberations as principles, we shall have trouble aplenty. If instead, we consider that their opinions are only their views of what they would have done if they had been serving in that station, that day, we can rest of nights and continue in peace to love and trust children.

PETER WRIGHT

Toronto

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DOMICILE — CHANGE OF DOMICILE FROM ONE PROVINCE TO ANOTHER — BURDEN OF PROOF — A CANADIAN DOMICILE.—Should not there be a single Canadian domicile, or at least should not the burden of proof on a party alleging a change of domicile from one province to another be less heavy than some courts have held it to be?

Two recent judgments of the Nova Scotia Appeal Court dealt with domicile, incidentally to divorce actions, *K.* v. *K.*[1] and *Williamson* v. *Williamson.*[2] In both these cases the court applied the principles laid down by the House of Lords in a taxation case, *Winans* v. *Attorney-General.*[3] In the result a very heavy burden is imposed on a party who asserts a change of domicile from one of origin to one of choice.

In the *Winans* case the ultimate question before the House of Lords was whether an annuity bequeathed by a testator to a relative was subject to legacy duty, a question that turned upon whether the testator was domiciled in England at the time of his death or not. He was an American citizen, born in the United States, who at the time of his death had lived in England for almost fifty years. The court held however that the Crown had not discharged the burden resting on it of showing that the testator intended to change his domicile to England, and therefore that the legacy was not liable to duty. Such expressions as "with

[1] (1945), 17 M.P.R. 19.
[2] (1949), 22 M.P.R. 75; [1948] 3 D.L.R. 319.
[3] [1904] A.C. 287.

perfect clearness and satisfaction" and "so heavy is the burden" appear in the reasons.

In the course of his judgment Lord Macnaghten put the question to be decided as follows: "Has it been proved 'with perfect clearness and satisfaction' to yourselves that Mr. Winans had at the time of his death a 'fixed and settled purpose' — 'a determination' — 'a final and deliberate intention' — to abandon his American domicil and settle in England?" Previously he had quoted with approval the statement of Wickens V.-C. in *Douglas* v. *Douglas*:[4] "What has to be here considered is whether the testator . . . ever actually declared a final and deliberate intention of settling in England, or whether his conduct and declarations lead to the belief that he would have declared such an intention if the necessity of making the election between the countries had arisen".

These principles were approved in *K.* v. *K.* and *Williamson* v. *Williamson.* In *K.* v. *K.* the change of domicile sought to be shown was from Newfoundland to Nova Scotia, Newfoundland not being then a province of Canada. In the *Williamson* case the change was within the provinces of Canada; it, at least, is authority for the proposition that the burden of proof of a change of domicile from one Canadian province to another is as heavy as it is stated to be in the *Winans* case.

On November 30th, 1948, the then Mr. Justice R. H. Graham of the Supreme Court of Nova Scotia decided the case of *Morrisy* v. *Morrisy.*[5] Here, another divorce case, it was sought to show a change of domicile of origin in New Brunswick to one of choice in Nova Scotia. The solicitor for the petitioner knew he was faced with the principles laid down in the *Winans* case and that he would have to distinguish it in order to succeed. The parties had lived in Nova Scotia only a short time and the evidence of the suggested change of domicile could not possibly meet the standard set in the two previous Nova Scotia cases on the authority of *Winans* v. *Attorney-General.* In his brief the solicitor used the following words:

> It is submitted that the *Winans* case should not be too closely followed in the case at Bar because there the House of Lords was considering a change of residence across national frontiers between two foreign sovereignties. This really would require strong evidence because people do not easily change from their own country to a foreign country. But, in Canada, the situation is quite different. The national home is Canada, and people easily and frequently move from one province to

[4] (1871), L.R. 12 Eq. 645.
[5] Not reported.

another. In the *Winans* case, the House of Lords was thinking and speaking in terms of countries foreign to each other and therefore their reasoning has no application to provincial changes of domicil.

For this argument there was support in a statement of Lord Macnaghten in the *Winans* case:

> A change of domicil is a serious matter — serious enough when the competition is between two domicils both within the ambit of one and the same kingdom or country — more serious still when one of the two is altogether foreign.[6]

These words, which are the key words where change of domicile is from one province to another, have apparently been overlooked heretofore.

In delivering his judgment in *Morrisy* v. *Morrisy*, in which he found the domicile of the petitioner to be in Nova Scotia, the trial judge used these words: "I think that the length of residence which is required to establish domicil in a foreign country is not necessary to establish a new domicil when the change of residence is from one province of Canada to the adjoining province. It is, of course, still the same question of fact, but the probability of intention is more easily raised and does not require so long residence to prove intention." The judge therefore drew a distinction between the application of the *Winans* case to changes across national boundaries and across provincial ones.

Morrisy v. *Morrisy* lends support to the view that less evidence is required to show a change of domicile from one province of Canada to another, and that the *Winans* decision has less application to provincial domiciles, than was formerly thought. This, it is submitted, is in accord with the realities of Canadian conditions.

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EVIDENCE — PRIVILEGE — QUESTIONS TENDING TO SHOW COMMISSION OF ADULTERY.— One may well agree with Mr. Morden[1] that section 7 of The Evidence Act of Ontario[2] should be repealed, and with Gale J. in *Booth* v. *Booth and Cook*[3] that where the custody of children is in question the court should be fully informed of all the facts. It does not follow that the actual decision in that case was correct. Although section 7 itself pur-

[6] [1904] A.C. 287, at p. 291.
[1] (1949), 27 Can. Bar Rev. 468.
[2] R.S.O., 1937, c. 119.
[3] [1949] O.R. 80.

ports, and its English prototype purported,[4] to extend the privilege to any witness "in any proceeding", the English courts early decided that Parliament had *per incuriam* omitted the word "such" from between the words "any" and "proceeding" and that the privilege was intended to exist only in proceedings instituted in consequence of adultery.[5] The courts assumed the duty of legislating to make good the default of Parliament and began to eliminate the privilege as far as possible by a course of judicial refinement of the meaning of the words "instituted in consequence of adultery". This process is well illustrated by the cases of *Evans* v. *Evans & Blyth (No. 2)*[6] and *Elliott* v. *Albert*[7] cited by Mr. Morden.

In the *Evans* case, a petition for divorce had been granted and afterwards the petitioner asked the court to vary a settlement made by the court in the divorce proceedings. The legitimacy of a child provided for by the settlement was questioned. The court held that this second petition was not a proceeding instituted in consequence of adultery and compelled the co-respondent to answer questions tending to prove his adultery with the respondent, as evidence tending to prove the illegitimacy of the child.

Elliott v. *Albert* was an action by a wife against another woman for damages for enticing away the plaintiff's husband. Adultery was alleged as one of the enticements. When the defendant refused to answer an interrogatory on the question of her adultery with the plaintiff's husband, the plaintiff asked leave of the court to amend by withdrawing the allegation of adultery, in order to remove the case from the class of proceedings instituted in consequence of adultery. The court refused leave to amend but required the defendant to answer the question anyway, on the ground that the action was instituted in consequence of enticing not of adultery.

In Ontario, the privilege had, until the *Booth* case, been given more respect.

The cases of *Mulholland* v. *Misener*[8] and *Taylor* v. *Neil*,[9] referred to by Gale J. in the *Booth* case, were decided before the Ontario statute took its present form. Parties to proceedings instituted in consequence of adultery were then competent but

[4] 32 & 33 Vict., c. 68, s. 3.
[5] *Evans* v. *Evans & Blyth* (*No. 2*), [1940] P. 378. See Stephens on Evidence (6th ed.), art. 109, p. 127.
[6] *Supra.*
[7] [1934] 1 K.B. 650.
[8] (1895), 17 P.R. 132.
[9] (1895), 17 P.R. 134.

not compellable witnesses, and could not be required even to submit to examination for discovery in such proceedings. The privilege now given to any witness by section 7 was then confined to the husbands and wives of the parties, and in *Taylor* v. *Neil* the court took the view that if a defendant in a criminal conversation case chose to give evidence at the trial he could be compelled to answer questions touching his adultery. These cases do not appear to be authorities under the present statute.

A series of cases in the Master's Office has dealt with problems arising on discovery after the statute attained its present form. In *Martin* v. *Martin*,[10] the claim was for alimony based on allegations of cruelty and adultery. The master held that there was but one cause of action, instituted in consequence of adultery as well as cruelty, and allowed the defendant the privilege of refusing to answer questions concerning his adultery. A similar result was reached in *Wellman* v. *Wellman*,[11] although a claim for custody was joined to one for alimony, both claims being based on adultery. *Pascoe* v. *Pascoe*[12] was an action for divorce with a counterclaim for alimony. The master appears to have taken the incorrect view that the defendant in a divorce action could not be compelled to submit to discovery at all. On the alimony issue, the wife was allowed to examine the husband on questions of desertion and neglect to provide for her maintenance only. An action for criminal conversation and alienation came up in *K.* v. *H.*.[13] It seems that both causes of action were based on adultery. In mitigation of damages, the defendant pleaded the unhappiness of the plaintiff's married life, connivance, condonation and other collateral matters. The defendant was ordered to submit to examination on all questions arising out of the defence the answers to which did not tend to prove him guilty of adultery.

There does not appear to have been a reported case before *Booth* v. *Booth* in which, where the main action was instituted in consequence of adultery, a party has been compelled in a collateral proceeding to the main action, tried at the same time, to answer questions tending to prove his or her adultery without previously having given evidence in disproof of adultery. The reasons for judgment in the *Booth* case suggest that the evidence was to be admitted in the wife's counterclaim for custody, but it appears that the husband's action included a claim

[10] (1923), 24 O.W.N. 323.
[11] (1931), 40 O.W.N. 489.
[12] [1937] O.W.N. 645.
[13] [1941] O.W.N. 102.

for custody that must have been, in part at least, based on the wife's adultery. The wife's evidence was relevant to the husband's claim for custody as well as to her own.

It is suggested that it is not correct merely to classify proceedings as divorce actions, custody proceedings, bastardy proceedings and so on, and to lay down a rule that the privilege does not apply in any custody proceedings. Mr. Morden points out that some divorce actions or alimony actions are instituted in consequence of adultery, and in these proceedings the privilege applies; and that some such actions are instituted on other grounds and in those proceedings there is no privilege. The correct method of distinguishing them would appear to be to examine the issues in each case, no matter what may be claimed, and determine whether the proceedings were instituted in consequence of adultery. In the *Booth* case, it is suggested that the husband's claim for custody was so instituted, and that the wife's privilege should have been allowed.

Mr. Morden has already mentioned the strange result that would have been brought about if the husband's action for divorce had been dismissed because the wife's adultery had not been proved, apart from her own answers, and if at the same time her claim for custody had been dismissed because those same answers proved her guilty of adultery. Several remarks by Gale J. in his reasons for judgment suggest that the wife's answers in cases of this kind, although inadmissible on the divorce issue, might tip the scales if the other evidence on that issue were just short of enough to prove the husband's case. At one place he says, "the plaintiff has introduced evidence which, *at this stage at any rate* [my italics], would indicate that his wife gave birth to an illegitimate child". It would appear that at that stage he had not finally decided that the husband was entitled to a divorce. Yet, shortly afterwards, he speaks of a "guilty wife" being required to disclose her adultery to prove her unfitness to have custody of the child.

If the wife can be compelled to answer in these circumstances, it would seem that the proper course would be to direct the custody issue to stand over until the question of divorce is settled and, after judgment on the divorce claim has been delivered, to permit the plaintiff to re-call the defendant for cross-examination and both parties to introduce other evidence.

The present course of interpretation of the section may lead to some remarkable anomalies. In an alimony action, if the plaintiff has been guilty of adultery, she might be well advised

to allege adultery on the part of the defendant, even if she cannot prove it, to protect herself from cross-examination on that point. On the other hand, if the defendant has been guilty of adultery, the plaintiff might in some circumstances be better off if she did not base her action on that ground, for if adultery is not alleged she may compel the defendant to disclose his adultery as tending to prove cruelty.

By all means let us urge the repeal of the section. It is not only in custody proceedings that the court should be fully apprised of all the facts. Perhaps the appropriate committee of the Canadian Bar Association would take the matter up.

H. R. S. RYAN

Port Hope, Ontario

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DIVORCE — CONDUCT OF HUSBAND CONDUCING TO ADULTERY BY WIFE — DISCRETION OF TRIAL JUDGE — CLAIM NOT RAISED IN PLEADINGS.— The case of *Devoe* v. *Devoe*[1] involved a petition for a divorce *a vinculo* brought in the New Brunswick Court of Divorce and Matrimonial Causes by a husband who proved adultery on the part of his wife — an isolated occasion. The judge found adultery proved, but exercised his discretion against granting the petition, basing his refusal on the conduct of the husband over a term of years, which he held was conducive to the adultery. "Such conduct was the continued wilful and excessive neglect and harsh and inconsiderate treatment by the petitioner. There is also the accompanying feature that the petitioner, without sufficient reason or explanation, has withdrawn from marital intercourse for ten or more years." The Appeal Division upheld the judge's power of discretion but by a majority decision sent the cause back for the taking of further evidence on the question of the petitioner's actions, since the pleadings had not properly raised that issue.

The case is of interest on social as well as legal grounds. The maintenance of the marriage bond is something in which the State has an interest, and the petitioner can only petition, he or she cannot claim a legal right to a release. Furthermore, the influence of the ecclesiastical courts still lies in the background, and as in the chancellors' courts of equity — and we must remember that for centuries chancellors were churchmen — the petitioner must come into court with clean hands.

[1] (1949), 23 M.P.R. 90; [1949] 2 D.L.R. 105.

In the old ecclesiastical courts of England, which date back to William the Conqueror, the canon law governed, and marriage performed with due ceremony was held to be indissoluble for any cause; the only decree granted was a divorce *a mensa et thoro*. To obtain a divorce *a vinculo* it was necessary to obtain a private Act of Parliament, after first having sued the paramour for criminal conversation. It was an expensive precedure and seldom followed. In the 150 years previous to 1857 the private bills of divorce passed by the British Parliament totalled only about 230, of which four only were obtained by wives.

When Nova Scotia was established, and later in 1784 when New Brunswick was set up as a separate province, the combined jurisdiction of the ecclesiastical courts and of Parliament was centered in the Court of the Governor in Council. This was done by colonial legislation duly approved. The Act in Nova Scotia passed in 1758 set out the grounds of divorce "in any of which every person suing for a divorce *shall be entitled* to a decree". The Act passed in New Brunswick in 1791, after an earlier Act of 1786 had not been approved, gave the power to grant a divorce *a vinculo* as follows:

> 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, intitled, 'an Act for Marriages to stand notwithstanding pre-contracts,' and no other causes whatsoever.

The mandatory clause was not followed and the grounds differ.

In time provision was made for a judge of the Supreme Court to sit as deputy for the Governor. This Court of the Governor in Council continued until 1860 when the present court was created and all jurisdiction of the old court was vested in it. It will be noted that the present New Brunswick court is in no way subject to the English Act of 1857 but on the contrary "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 1857". In 1866 Nova Scotia amended its Act to extend the powers of its court, following the 1857 legislation in Great Britain, but New Brunswick has never followed suit. In 1934 certain amendments to the New Brunswick legislation were made and the practice was changed by rule of court, but, in view of the allocation of "Marriage and Divorce" to the federal jurisdiction under the B.N.A. Act of 1867, it is doubtful

at least whether the basic law was changed by the amendments. At any rate the discretionary power of the judge has been upheld by the Supreme Court of Canada in *Gracie* v. *Gracie*[2] and in 1942 the New Brunswick Court of Appeal had upheld the discretion exercised by Mr. Justice Baxter, who refused several cases on the ground of undue delay, inferring that the petitioners did not feel greatly wronged. Now we have a new phase of declared law in New Brunswick, namely that acts not actually "conniving" at adultery may yet be "conducive" to it and a bar to a divorce.

A case which upholds this view, but which apparently was not drawn to the attention of the court in *Devoe* v. *Devoe*, was *Simmons Divorce Bill*,[3] where the wife's adultery was abundantly proved but the bill was put over on the ground of the husband's neglect of his wife.

Back of the legal question is a broad social one. Here is a marriage that for twelve years has been a sham. Would it not be wiser from a social or community standpoint to acknowledge that fact in law and not require any act of adultery? In the June 1949 number of the American Bar Association Journal there is an interesting article suggesting a solution of the divorce muddle in the United States and advocating as the sole ground of divorce a separation over a term of years. The author, who is a member of the Virginia Bar, argues that with separation the only fact to be proved we would do away with a lot of perjury, collusion and fabricated evidence of a debasing kind; he asserts also that the period of separation would afford time for reconciliation and would at least prevent the present indecent haste of "off with the old, on with the new". The article was rather startling at first, but cases like *Devoe* v. *Devoe* make one think the suggestion worth considering. At any rate the *Devoe* case has this legal value: it emphasizes that in marriage both must play the game and that the rights of the individual are still subsidiary to those of the State; and that any right to relief in a divorce court (in New Brunswick at least) is discretionary and therefore dependent on the conduct of the petitioner as well as of the respondent.

H. A. PORTER

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[2] [1943] S.C.R. 527.
[3] (1845), 12 C. & F. 339; 8 E.R. 1438.