

FIRST DIVISIONAL COURT.

APRIL 16TH, 1918.

WHIMBEY v. WHIMBEY.

Husband and Wife—Alimony—Cruelty—Assault—Insane Delusions of Husband as to Wife's Infidelity—Judgment Founded on—Pleading—Necessity for Full Investigation—Expert Evidence—Insufficiency—New Trial—Leave to Amend Pleadings.

Appeals by the defendant from the judgment of RIDDELL, J., at the trial, in favour of the plaintiff, awarding her alimony, to be fixed upon a reference, and dismissing the defendant's counter-claim.

The appeals were heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, J.J.A.

R. T. Harding, for the appellant.

C. W. Plaxton and T. G. Plaxton, for the plaintiff, respondent.

HODGINS, J.A., reading the judgment of the Court, said that during the trial questions were asked about one Alderson, who was defendant in an action brought by the husband (the defendant in this action) for alienating the affections of the wife (the plaintiff in this action), a woman of 56. The husband was 68. Alderson was not mentioned in the record in this action; but the trial Judge, finding the other action on the docket, and having decided to try both together, admitted evidence as to the alleged relations of Alderson and the wife and the husband's delusions in regard thereto. He also admitted, subject to objection, the evidence of the other men who were indicated by counsel as those charged by the appellant with frequenting the respondent's house for improper purposes. It appeared that the appellant had never made any charges as to any of these individuals until after the parties had separated.

After this evidence had been given, Dr. A. J. Johnson was called by the respondent, also subject to objection, and his opinion was asked and given as to the condition of the appellant's mind, having regard to the evidence of the respondent and of the men who had given testimony. Dr. Johnson had not the advantage, when giving his evidence, of having observed the appellant's demeanour in the witness-box, for the appellant was not called until after the professional witness had formed and expressed his opinion.

The trial Judge found that the husband assaulted the wife; that the assault threw her into an hysterical state, and, with the