88, 1935

No. 25 of 1934.

In the Privy Council.

ON APPEAL
FROM THE SUPREME COURT OF ALBERTA,
(APPELLATE DIVISION).

BETWEEN—

CORA LILLIAN McPHERSON

(Plaintiff) *Appellant*

— AND —

ORAN LEO McPHERSON

(Defendant) *Respondent.*

CASE FOR THE APPELLANT.

RECORD.

1. This is an Appeal in *formâ pauperis* by special leave from the Judgment of the Supreme Court of Alberta (Appellate Division) dated the 21st of February, 1933, affirming the judgment of Ewing, J., in the Supreme Court of Alberta, dated the 20th of December, 1932, dismissing the Appellant's action so far as concerned a separate issue raised by paragraphs 17 and 18 of the Amended Statement of Claim and paragraphs 18 (a) and 18 (b) of the Amended Defence.

2. The Appellant was married to the Respondent in the year 1908 and the Respondent claims to have obtained valid decrees for the dissolution of the marriage. The action as originally framed was brought to rescind and set aside the Divorce decrees obtained by the Respondent against the Appellant and for other relief. The separate issue above referred to was raised by amendment of the pleadings before trial, after the Appellant became aware of the circumstances in which the suit for divorce was heard.

3. The issue thus raised was whether or not the divorce action had been tried according to law, namely in open Court and if not tried in open Court whether the decrees were void and by paragraph (aI) of her amended prayer the Appellant claimed a declaration that the divorce decrees were null and void. By Order dated the 28th of November, 1932, the said issue was directed to be heard and determined before the other issues; and it was so heard and determined.

p. 7.

4. The remaining issues in the action were, after the Appellant's appeal from the Judgment of Ewing, J., had been dismissed, tried by Ford, J., who on the 11th of July, 1933, dismissed the action on the remaining issues. Notice of Appeal was given but on the hearing of the Petition for Special Leave herein the Appellant undertook not to proceed further in the meantime with the Appeal to the Appellate Division of the Supreme Court of Alberta from the Judgment of Ford, J., of the 11th July, 1933.

5. It was decided by Ewing, J., as to the separate issue that on the facts as found the Divorce proceedings had been held in open Court and that it was not necessary to consider the further question whether if that were not the case the decrees were void. In the Appellate Division reasons for affirming the Trial Judge were given by Harvey, C.J.A., with which Clarke Mitchell and Lunney, JJ., concurred. MacGillivray, J., gave separate reasons and after a close consideration of the evidence and authorities came to the conclusion that the case was near the line and decided "not without hesitancy" that he could not say that Ewing, J., was wrong in holding that the Divorce trial was not held in secret but in open Court.

p. 54.

p. 56.

6. The Appellant's submission is that Ewing, J., and the learned Judges of the Appellate Division were in error in holding that the facts found in relation to the conduct of the trial of the suit for Divorce satisfied the requirements of a trial in open Court and that on the contrary the facts so found established clearly that the trial was not conducted in open Court. On the further question the Appellant submits that a trial and particularly a trial of a Divorce suit not conducted in open Court is no trial at all and that the decree nisi pronounced on such purported trial and consequently the subsequent decree absolute are void.

7. The Appellant and the Respondent were married on the 21st April, 1908, and there are issue of the marriage four sons now aged from nine to twenty years. On the 17th March, 1931, after twenty-three years of matrimonial union the Respondent brought a suit in the Supreme Court of Alberta for dissolution of his marriage

pp. 1, 2.

p. 8.

p. 69.

with the Appellant on the ground of her alleged adultery with one Leroy Mattern. The suit was not defended and it came on for trial before Tweedie, J., at Edmonton on the 22nd April, 1931, when a Decree Nisi was pronounced. The Decree Nisi was made absolute on the 28th July, 1931. The Respondent had in the meantime become and is now the Minister for Public Works in Alberta and in the month of July, 1932, he married one Helen Mattern formerly the wife of the said Leroy Mattern from whom she obtained a divorce. p. 85. p. 86. p. 17, l. 7. p. 5, l. 7.

8. The facts in relation to the circumstances in which the trial of the divorce suit was held as found by Ewing, J., and the Appellate Division are not in dispute. As so found they are set out in the Reasons which MacGillivray, J., gave for his judgment in the Appellate Division as follows:—

"The facts having to do with the conduct of the divorce trial are stated p. 57.
"by Ewing, J. As his reasons for judgment have not been reported I repeat
"his statement of the facts so that this judgment may be intelligible if it
"should happen to be reported. Ewing, J., says:—

" 'The facts given in evidence in connection with the trial of the p. 48, l. 9.
" 'divorce action Number 22420, are as follows: The trial was held on
" 'Wednesday, April 22nd, 1931, in a room on the second floor of the Court
" 'House at Edmonton known as the Judges' Library. The trial Judge
" 'was not the Judge presiding over the regular sittings in Edmonton for
" 'that week. The reporter was Mr. Powell, who says that he was not
" 'the regular reporter for that week according to the system of rotation
" 'of work employed by the reporters. Mr. Powell says that as he was
" 'leaving the Court House on his way to lunch he was requested by the
" 'Assistant Clerk, Mr. Mason, to act as reporter for this particular trial.
" 'Mr. Mason says that at the request of Mr. Wallace, Clerk of the
" 'Supreme Court, he acted as Clerk at the trial but that he seldom acts
" 'in that capacity.

" 'Considerable stress was laid on the nature of the entrance to the
" 'Judges' Library. There is a public corridor running around the entire
" 'second floor of the Court House. On one side of this corridor is the
" 'well of the main stairway and on the other side of the corridor are the
" 'doors opening into the various rooms. Immediately in front of the
" 'top of the stairway and across the corridor are double doors, that is to
" 'say, each door swings on its own jamb and when both are closed they
" 'meet in the centre. The South door is not used and is kept fastened
" 'while the North door, which is used and which opens inward has a self
" 'closing device attached. The door which is fastened has a brass plate on
" 'which the word "private" is engraved. There is no sign on the door

" 'which is used. These doors lead into a narrow hall and across this hall
" 'and almost opposite to the entrance is an ordinary door opening into
" 'the Judges' Library. The Sheriff states that no Orderly is ever posted
" 'at these doors. The Library is a large room with a large library table
" 'in the centre. The trial Judge entered the Library through the north
" 'door opening from the Appellate Court room and took his seat at the
" 'head of the table. He then announced that he was sitting in open
" 'court. There were present in the Library, in addition to the trial
" 'Judge, the Clerk, the reporter, the Plaintiff in the action and his
" 'Counsel. The witnesses were called as they were required. The Clerk
" 'was about to close the door leading from the Library into the hallway
" 'but was directed by the trial Judge not to do so. It is admitted that
" 'one or more of the regular Court rooms were at that time available for
" 'the trial. The trial Judge gave evidence at the present trial and by
" 'request of both Counsel his evidence was not taken under oath. He
" 'states that he selected the Library as the place of the trial on his own
" 'motion and without any intention of shutting anybody out. The date
" 'of the trial had been arranged in advance at the request of Counsel for
" 'the Plaintiff to accommodate a witness who was being brought from
" 'Saskatoon'.

"Since on the argument before this Court great stress was laid on a part "of the evidence given by the Judge who granted the decree nisi, to which "Ewing, J., does not allude. it is proper to add to the foregoing statement of "the facts the following extract from the evidence :—

p. 44, l. 43. " 'Q. May I ask if your Lordship made the arrangements for hearing
" 'in this room to save the feelings of the Plaintiff in view of his position?
" '—A. Well I imagine that would be it, to lessen the publicity but not
" 'for the purpose of excluding any person who might have a right to
" 'attend at the hearing.'

p. 45. " 'Q. I am not suggesting that.—A. But I think that is correct.

" 'Q. It is correct to say it was done to save Mr. McPherson's
" 'feelings and to avoid publicity in this case as a public man?—A. No,
" 'not to save Mr. McPherson's feelings but perhaps to lessen the publicity
" 'by reason of the position which Mr. McPherson occupied in this
" 'Province and his relation to the public."

9. To these facts it should be added that the trial of the Divorce
p. 24, l. 27. suit was held during the noon recess and that neither the learned
p. 25, l. 16. Judge nor the Clerk was robed. Mr. Justice Tweedie in his state-
p. 45, l. 35. ment to the Court said that there was no necessity for a hearing in a private room, all the witnesses being capable of stating their evidence in open Court.

And the Sheriff who exercises supervision over the Court House Building stated as follows :—

"*Q.* What access is allowed to the public to that inner corridor that you "just referred to?—*A.* Generally speaking the public are not allowed in that "corridor. Sometimes the Judges' Library has been used for purposes which "require the attendance of outsiders and they have been allowed in but as a "general rule if the orderlies or myself or any official of the Court House see "any of the public opening that door and going in we will check them. p. 28, l. 23.

"*Q.* You will exclude them?—*A.* Yes.

"*Q.* If a member of the Bar or members of the public wish to see a "Judge who is in the room what is the procedure?—*A.* He is announced. "The only Supreme Court Judge who has a room in there outside of the "Library is Mr. Justice Ford and it is customary to announce anyone to p. 29. "Mr. Justice Ford before allowing them entrance.

"*Q.* By means of—?—*A.* Either myself or the orderlies whoever "happen to be there.

"*Q.* Is that part of the duty of the orderlies?—*A.* The orderlies are for "that purpose among others.

"*Q.* To escort?—*A.* To see that the public do not overstep their "privileges."

The door referred to by the witness is the double door leading from the public corridor.

A plan of the second floor of the Court House at Edmonton forms part of the record on this appeal.

10. A few days prior to the trial of the Divorce suit the Respondent's Solicitors wrote to one J. J. McKenzie (who was a witness at the trial) at Saskatoon, Saskatchewan, advising him of the time, place and circumstances of the trial in the following terms :—

11,067. "April 15th, 1931.

"J. J. McKenzie Esq.,
"Clerk,
"Flanagan Hotel,
"Saskatoon, Sask.

"Dear Sir,

"Re : McPherson vs. McPherson.

"Referring to Mr. Hemmick's recent conversation with you we are glad "to hear that you have agreed to come to Edmonton to act as a witness for "the Plaintiff in this case.

"Mr. Justice Tweedie has fixed the hearing to take place on Wednesday, "22nd April. The case will be heard in his own room and there will be no "publicity whatever. In addition the case will not be defended so that you "will not be submitted to cross-examination.

"On behalf of Mr. McPherson we are instructed to intimate that he will "pay your travelling and living expenses and also your salary for the whole "time you are away from Saskatoon in connection with this matter. In the "meantime we are sending you herewith our cheque for $30·00 and we can "have a final straightening up with you when you come to the City.

"Perhaps you will be good enough to get in touch with our Mr. Mayne "Reid by 'phone whenever you get to the City. The office 'phone is 26269 "and Mr. Reid's residence 'phone is 81656. We should know that you are in "town not later than 9 o'clock in the morning of the 22nd. If any hitch should "take place whereby the case is not to come on on the 22nd inst., we shall wire "you immediately but in case you do not receive a wire from us please be here "by 9 o'clock in the morning."

"Yours faithfully,

"(Sgd.) LYMBURN REID & COBBLEDICK.

"MR/CB.
"Encl. chq."

This letter was not in evidence before Ewing, J., or the Appellate Division although it had been disclosed by the Respondent in his Affidavit of documents, but it was put in evidence on the trial of the other issues before Ford, J., in May 1933, and now forms part of the Record on those issues.

11. The issue in regard to the trial not having taken place in open Court was raised by paragraphs 17 and 18 of the Amended Statement of Claim which were as follows :—

p. 7, l. 8. "17. The said action mentioned in paragraphs 3 and 4 hereof was not "heard or tried in open Court and the witnesses in the said proceedings before "the said Court were not sworn or examined orally in open Court as required "by law but instead the said action was tried and heard and the witnesses were "sworn and examined in Camera in a private room of the said Court House "and during the noon recess on the said date all of which was contrary to law "in that behalf made and provided.

"18. By reason of the matters in the next preceding paragraph the said "Court and the learned Judge thereof who presided on the said occasion had "no jurisdiction power or authority to hear or determine the said action or to "make the said decree nisi and the said Court and the learned Judge thereof "who presided upon the application for a decree absolute had no jurisdiction, "power or authority to make such latter mentioned decree and the same are "therefore void and of no effect."

The Respondent pleaded to this by paragraphs 18 (a) and 18 (b) of his Amended Statement of Defence as follows :—

"18 (a). The action referred to in paragraph 3 of the Amended State- p. 13, l. 11.
"ment of Claim was heard in open Court and the witnesses were sworn and
"examined orally in open Court as required by law.

"(b) The action referred to in paragraph 17 of the Amended Statement
"of Claim was not tried and heard nor were the witnesses sworn and examined
"in Camera or during the noon recess. Even if the allegations in paragraph
"17 of the Amended Statement of Claim were true, which the Defendant does
"not admit, but denies, the decree nisi was a valid and binding judgment of
"the Court and the learned Judge who presided on the occasion of the granting
"of the decree nisi had jurisdiction to determine the said action and did in
"fact determine it and the Judge who presided upon the application for the
"decree absolute had such jurisdiction to make such decree and both such
"decrees are of full force and effect."

12. In his reasons for judgment dismissing the action the p. 47.
learned trial Judge after stating that the law seems settled that in p. 49, l. 37.
the trial of a civil action subject to certain exceptions, which have no application here, trials shall be held in open Court proceeded to hold that the trial had in fact been held in open Court. He referred to Section 88 (1) of the North-West Territories Act (R.S.C. 1886 Chap. 50 as amended by 60 and 61 Vict. Chap. 28 S.15) as follows :—

"Every Judge of the Supreme Court shall have jurisdiction, power and
"authority to hold courts whether established by ordinance of the Legislative
"Assembly or not at such times and places as he thinks proper and at such
"Courts as sole Judge to hear all claims disputes and demands whatsoever
"except as herein provided which are brought before him and to determine
"any questions arising thereout as well of fact as of law in a summary
"manner and such Courts shall be open public Courts."

and then said that it would appear from this Section that the trial Judge had the power to hold the trial in question at such time and place as he thought proper.

The learned Judge then said :—

"But apart from Section 88 altogether I am of the opinion that the trial p. 50. l. 22.
"Judge had the right to hold Court at any place in the Court House selected
"by him and that such place thereby became an open public Court. The sole
"question to my mind is whether or not anything was done which would have
"the effect of converting the Court so held into a closed Court or a Court in
"camera. No order was made declaring the Court closed. The trial Judge
"openly declared himself to be sitting in open Court. No one was ejected
"and none was denied access. But it is argued that under the conditions

"above set out it was virtually a closed Court. I cannot accede to this "contention. The Court is not obliged to give public notice of the time and "place of every session. In *Rex. v. Lewes Prison* 1917 2 K.B. at page 271 "Lord Reading said:—

> " 'I think the words "in open Court" means a Court to which the " 'public have a right to be admitted'.

"The right of the public is the right of access and in the case at Bar access "was not denied to anyone. If it were necessary to go further I would say "that I think it a fair inference from the evidence that if anyone who was "interested had made the proper inquiries he could have discovered the time "and place of the trial. He could then have exercised his legal right to enter "the library regardless of the sign "private" on the unused door. Had he "done so it is clear from the evidence that no one would have attempted to "interfere with him. Even if any misguided orderly had tried to prevent the "entry of a spectator the latter would have his remedies against the orderly "but I do not think that the action of the orderly would have destroyed the "jurisdiction of the Court. Trials are sometimes held in the rooms of the "Court House other than the regular Court rooms for the mere purpose of "convenience. It is given in evidence that some trials and many bankruptcy "cases are held in such rooms for convenience and without the slightest "thought of excluding anybody. Although not given in evidence I understand "that the Court of Appeal itself not infrequently hold sittings in this very "Library. This I assume, is also done for the purpose of convenience and "certainly not with the idea of shutting anyone out."

13. The Appellant's submission is that this judgment is based upon an entirely wrong principle and that the tests applied namely whether any member of the public was in fact excluded or denied access and whether any member of the public could if he had made sufficient exertions have gained admission to the trial are fallacious and that the learned Judge really failed to consider the substantial question which is whether the Divorce trial satisfied the requirement of the law as to publicity.

14. The Appellant appealed from the judgment of the Supreme Court to the Appellate Division of the Supreme Court
pp. 53, 54. consisting of Horace Harvey, C.J.A., and Clarke, Mitchell, Lunney and MacGillivray, JJ., and on the 21st February, 1933, the appeal
p. 63, l. 37. was unanimously dismissed MacGillivray, J., agreeing "Not without hesitancy."

p. 54. **15.** In the Appellate Division Harvey, the learned Chief Justice of Alberta (with whom Clarke, Mitchell and Lunney, JJ., concurred) first dealt with the question whether the decrees in the Divorce action were a nullity: he said:—

"The Appellant relies on *Scott v. Scott*, 1913 A.C. 417 as authority for "the contention that the judgment in this action"—that is the decrees of divorce—"is a nullity, or at least that it should be set aside, but I can find "nothing in the judgment that warrants such a view.

"In so far as the actual decision went, for which alone, it has been said "time and again that any case is an authority, it only held that no liability "attached to the parties who published the proceedings in the case, which had "been ordered to be tried in camera, on the ground, in the main, that the "order for trial in camera was made without authority, and was therefore of "no effect. The logical consequence of that was that the trial, though ordered "to be held in camera, was not held in camera at all, for though the public "were not present they had a right to be if any of them had chosen to exercise "that right. It does not follow from that that the trial was a nullity but "rather the contrary. There is no suggestion in any of the reasons for judg- "ment that the validity of the trial could be questioned because of the "erroneous order to hold it in camera. It cannot be thought that this feature "could have been overlooked."

The learned Judge then stated that the only question was whether the place where the trial was held was an open Court or whether on the contrary the public were excluded, that they certainly were not excluded by any Order, on the contrary the trial Judge declared he was sitting in open Court: that naturally that declaration would not convey any information to the public who were not there, but on the other hand it showed that if any member of the public desired to be present no objection would be made; in other words that it was not closed to public admission.

16. MacGillivray, J., in his separate reasons after dealing with the facts said:—

"The Appellant's contentions based on the foregoing facts are these:— p. 58, l. 20.
"First, that it must be found that the trial leading to the decree nisi was not "held in open Court: Secondly, that this being so the Appellant is entitled to "a declaration that the trial and the decree nisi and decree absolute which "followed, are nullities.

"Dealing with the first submission, I may say that in my opinion, it is "to be taken as the settled law of this Province that Courts of Justice must "administer the law so openly and so publicly that it may be truly said that a "Judge trying the case is himself on trial at the bar of public opinion. The "only exceptions to the application of this rule are in cases affecting wards, "in lunacy proceedings; in cases where secrecy must be maintained unless the "very purpose of the trial is to be defeated, such as in trade secret cases, and "lastly in cases in which it is necessary in order that justice may be done that "the Court should exclude the public, for example, a case in which the judge

"has judicially determined that he cannot get the truth or all the truth from "the witnesses in the presence of an audience."

With reference to the decision in *Scott v. Scott* 1913 A.C. 417 he said :—

p. 59, l. 5. "It is to be noticed that although a decree absolute was granted, no "question arose as to the validity of the decree granted following the hearing "of the case in camera and consequently it cannot be said that the precise "point which now engages the attention of the Court was the subject of "decision in that case, but the strong views expressed by the Lords who took "part in the Judgment with respect to Judges performing their functions in "open Court, have ever since been accepted as the law of England and I think "must be accepted and followed as the law of this country."

17. The learned Judge, having referred to cases decided in England and Canada, following *Scott v. Scott*, and to the reiteration of the principal of publicity, said :—

p. 61, l. 28. "It seems to me having regard to all these cases that whether the 'open " 'Court' rule be adjective law or substantive law, one cannot escape the "conclusion that it became so firmly embedded in the law of England which "we adopted, that it now must be said to be a settled rule of law that our "Courts must function openly and in view of all men who wish to attend their "sittings. I emphasize this view by repetition because it has been suggested "that an open Court is any place in which a Judge is holding Court, from "which he has not excluded anyone by order and to which he has not pre-"cluded entry by order. In my view the words 'open Court' when used in "their proper legal sense mean a Court that is open to the public as distin-"guished from one that is held in secret. I have no manner of doubt that "if a judge were to hold Court in the glade of a forest or in the furnace room "of the Court House, without public notice he would be as surely sitting in "secret as a Judge who while sitting in Court in the Court House, ordered "that a cause be heard in camera."

"The necessity for the making of the Order that the cause be heard in "camera arises only because the Judge is sitting in a Court room to which "the public resort. The purpose of the order is to provide a secret hearing, "that purpose may be equally achieved by a Judge removing himself to a "place to which there is no possibility of the public resorting.

"The Court is held as an open Court or it is not: this is a question of fact "which must be determined having regard to all the circumstances surrounding
p. 62, l. 21. "each particular case that may come under review . . . . In my view "it matters not at all where a Court be held, provided that in the circum-"stances of the particular case it may be said that the Court was held openly "and publicly so that all the members of the public interested in so doing had "the opportunity of attending without hindrance of any kind. Equally I am

"of the opinion that subject to the exceptions mentioned, the holding of a "Court in a secret fashion whether by order of the Court or by reason of the "holding of the Court in a secret place, at which place members of the public "have not the opportunity of attending is a reversion to Star Chamber methods "which should not and will not be tolerated in this country."

18. The learned Judge then dealt with the facts upon which the trial Judge based his judgment:—

"I will first deal with the declaration of the Judge that he was sitting in p. 62, l. 30.
"open Court. Such a declaration has not infrequently been made when a
"Judge sitting in Chambers, who is conducting the chambers proceedings in
"an open and public manner, is requested to make some order that should be
"made by a Judge sitting in Court, but it seems to me that this affords not
"the slightest justification for saying that a Judge who is holding court
"in secret may by declaring that he is sitting in open court, convert a secret
"court into an open court, and so the question still remains, was this an
"open or a secret court.

"I attach no importance to the instances of what other Judges have done
"that have been mentioned in evidence. In each case they either were or
"were not sitting in open Court. If they were the proceeding was unassailable,
"if they were not they were acting contrary to the law of the land.

"I do not attach the importance which the Appellant does to the evidence
"of the trial Judge in the divorce proceedings as to his reason for making
"use of the Judge's library. In my view it is of no interest what was in the
"Judge's mind so long as there is no suggestion, as there has not been and
"could not be here, that the learned Judge was acting in collusion with one
"of the parties. He either was sitting in open Court or he was not, and it
"seems to me that his hope as to how many or how few people would be
"present as spectators has no bearing upon the question to be decided. Even
"if it be conceded as suggested that it was the learned Judge's ambition to
"hold a secret court, it must still be decided by this court as to whether or
"not in the circumstances of this case his ambition was realised."

19. He then referred to the balance of the evidence as follows:—

"There is in support of the Appellant's contention the evidence that one p. 63, l. 20.
"of the doors leading to the place of the hearing was marked private, that
"the case was heard at an unusual hour by a Judge who was not presiding
"at the regular sittings of the Court at Edmonton that week. On the other
"hand in support of the Respondents' position there is evidence that there
"was no contest, that the Judge who took the trial had arranged to do so
"in advance, to accommodate a witness from another province, that he sat in
"a room in the Court House which was quite suitable for the hearing of an

"undefended divorce action; that since he says he desired to lessen publicity "by the selection of this room it is to be inferred that he expected some "publicity in the room so selected and that his expectation was not without "foundation that all the Court officials were present at the hearing, that the "Clerk of the Court was notified of the holding of the Court in this room and "so could have informed anyone inquiring as to where the case was being "proceeded with and that the door leading directly into the room in which "the sittings was held, was left open during the proceedings at the Judge's "direction."

20. The learned Judge then concluded :—

p. 63, l. 37. "This case is near the line. However after giving careful consideration "to all the evidence I have come to the conclusion not without hesitancy "that I cannot say that Ewing J. was wrong in holding that the divorce trial "was not held in secret but was conducted in open court. In the view I take "of the case it becomes unnecessary to consider the further question as to "whether the failure to hold a divorce trial in open court is merely an "irregularity which does not make the decree invalid or is a matter going to "the jurisdiction of the Court (in that the conditions essential to the exercise "of divorce jurisdiction are absent) with the result that the decree is a "nullity."

21. The learned Judge then added that he could not refrain from saying that no question could or did arise as to the *bona fides* of the trial Judge or as to his absolute impartiality in this divorce case as in all others, that his desire not to have more people than need be attend that undefended divorce action was something of which one might not approve and yet understand as a generous impulse rather than an attempt to hold a secret Court.

22. The Appellant respectfully submits that the learned Judges of the Appellate Division other than MacGillivray J. were mistaken in applying to the question whether the divorce suit was held in open court the same test which was applied by Ewing J. which was whether or not anyone was or would have been excluded. The Appellant submits that when Mr. Justice Tweedie ordered the Divorce suit to be heard in the Judge's Private Library he virtually and effectively ordered a private hearing. If the Court withdraws itself from those places which are established by law and recognised by the public as the place where the Court sits, it has as effectively excluded the public as if it sits behind locked doors. It is submitted that it is contrary to any principle applicable to this subject to say that any Judge in any case which should be heard in open court may withdraw to the privacy and seclusion of a room unfrequented

by and indeed unknown to the public and there undertake in a constitutional manner the open administration of justice. The machinery of the Court including the learned Judge moved from an open Court room into this private, secluded and guarded inner chamber with the sole object of avoiding the public, its observation and comment—that publicity which it is submitted is essential and indispensable to the proper administration of justice. The learned trial Judge himself says that he selected this room to lessen the p. 45. publicity by reason of the position which Mr. McPherson occupied in this Province and his relation to the public. This statement it is submitted really concludes the question since as soon as the Court lessens the publicity as it did here it hides the proceedings and the open administration of justice is gone.

23. The learned Judges of the Courts below having come to the conclusion that the trial was in fact held in open Court did not find it necessary to consider the further question namely what, if the trial had not been conducted in open court, would have been the effect on the decrees pronounced. The Appellant's submission was in the Courts below and is now that the decrees are void: that the decree nisi was pronounced at a trial which was no trial and *coram non judice*, that the learned Judge was acting without jurisdiction, that the learned Judge had no power even with the consent of the Appellant (which was not in fact given) to hear and determine the suit otherwise than in open court: that when a Judge with the consent of both parties purports to hear a suit in private: "he demits "his capacity as a judge and sits as an arbitrator. The right to "invoke the assistance of a Court of Appeal may be thereby affected, "but the parties are at liberty to do what they please with their "private rights. In proceedings, however, which, like those in the "Matrimonial Court, affect status, the public has a general interest, "which the parties cannot exclude, and I am unable to see how their "consent can justify the taking of an exceptional course" (per Viscount Haldane L.C. *Scott v. Scott* 1913 A.C. at p. 436). It was admitted by Mr. Justice Tweedie that all the witnesses could perfectly well have given their evidence in open Court and there was nothing in the circumstances of the suit for Divorce which took it out of the general rule that Divorce suits must be tried in open Court.

24. The obligation to hear the case and to take the evidence of witnesses in open court is a fundamental rule of English Justice, indeed if there is one class of case which more than another requires to be heard in public it is an undefended suit for Divorce which as well as involving the status of an individual is a matter in which

the State itself has a vital interest. The important power of dissolving marriages which the legislature has entrusted to the Courts can only be properly supervised and safeguarded if every step is exposed to complete publicity and every facility is provided for the detection of collusion. This principle with regard to matrimonial causes receives statutory recognition in Section 46 of the (Imperial) Matrimonial Causes Act 1857 which is, so far as material, as follows :—

"Subject to such Rules and Regulations as may be established as herein "provided the witnesses in all proceedings before the Court where their "attendance can be had shall be sworn and examined orally in open court. " . . . . ."

No rules or regulations have been made under the Act either in England or in Alberta which in any way alter the effect of the Section. The Section, it is submitted, is not a merely procedural Section but is part of the substantive law of Divorce. That law has by Dominion legislation been carried into and forms part of the law of the Province of Alberta (*Board v. Board* 1919 A.C. 956) and if (which the Appellant denies is the case) there is anything in the law of Alberta inconsistent with it, such inconsistent provisions cannot apply to the law of Divorce and its administration, since Divorce is a matter on which provincial legislatures in Canada are incompetent to legislate. At the relevant date functions similar to those exercised by the King's
p. 68. Proctor in England in Divorce and matrimonial causes were being exercised by an official appointed for the purpose.

25. The general provision governing the exercise of the jurisdiction of the Supreme Court of the Province is contained in Section 27 of the Judicature Act (R.S.A. 1922 C. 72) which declares :—

"That the jurisdiction of the Court shall be exercised so far as regards "procedure and practice in the manner provided by this Act or by the Rules "and Orders of the Court made pursuant to this Act."

And Rule 393 made under the Act is, so far as material, as follows :—

"In the absence of any agreement between the parties and subject to "these rules the witnesses at the trial of an action or at an assessment of "damages shall be examined *viva voce* and in open court."

And by Rule 7 of the Divorce Rules of the Province (Alberta Rules of Court 1914 p. 216) it is laid down that :—

"Except as provided by these Divorce Rules the general rules of "procedure shall apply to divorce actions."

The Divorce Rules contain no special provisions on this point so that there is, in force, in Alberta a statutory rule expressly confirming the provisions of the law of England.

26. With regard to Section 88 (1) of the North West Territories Act upon which reliance was placed by the learned trial Judge and which is set out in paragraph 12 of this Case the Appellant's submission is that the provision that "such Courts shall be open public "Courts" is an imperative direction to the Judge to sit in open court and not a provision declaring that any place in which the Judge sits is an open court. That this is so appears clearly from the wording of Section 89 of the same Act which requires the judgment to be pronounced in open Court. The Interpretation Act (R.S.C. 1886 C.1. 7. (4)) provides that unless the context otherwise requires the expression "shall" is to be construed as imperative.

Further, the words in the same Section giving a Judge power to hold courts at such times and places as he thinks proper (which are also found in the Alberta Rule 167) cannot, the Appellant submits, on any construction be interpreted to give a Judge power to sit in private; they must be interpreted with reference to the nature of the territory to which they were applied, an undeveloped territory with few towns and few regular Courthouses: it is assumed throughout that the proceedings wherever they take place shall be public.

The Alberta Rule 167 is as follows :—

> "The judges of the Supreme Court shall appoint the days and places upon "which sittings for trial of actions shall be held, but a judge may hold a "special sitting at any other time or place."

27. In any case, whatever the force of Section 88, the Appellant submits that it is no longer in force in Alberta having been specifically repealed by The Jury Act of Alberta, 1921 (11 Geo. V. C.8. Section 48).

28. The Appellant humbly submits that the Appeal ought to be allowed, the Judgments of the learned trial Judge and of the Appellate Division reversed and the claim of the Appellant on the said issue allowed for the following, amongst other

REASONS

(1) Because the facts found in relation to the circumstances in which the Divorce suit was tried show that the suit was not tried and the witnesses were not sworn and examined in open Court.

(2) Because it is a fundamental rule of the law of England and consequently of the law of Alberta that, apart from well settled exceptional cases, justice shall be administered in public and that a trial which is not held in open Court is no trial at all.

(3) Because failure to comply with this fundamental rule is not a mere error in procedure but destroys the jurisdiction of the Judge and invalidates the trial.

(4) Because even in cases where the parties may competently consent to a hearing in private, the Judge is acting as an Arbitrator and not as a Judge.

(5) Because in a case affecting status the parties are not competent to give such consent and in any event no consent was given in the present case.

(6) Because the jurisdiction of the Supreme Court of Alberta to dissolve marriages can only be exercised in accordance with the statutory provisions relating thereto which expressly declare that the witnesses shall be sworn and examined in open Court.

(7) Because the learned Judge who presided over the Divorce action had no jurisdiction, power or authority to pronounce a decree nisi except at a trial held and conducted in the manner provided by law and because any decree pronounced or order made in any other manner is a nullity.

(8) Because the Judgments appealed from are wrong and ought to be reversed.

WILFRID GREENE.

HORACE DOUGLAS.

R. O. WILBERFORCE.

No. 25 of 1934.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF ALBERTA
(APPELLATE DIVISION).

McPHERSON

v.

McPHERSON.

CASE FOR THE APPELLANT.

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