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In the Privy Council.

No. 25 of 1934.

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

BETWEEN

CORA LILLIAN McPHERSON ... ... (*Plaintiff*) *Appellant,*

AND

ORAN LEO McPHERSON ... ... (*Defendant*) *Respondent.*

RESPONDENT'S CASE.

RESPONDENT'S CASE

Record.

1. This is an appeal by special leave *in forma pauperis* from the judgment of the Supreme Court of Alberta, Appellate Division, dated 21st February, 1933, dismissing with costs an appeal of the Appellant (Plaintiff) from the judgment of Ewing J. who tried the issue here presented and dismissed the Appellant's (Plaintiff's) claim in respect of the same with costs by judgment dated the 20th December, 1932, the issue having been tried before him on the 16th December, 1932. p. 66. p. 53. p. 46.

2. This action was brought by the Appellant against the Respondent by Statement of Claim dated 11th October, 1932, claiming, *inter alia*, that all orders, decrees and judgments pronounced in a previous action (No. 22420) in the Supreme Court brought by the Respondent against the Appellant, whereby the marriage between the Respondent and the Appellant was dissolved, be vacated and set aside and for a decree restoring the Appellant to her marital rights upon the ground that the decree in the said action had been obtained by perjury of the Respondent in stating that there had been no collusion between himself and the Appellant whereby the necessary evidence of adultery had been obtained and that there had been no condonation of the act of adultery complained of and no agreement whereby the evidence of adultery should be provided. It was stated in the original statement of claim before amendment that the hearing of the application for a decree nisi in the said action was held in the Law Library pp. 1-8. p. 3, l. 5.

VACHER—18590.

Record. of the Court House in the City of Edmonton. On 1st November, 1932, this statement of claim was amended to include claims for judicial separation and damages and for a new trial of the said action, and later still, on 15th
p. 7, l. 8. November, 1932, it was further amended by alleging that the action had not been heard or tried in open Court contrary to law by reason whereof the Trial Judge had no jurisdiction to hear the same or make the decree nisi therein and that the Trial Judge who presided upon the application for a decree absolute had no jurisdiction to make the same and that both of the said decrees were therefore void and of no effect, and claiming a declaration to this effect.

3. The issue raised by the last amendment of the Statement of Claim, that of the 15th November, 1932, alleging want of jurisdiction in the Trial Judge on application for decree nisi as well as in the Trial Judge who pronounced the decree absolute by reason of the application for the decree nisi having been heard and determined in the Law Library of the Court House
p. 15. at Edmonton, was by order of 28th November, 1932, directed to be heard in advance of the other issues in the action, and the same proceeded to trial before Mr. Justice Ewing on 16th December, 1932. Affidavits on production exhibiting all documents in the possession of the litigants relative to the matters in issue had previous to the trial been filed and served, the affidavit of the Respondent filed and served on 28th November, 1932, exhibiting, in the first schedule among the documents in his possession which he did
App. p. 3, l. 46. not object to produce as number 44 of such documents, the letter of Lymburn, Reid & Company to J. J. McKenzie, Saskatoon, dated 15th April, 1931, to which reference will hereafter be made.

4. During the course of the examination in chief of the Appellant on the trial before Mr. Justice Ewing the following evidence was given by her
Record, and submissions made by Counsel :—
p. 38, l. 4 *et seq.*

" Q. What notice if any did you receive of the time or place of " the trial ?

" Mr. WOODS : I object.
" A. I received the Statement of Claim.

" Mr. WOODS: We are not concerned with any other issue than——

" THE COURT: I am inclined to agree with Mr. Woods as to the " features and definite issue that we are to try. It may be that some " facts which you propose to adduce may have some connection with " that and where there is any doubt about it I think I am entitled to " the benefit of that doubt. I confess some of this evidence, the " bearing of it I do not see at all, on the issues involved.

" Mr. VAN ALLEN : With great respect, my Lord, my submission " is that any witness who can give any evidence which has a bearing " of any kind on the secrecy with which the divorce action was tried is " material. Now the real complaint that the Plaintiff makes with " respect to the issue now under consideration is that it was tried in " a sort of hole-in-the-corner way and that is illegal.

Record.

" THE COURT : If you allege that apart from the way of holding it " in camera—if you allege that there were active efforts made by the " parties to make that trial a secret trial——

" Mr. VAN ALLEN : Not just that. As your Lordship has observed " from reading paragraphs 17 and 18, we set out that the case was " heard and determined in camera ; that the Witnesses were called, " sworn and heard in camera contrary to law. Now then, Sir, I would " submit with great respect that any evidence which has a bearing on " the surrounding circumstances of that secret hearing is material. " Now somebody conceived the idea of having this case heard in camera. " It is to your Lordship's knowledge quite an unusual thing. After " twelve years of experience in the Court House the Clerk was only " able to think of one or two cases, and Mr. Woods suggested the other " cases to him. We all know that actions are triable in this room or " rooms like this. Now it is these surrounding circumstances which " I submit are admissible and relevant."

* * * * * *

" THE COURT : Subject to Mr. Woods' objection you may proceed p. 40, l. 9 *et seq.*
" with the examination of the Witness.

" Mr. VAN ALLEN : What notice if any did you have of the time or " place of the trial of the divorce action in McPherson v. McPherson " number 22420 ?—A. The only papers I received at all were the State- " ment of Claim—nothing else at all.

" Q. Did you ever receive any notice either verbally or in writing " of the time or place of that trial ?—A. I did not.

" THE COURT : Do you suggest, Mr. Van Allen, that she was " entitled to any notice ?

" Mr. VAN ALLEN : Oh, no, no. I am not suggesting it."

* * * * * *

" Q. Did you see the Defendant in Winnipeg ?—A. I did. p. 41, l. 26
" Q. In what month, do you remember ?—A. Early in July, 1931. *et seq.*
" Q. How did you come to see him ?

" Mr. WOODS : Well, that has not anything to do with it.

" Mr. VAN ALLEN : My friend need not worry, my Lord.

" Mr. WOODS : It opens up a completely new field, my Lord.
" A. (The Witness) : He was *en route* to Ottawa and stopped——

" Mr. VAN ALLEN : Well, never mind that. During the time you " saw the Defendant was anything said regarding the trial of the divorce " action between you and the Defendant ?—A. I asked him if the " divorce were through and if it was very disagreeable to him, and he " said it was.

" Q. Did you ask him about any particulars ?—A. He was rather " evasive as to particulars but he said it had been with as little publicity " as possible.

" Q. When did you first hear that the divorce action had been " tried in a private room ?—A. After I started this action."

Record. App. p.3, l.46. **5.** No reference was made during the trial to the letter from Lymburn, Reid & Company to J. J. McKenzie, Saskatoon, exhibited in his documents by the Respondent, nor was the same filed as an exhibit at the trial, and the suggestion that active efforts were made by the parties to make the trial of the former action a secret trial was disclaimed by Counsel for the Record, p. 38, l. 20. Appellant in answer to the Trial Judge. The sole question at issue was whether the mere holding and determination of the application for the decree nisi in the former action in the Law Library of the Court House in Edmonton deprived the Judge making such decree of jurisdiction to make it, and whether by reason of this fact the Judge who afterwards on 28th July, 1931, made the decree absolute dissolving the marriage between the Appellant and Respondent was thereby deprived of jurisdiction to make such decree absolute.

App. p.5, l.32. **6.** Under the Alberta Rules of Court a Defendant who does not defend an action may nevertheless file a demand of notice, the effect of which is that the Plaintiff in the action may proceed in the same way as he would proceed to obtain a default judgment against the non-defending Defendant save that the Defendant filing such demand of notice is entitled to receive notice of all motions against him subsequently made in the action unless in any particular instance the Court or Judge before whom such motion is made shall dispense with such notice.

7. No statement of defence or demand of notice having been filed by the Appellant in the former action, application for decree nisi was made therein to the Hon. Mr. Justice Tweedie, a Justice of the Supreme Court Record, p. 43, l. 39 *et seq.* of Alberta on Wednesday, 22nd April, 1931. Mr. Justice Tweedie had at the beginning of the week fixed a special sitting for this day at the request of the solicitor for the then Plaintiff (the Respondent herein) to accommodate a witness who had to be brought from Saskatoon in the Province of Saskatchewan. This was the witness J. J. McKenzie to whom the letter of 15th April, 1931, hereinbefore referred to, was written by the then Plaintiff's solicitors and which will be referred to hereafter. The application for the decree nisi was heard by the learned Judge in the Judges' Law Library in p. 24, l. 27 *et seq.* the Court House in Edmonton between 12.30 and 1.00 o'clock in the afternoon. Mr. Justice Tweedie being examined as a witness gives the following account of how it happened that the application was heard by him in the Judges' Law Library :—

p. 44, l. 22 *et seq.*

" Mr. VAN ALLEN : Was any application made to you for the trial
" of the McPherson divorce action in that room or any private room ?—
" A. No. I selected the place myself.

" Q. That was hardly usual to have the case tried in that kind of
" a room ?—A. No. It was no more usual than the case which I tried
" in the visiting Judges' room under the circumstances, the case which
" was tried by Mr. Justice Beck in his own room.

" Q. And it was your Lordship who proposed that this trial take
" place in the room in which it was actually heard ?—A. I selected
" the room, yes.

" Q. The date for trial had been arranged in advance by Mr. " Reid ?—A. Yes.

" Q. So that your Lordship knew it was coming up before you ?— " A. Yes.

" Q. The arrangement to have the trial held in that room was not " because the other Court rooms were unavailable ?—A. No, not that " I recall.

" Q. Or because of the nature of the evidence to come out ?—A. " Well the nature of the evidence—no.

" Q. Because you did not know the evidence ?—A. Oh yes, we " know the nature of the evidence in divorce cases beforehand, because " divorces can be granted only on one ground, and that is because of " sexual relations between the Respondent and Co-respondent. That " is one class of case in which we do know the evidence in advance.

" Q. May I ask you 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.

" 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 his 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.

" Q. When you proposed that the hearing take place in that room, " did either the Plaintiff or his Counsel, Mr. Reid, object ?—A. Not to " my knowledge. I do not think they knew where I was going to hold " it until about perhaps within four or five minutes of the time I held " it because I had not decided where I was going to hold it until I was " prepared to go on with the hearing.

" Q. I am referring to the beginning of the trial when they did " say that your Lordship was going to sit in the Judges' Library, did " either the Plaintiff or his Counsel make any objection to having it " held there ?—A. No, none that I recall.

" Q. Would it be fair to say that they acquiesced in having it " disposed of there ?—A. Well I went on with the trial and they took " part in the proceedings and said nothing.

" Q. Was any formal order made by your Lordship providing for " a trial in that room ?

" THE COURT : You mean previous order ?

" Mr. VAN ALLEN : Previous or later.

" THE COURT : Well later.

" Mr. VAN ALLEN : You have no recollection of signing such " an order ?—A. No. I followed exactly the same procedure as I do " in other cases. When I come up and I am in the visiting Judges' " room, Counsel come in and ask me in the morning where we will sit

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" to-day and I say we will sit in the criminal court room or sit in the " Appellate Division room. There is no formal order taken out and " never has been and I have followed that practice ever since I have " been on the bench."

p. 45, l. 26 *et seq.*
p. 25, l. 16.
p. 43, l. 31.
p. 34, l. 3.
p. 43, l. 23 *et seq.*
p. 33, l. 20 *et seq.*
p. 27, l. 45 *et seq.*
p. 28, l. 36 *et seq.*
p. 34, l. 32.
p. 35, l. 12 *et seq.*
p. 44, ll. 17-20.

8. The application for decree nisi was otherwise heard in the same way as other applications of a similar character are commonly heard, save that the Judge and Counsel for the then Plaintiff were not gowned and that the Judge hearing it declared himself to be sitting in open Court by reason of the fact that it was not held in the Court room and it was in the library. The door of the library opening on to the corridor that runs past it to the east was directed by the Judge to be left open. The door from this corridor to the public part of the Court House is a double door, the south portion of which has a brass plate with the word " Private " on it and is kept closed ; the north portion of it is not locked and would remain open but for the fact that there is an automatic spring on the corridor side which shuts it after it has been opened. It can be opened all the time. Generally speaking the public are not allowed in the corridor, though the Judges' Library has sometimes been used for purposes that require the attendance of outsiders. Actions are sometimes tried there, mostly bankruptcy actions. Mr. Justice Tweedie, who is the Bankruptcy Judge for the Province, states that perhaps four-fifths of the bankruptcy proceedings are held by him in the visiting Judges' room. It does not appear in evidence whether this outer door was open or closed on this occasion ; in the absence of something to hold it open the automatic closing device would close it.

App. p.7, l.25.
App. p.5, l.21.
App. p.4, l.20.
App. p.7, l.14.
App. p.8, l.31.

9. Save as specially provided by the Alberta Divorce Rules, the general rules of procedure in Alberta apply to divorce actions. If the sole Defendant or all of the Defendants have been noted in default (that is where no statement of defence or demand of notice has been filed) the Plaintiff may apply *ex parte* to a Judge and the Judge may with or without proof of the Plaintiff's claim as he shall see fit, make such order for final judgment or assessment of damages or otherwise as the Plaintiff is entitled to. Except as otherwise provided by the Rules all motions, applications and hearings other than the trial of actions may be disposed of by a Judge in Chambers. No order, however, for final judgment of nullity or dissolution of marriage may be made whether or not there is default of defence until the Judge is satisfied of the truth and sufficiency of the facts on which the claim for such judgment is founded. By a special provision of the Divorce Rules applications for a decree absolute may be made to any Judge sitting in Court upon at least five days' notice to the King's Proctor or the Attorney-General and to the Defendant if there has been a defence or demand of notice filed. By request of the Judges, applications for decrees absolute are placed on the regular trial list. No special provision is made either by the Divorce Rules or the general rules of procedure with regard to applications for decrees nisi and an application for a decree nisi in a case where no defence or demand of notice has been filed and where the Defendant has been noted in default (as was the case in the former divorce action wherein the present Appellant was Defendant and the present Respondent was Plaintiff) would appear to

be governed by the provisions of the rules mentioned (Rules 8 and 157) whereby the Plaintiff in the divorce action may apply *ex parte* to a Judge in chambers who may with or without proof of the Plaintiff's claim as he shall see fit make a decree nisi. The form of decree nisi attached to the Divorce Rules (to which no reference is made in the Rules themselves), being read with the other Rules of which mention has been made, would appear to be appropriate only to defended divorce cases. Record. App. p. 7.

10. In addition to the Rules of Court above mentioned applicable to the matter here in issue there are two statutory provisions governing procedure in the Province of Alberta that are important to have in mind in considering the question here raised. The *first* is Section 88, s.s. 1 of the North-West Territories Act which was carried into the Provincial law by the general terms of the Provincial Judicature Act. As pointed out by Mr. Justice Ewing, the Judge who tried the issue here raised, this section was passed to meet pioneer conditions in a country where few Court Houses existed but it is nevertheless still part of the Provincial law and in the less settled parts of the Province is still found to be of value. Its effect is to enable a Judge to hold a trial in any place he shall think proper to hold it, the effect of so doing, however, being to convert such place wherever it may be into an open Court to which the public have access as a matter of right. It is not suggested that this statutory provision gives any power to a Judge to collude with one of the parties to an action to hold a trial secretly, but no such suggestion is contained in the pleadings in this action and it was expressly disclaimed by Appellant's Counsel at the trial before Mr. Justice Ewing. No such suggestion was even mooted before the Appellate Division on the appeal from Mr. Justice Ewing's judgment. Mr. Justice McGillivray in his judgment in the Appellate Division says as to this :— App. p. 9. Record, p. 50, l. 18 *et seq.* p. 38, l. 20 *et seq.*

" In my view it is of no interest what was in the Judge's mind p. 63, l. 9.
" 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.

* * * * * *

" I cannot refrain from adding that no question can or does arise p. 64, l. 1.
" as to the *bona fides* of the Trial Judge or as to his absolute impartiality
" in this divorce case, as in all other causes. His desire not to have
" more people than need be attend this undefended divorce action is
" something of which one may not approve and yet quite understand
" as a generous impulse rather than an attempt to hold a secret Court."

Mr. Justice Ewing in his judgment says in this regard :—

" If it were necessary to go further I would say that I think it is p. 50, l. 38.
" 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

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" remedies against the orderly but I do not think that the action of " the orderly would have destroyed the jurisdiction of the Court."

The *second* statutory provision having a bearing upon the matter is Section 5 of the Judicature Ordinance of the North-West Territories which is still in force with respect to the practice of the Supreme Court of Alberta. This section says :—

Nestler *v.* Dom. Meat Co., [1910] 13 W.L.R. 241.

App. p. 9.

" A Judge sitting in Chambers, if he shall announce that he is " sitting in Court, shall have, possess, exercise and enjoy all the powers " and authorities, rights, privileges, immunities and incidents of the " said Court and any judgment given or decision or determination or " rule, order or decree made by him, . . ."

Record, p. 85. p. 86. p. 5, l. 7. p. 1.

11. The decree nisi was made in the former action on 22nd April, 1931, and the decree absolute on 28th July, 1931. About a year later the Respondent married Helen Mattern, whose former husband was the person with whom the Appellant had, according to the evidence in the former action, committed a statutory offence, and whom Helen Mattern had in the meantime divorced. The present action was begun on 11th October, 1932, about three months after the Respondent had so re-married. The former Helen Mattern, now Helen McPherson, was not made a party to the action and is not a party to these proceedings which seek so vitally to affect her status as well as that of her husband the Respondent.

pp. 47-51. pp. 53-54. p. 64, l. 9. p. 65, l. 10.

12. Judgment was given by Mr. Justice Ewing on the issue alleging want of jurisdiction in the Court by reason of the place where the application for the decree nisi in the former action was heard, on 20th December, 1932, dismissing the action of the Appellant with costs so far as concerned this issue, and an appeal by the Appellant to the Appellate Division of the Supreme Court of Alberta from this judgment was, on 21st February, 1932, unanimously dismissed with costs. An application by the Appellant to the Appellate Division for leave to appeal to His Majesty in Council was dismissed.

13. The other issues in the action came on for trial before Mr. Justice Ford in the Trial Division of the Supreme Court of Alberta on the 8th, 9th, 10th, 11th, 12th, 15th, 16th, 17th, 18th, 19th, 23rd, 25th and 26th days of May, 1933, when judgment was reserved. Judgment was handed down by Mr. Justice Ford on 11th July, 1933, dismissing the action, the matter of the costs of the action to stand reserved to be disposed of upon a subsequent application. The ground of the dismissal of the action was that the Appellant had not proved the allegations of collusion, connivance, conspiracy and perjury alleged by her. In the course of the judgment, however, the learned Judge said :—

[1933] 2 W.W.R., p. 513.

" It is remarkable that in the 76 years during which the English " Courts have had jurisdiction absolutely to dissolve marriages there " is, as far as I have been able to find, only one reported case in England " where, after decree absolute for divorce granted by an English Court, " an attempt has been made to have it set aside on the ground of

" fraud. In that case the attempt was made in the same action in " which the decree had been obtained. It was unsuccessful because it " was held that the Court has no jurisdiction to entertain the motion. " The only reported Canadian decision to which I have been referred, " and I have not been able to find any other, in which a similar attack " has been made is an Alberta one, *Blatchford* v. *Van Ruyven* (1931) " 1 W.W.R. 444, 640, 25 Alta. L.R. 404, a decision upon pleadings in " an action which never went to trial. This decision is distinguishable " from the present case on a number of grounds . . .

" Once a decree nisi has been made absolute the Court has no " jurisdiction on motion in the action, except upon appeal, to rescind " or set aside a decree or judgment absolute dissolving a marriage. " In *Kemp-Welch* v. *Kemp-Welch and Crymes* (1912) p. 82, 81 L.J.P. 25, " Sir Samuel Evans, President, seems to have expressed a doubt as to " whether there is any method of getting rid of the decree . . .

" It may well be arguable that an estoppel arises after a decree " absolute as against a person who, knowing all the facts upon which " she might have obtained a dismissal of an action for divorce, has " not defended. I agree that there is no estoppel before the decree " absolute passes the seal of the Court, but I am inclined to think, " though it is unnecessary to express any definite opinion upon the " point, that, especially where the Defendant who has not defended " the action has allowed the judgment to be acted upon, all the elements " of estoppel are present.

" In connection with the principles I have just been discussing, " I venture to say that the English and Canadian reports will be searched " in vain for any case in which a Defendant in a divorce action, whether " since the Courts were given jurisdiction absolutely to dissolve mar- " riages or when the Ecclesiastical Courts exercised the jurisdiction to " grant a divorce a *mensa et thoro* for which the relief by judicial separ- " ation has been substituted, has ever brought such an action, and in " *Blatchford* v. *Van Ruyven* supra, the possibility of estoppel existing " on the facts as they appeared in that case, was expressly denied (see " p. 424). As I read the judgments delivered in that case I think " they support the view that estoppel may be a bar even where a judg- " ment is procured by a fraud on the Court. . . .

" I do not desire to be understood as assenting to the view that, " where the direct effect of a judgment setting aside a judgment for " divorce granted by our own Court would be that of altering a status " acquired on the faith of it, such a judgment should be given without " both of the parties whose status would be so affected being made " parties to the action. It is not enough, in my present opinion, to " say that a woman who has married a divorced man might have the " right under the Rules of Court to be added as a Defendant in an " action to set aside the judgment as procured by or against her husband " for fraud. My view is that after the time for appealing from a decree " absolute dissolving a marriage has elapsed, and no appeal is taken, " the judgment, whether collusively or otherwise fraudulently obtained, " is one which may be acted upon until set aside in a proper proceeding.

Record.

" It is, I think, because of this, as much as of the recognition of the " likelihood of a Court exercising such a jurisdiction being imposed " upon, that the extraordinary safeguards I have mentioned were " thrown around the exercise of the new jurisdiction conferred by the " Act of 1857. Test the matter in this way. Say that a year after " judgment, in an action which the Court had jurisdiction to entertain, " absolutely dissolving the marriage, an innocent woman, acting on " the faith of the status of celibacy apparently given to the divorced " man by a judgment of the Court, marries that man and by such " marriage acquires the status of being a married woman, can it be " said that without her being made a party to the action, a judgment " should be given which would have the effect of making her husband " again, or, if one likes the expression better, still the husband of his " former wife and making the new wife an unmarried woman ? . . ."

App. p. 9. App. p. 10.

14. On 21st September, 1933, after judgment given the Appellant applied to add Helen McPherson as a party Defendant to the action. This application was dismissed.

App. p. 11.

15. On 11th October, 1933, the Appellant served a notice of appeal to the Appellate Division of the Supreme Court of Alberta from the judgment of Mr. Justice Ford, and on the same day served a further notice of appeal to the Appellate Division from the order dismissing her application of 21st September, 1933, to add Helen McPherson as a party Defendant to the action. One of the grounds mentioned in such last mentioned notice of appeal is that " the said Helen Mattern McPherson is a necessary and proper party to this action." These two appeals have been postponed from time to time on the application of the Appellant on the ground of the pendency of the Petition for leave to appeal to His Majesty in Council from the judgment of the Hon. Mr. Justice Ewing and the judgment of the Appellate Division affirming the same presently before His Majesty in Council, and upon the further ground that the Appellant had no money to finance these appeals.

App.p.11,l.29

16. With reference to statements made in the Appellant's Petition for special leave it is to be observed :—

Record, p. 3, l. 5.

(A) That as appears by the original Statement of Claim dated the 11th October, 1932, the Appellant was aware at the time of the commencement of the present action that the hearing of the application for the decree nisi had taken place in the Judges' Law Library.

(B) That the letter of 15th April, 1931, from Messrs. Lymburn, Reid & Cobbledick to J. J. McKenzie at Saskatoon, although disclosed in the Respondent's affidavit of documents, was not put in evidence in the proceedings now under review and there has been no opportunity of obtaining any explanations of the circumstances from the writer of the letter or from the learned Judge who tried the action for divorce.

p 45, l. 26.

(C) That the said learned Judge did not move from an open Court to the Judges' Law Library. He went from the visiting Judges' room

through the Appellate Court Room to the Law Library selecting the place himself. Record. p. 25, l. 14.

(D) Helen McPherson divorced her former husband Roy Mattern. She was not divorced by him. p. 35, l. 30.

17. The judgments of Mr. Justice Ewing and of the Appellate Division proceeded upon the ground that the application for the decree nisi in the former action was not heard and determined by Mr. Justice Tweedie in camera but in open Court; that no order was made declaring the Court closed; and that upon the facts presented in evidence it could not be said that the hearing was not in open Court. Chief Justice Harvey in the Appellate Division, whose judgment was concurred in by Mitchell and Lunney, JJ.A., speaking of the case of *Scott* v. *Scott* (No. 1) [1913], A.C. 417, relied upon by the Appellant for the contention that the judgment in the former action was a nullity, points out that there is no suggestion in any of the reasons for judgment in that case that the validity of the trial could be questioned because of the erroneous order there made to hold the trial in camera and states that it cannot be thought that this feature could have been overlooked. Mr. Justice Clarke concurred in the result reached by the other members of the Court, pointing out that it was not contended that the Plaintiff was in any way prejudiced by reason of the matters complained of in connection with the trial of the action. Mr. Justice McGillivray reviewed the facts and the law applicable and held it to be the settled law of the Province "that Courts of Justice must administer the "law so openly and so publicly that it may be truly said a Judge trying "a case is himself on trial at the bar of public opinion." Speaking of the decision of the House of Lords in *Scott* vs. *Scott* (No. 1) (supra), he says :— p. 51, l. 11. pp. 54 to 64. p. 54, l. 33. p. 56, l. 15. p. 56, l. 25.

". . . 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 this 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. The exceptions to "which I have referred were fully discussed. . . ." p. 59, l. 5.

After mentioning the decisions following *Scott* v. *Scott* (No. 1) (supra), the learned Judge continues :—

". . . It seems to me having regard to all of 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 the view of all men who wish to attend their sittings. I emphasise "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 precluded p. 61, l. 28.

Record.

" 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 " distinguished 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. . . ."

p. 62, l. 3.

" The Court is held in an open Court or it is not. This is a question " of fact which must be determined having regard to all of the circum- " stances surrounding each particular case that may come under review. " In a new country such as this, Courts are frequently held in fire halls, " town halls, and picture theatres for the lack of any other proper " accommodation for the Court ; my Lord the Chief Justice has referred " to a sittings of the Court held in an Indian tepee ; the use of the rooms " of the mounted police barracks as places for holding Court has been " quite common in this country ; but it cannot be said with truth that " the holding of the Courts in any of these places in times past was " cloaked in secrecy, nor can it be said that the North-West Territories " Act or any other Act has given power to a Judge to hold a secret " Court in this country. . . ."

He concludes as follows :—

p. 63, l. 19

" Turning then to the balance of the evidence, there is, in support " of the Appellant's contention, the evidence that one 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 in Edmonton that week. On the " other hand, in support of the Respondent's position, there is the " evidence that there was no contest, that the Judge who took the " trial had arranged so to do 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 of the Court officials were present at " the hearing ; that the Clerk of the Court was notified of the holding " of 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 in to the room in which the sittings was held, was " left open during the proceedings at the Judge's direction.

" This case is near the line. However, after giving careful con- " sideration to all of 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 Record.
" 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. . . ."

18. It will thus be seen that neither at the trial nor in the Appellate Division did the Courts find occasion to decide upon or to discuss the consideration which, in the Respondent's submission, lies at the threshold of the Appellant's action as a bar to any such relief as she seeks. This submission is that where as here no question is raised as to the competency or jurisdiction of the Court that pronounced the decree absolute in the former action, save only that the decree nisi in that action was made without jurisdiction because of the trial resulting in such decree nisi not being held in open Court, such decree absolute is a decree determining the status of the parties and is conclusive and binding not only as against the Plaintiff and the Defendant in the action in which such decree was made, but against all the world; and further that, where as here it is shown that the party who has obtained a decree absolute dissolving his marriage in a jurisdiction such as the Province of Alberta where the King's Proctor system is in force, marries again, a Court will not entertain an action for a declaration such as the Appellant here seeks.

19. In the case of *Board* v. *Board* [1919] A.C. 956, the Privy Council held that the English law of divorce as established by the Matrimonial Causes Act of 1857 applied to the Province of Alberta the same having been brought into force in the Province by the terms of Section (3) of the Canadian Statute, 49 Victoria, chap. 25 being the North-West Territories Act. This section (being R.S.C. ch. 50, sec. 11 in the revision of the Dominion Statutes of 1886) is as follows :—

" 11. Subject to the provisions of this Act, the laws of England App. p. 8.
" relating to civil and criminal matters, as the same existed on the
" fifteenth day of July, in the year of our Lord One thousand eight
" hundred and seventy, shall be in force in the Territories, in so far as
" the same are applicable to the Territories, and in so far as the same
" have not been or are not hereafter repealed, altered, varied, modified
" or affected by any Act of the Parliament of the United Kingdom
" applicable to the Territories, or of the Parliament of Canada, or by
" any Ordinance of the Lieutenant Governor in Council."

Section 57 of the Matrimonial Causes Act (1857) is as follows :—

" 57. When the time hereby limited for appealing against any App. p. 12.
" decree dissolving a marriage shall have expired, and no appeal shall
" have been presented against such decree, or when any such appeal
" shall have been dismissed, or when in the result of any appeal any
" marriage shall be declared to be dissolved, but not sooner, it shall be
" lawful for the respective parties thereto to marry again, as if the prior
" marriage had been dissolved by death: provided always, that no

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" clergyman in holy orders of the united church of England and " Ireland shall be compelled to solemnise the marriage of any person " whose former marriage may have been dissolved on the ground of his " or her adultery, or shall be liable to any suit, penalty, or censure for " solemnising or refusing to solemnise the marriage of any such person."

The Respondent submits that the provisions of this section which, in effect, provide that parties finally divorced may respectively marry again as though their former marriages had been dissolved by death, is a part of the English law of divorce as established by the said Act which was so brought into force in the Province of Alberta ; it is a consequence of the divorce as provided by that Act ; that this is a substantive part of the law of divorce so introduced into the Province and that it makes provision for the status of divorced persons in the Province. By this section the decree absolute of a Court competent to pronounce the same, that is to say, of a Court having jurisdiction to administer the law of divorce, has the same effect as though the marriage of the parties to the decree had been dissolved by death. The Privy Council in *Board* v. *Board* (supra) also decided that the Supreme Court of Alberta had jurisdiction to administer the law of divorce in the Province. Therefore the decree absolute of the Supreme Court of Alberta pronounced in the former action on 28th July, 1931, no appeal having been taken therefrom, finally dissolved the former marriage between the Respondent and the Appellant as though such marriage had been dissolved by death, and the Respondent lawfully married his present wife Helen McPherson. He is her lawful husband and she is his lawful wife.

20. The consideration in the last preceding paragraph referred to was not put before the Appellate Division on the appeal from the judgment herein of Mr. Justice Ewing because of the Court's previous decision in *Blatchford* v. *Van Ruyven* (supra) (the case referred to in the judgment of Mr. Justice Ford as stated in paragraph 13 hereof). It does not appear that the effect of Section 57 of the Matrimonial Causes Act, 1857, was mentioned to the Appellate Division in that case. Had it been, it is submitted to be doubtful if the judgments of the Appellate Division would have been as they appear.

21. The Respondent points out that in *Board* v. *Board* (supra) the Privy Council refer with approval to the reasoning of Stuart J. in the Supreme Court. In the course of his judgment Stuart J. says that the body of substantive law in the Act of 1857 " can be extracted and segregated " from the rather complicated provisions as to the machinery of enforce- " ment with which it was involved." The Respondent relies upon this statement as showing that the procedural references in Section 57 of the Act in no way detract from the submission here made. The Judges of the Supreme Court of Alberta have made rules and regulations concerning the practice and procedure in divorce matters which carry in the general rules or practice save where expressly varied by the Divorce Rules, and such general rules provide for the time for appealing from all judgments, orders or decrees.

L.R. [1919] A.C. at p.963. 13 A.L.R. at p. 380, 1918, 2 W.W.R. at p. 648.

App. pp.5&6. Rules 318-321.

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22. The reasoning also of Mr. Justice Stuart in his judgment in the Supreme Court (Appellate Division) in *Board* v. *Board* (supra), especially that portion of it which refers to the carrying into a new and unsettled territory by English settlers of English law, and that such law applied to such settlers even before any Court was established in the new territory to administer the same, is submitted by the Respondent as strongly supporting the submission here made. It is submitted that it could not be successfully contended that the divorce law governing such settlers differed from the divorce law of England in the all-important respect of the effect on the status of the parties to a decree absolute in a divorce action and their respective right to remarry. Can it be suggested that had the Matrimonial Causes Act, 1857, provided that the party to a divorce decree that had been found guilty of adultery should not be capable of remarrying such provision would not have been carried into the new territory by English settlers as part of the English law of divorce ?

13 A.L.R. at pp. 373 *et seq.* 1918, 2 W.W.R. at pp. 642 *et seq.*

23. The Respondent respectfully submits that the immediately foregoing submissions and conclusions are consonant with public policy and with the principles of estoppel as administered by the Courts. They are not, it is submitted, affected by the fact that no reference is made to the effect here contended for of Section 57 of the Matrimonial Causes Act, 1857, in the only English case that appears to have a bearing on the point, viz., *Kemp Welch* v. *Kemp Welch and Crymes* (supra). In that case the attention of the Court was not drawn to the provisions of Section 57, but even so Sir Samuel Evans held that he had no jurisdiction to disturb the decree absolute, adding, " If there is any method of getting rid of the decree after " it has been made absolute it is not by motion to this Court." In Browne & Latey's on Divorce, 11th edition, p. 135, the following proposition is stated :—

> " A decree absolute dissolving a marriage in the Divorce Court is " a judgment *in rem*, binding *inter partes* and against the whole world, " so far as the English jurisdiction is concerned."

The authors proceed :—

> " Though there is an almost entire lack of authority in Divorce " Court precedents for this proposition, it would seem to follow as of " course by reason of the fact that, in the words of the statute (Judicature ' Act, 1925, s. 184, sub-s. 1) ' as soon as any decree for divorce is made ' absolute, either of the parties to the marriage may, if there is no ' right of appeal against the decree absolute, marry again as if the ' prior marriage had been dissolved by death or, if there is such a right ' of appeal, may so marry again, if no appeal is presented against the ' decree, as soon as the time for appealing has expired, or, if an appeal ' is so presented, as soon as the appeal has been dismissed.' "

The provisions of the English Judicature Act, 1925, quoted by the authors comes by adaptation from Section 57 of the Matrimonial Causes Act 1857.

24. The Respondent, therefore, submits that the Dominion Statute 49 Victoria, Section 3 (the North-West Territories Act) intended to and did

App. p. 8.

Record. introduce into the then North-West Territories the English law of divorce, including the English law of the effect of an absolute decree of divorce on the right of the parties to it to remarry. No other law relating to this matter has ever been passed by the Dominion Parliament or by any other Parliament or Legislature. It is a law falling within the exclusive competence of the
App. p. 12. Dominion Parliament under Section 91 of the British North America Act. This law, it is submitted, governs the status of divorced persons in the Province of Alberta to-day, having been continued in force in the Province
App. p. 13. by Section 16, Chapter 3, 4-5 Ed. VII (Dom.) being the Alberta Act.

25. The amendment in 1868 of the Divorce and Matrimonial Causes Act, 1857, does not apply in Alberta and does not, it is submitted, affect the submissions hereinbefore set out.

26. The Respondent further submits that even on the assumption that a decree nisi in a divorce action is made by a Court without jurisdiction this does not affect the competence or even the jurisdiction of the Court to make a decree absolute in the same action. Such decree absolute might be set aside on appeal by reason of the invalidity of the decree nisi which preceded it, but until it is set aside it is a decree of a competent Court, and, if no appeal be taken within the time limited therefor, either party to the divorce action may, by virtue of the Statute mentioned, marry again as if the prior marriage had been dissolved by death.

27. The Respondent further submits, that apart from the submissions in the immediately preceding paragraphs contained, in the present case the Appellant had she so desired might have, by filing a demand of notice in the former action, been entitled to receive and would have received notice of the applications for both the decree nisi and the decree absolute. It is clear that she would have experienced no difficulty in ascertaining where the application for the decree nisi was being heard. She could have raised on the application for the decree absolute the same objection to the validity of the decree nisi as she now makes in these proceedings, or she could have appealed from that decree if made on the same ground as she raises here. She did none of these things but, on the contrary, stood by for eighteen months after the decree nisi was made and fifteen months after the decree absolute was pronounced, during which time the Respondent married again, thus changing not only his own status but the status of the person he married, before applying to the Court for a judgment declaring the decrees in the former action to be nullities. It is submitted that the general law of estoppel as applied in *Woodland* v. *Woodland*, L.R. [1928] Probate Division 169, and *Hopkins* v. *Hopkins and Castle*, T.L.R. (1933), Vol. 1, p. 99, applies to the Appellant ; that as against the Appellant the application of this principle would operate quite independently of the Matrimonial Causes Act, 1857, to produce the same result so far as the Respondent is concerned as is effected by that Statute ; and that as against the Appellant the decree absolute in the former action is a bar to the relief she seeks in this action.

28. The Respondent also submits, apart from the considerations immediately above mentioned, that in any event no judgment affecting

the status of Helen McPherson can be or ought to be given in an action to which she is not a party; and that the considerations in this regard mentioned by Mr. Justice Ford in giving judgment on the issue tried before him are similarly applicable to the issue tried before Mr. Justice Ewing now under consideration. This proposition appears to be common ground because, as stated, one of the grounds of the Appellant's appeal to the Appellate Division of the Supreme Court of Alberta from the order dismissing her application to join Helen McPherson as a party Defendant (an application made after judgment had been given dismissing the action) is that "Helen McPherson is a necessary and proper party to the action." Upon her own statement, therefore, the Appellant should have proceeded with her appeal to the Appellate Division before bringing this appeal to His Majesty in Council, and should only bring such appeal if the Appellate Division allowed her appeal to it and directed Helen McPherson to be added to the Record as a party Defendant in the action, a contingency that would appear somewhat remote in view of the fact that this lady was not represented at either the trial before Mr. Justice Ewing or at the long trial before Mr. Justice Ford and that the action presently stands dismissed. It is submitted that no practice justifying the making of such an order at such stage of an action exists.

Record.

App.p.11,l.29

29. The Respondent relies on the reasons for judgment of Mr. Justice Ewing and of the Appellate Division in support of the position that the application for the order nisi in the former action and the decree nisi therein was in fact made in open Court, especially having regard to the special statutory provisions with relation to the holding of Courts applicable to the Province of Alberta. As pointed out, no question here arises of a collusive design to hold a Court in a secret place. One cannot well imagine a Court being held secretly "in a glade in a forest or in the furnace room of the Court House" without there being collusion between the Judge purporting to hold such a Court and one of the parties, and it is in this connection that Mr. Justice McGillivray in the Appellate Division uses these illustrations. What would be the effect of any such collusion upon the jurisdiction of the Court to make a decree nisi therefore, need not be discussed.

30. The Respondent further submits that even if the application for the decree nisi in the former action was not made in open Court this would constitute an irregularity not going to the jurisdiction of the Court. No provision now exists in the Province of Alberta requiring judgments to be delivered in open Court and reserved judgments are commonly not so delivered. The provision governing the giving of evidence at a trial is contained in Rule 393 of the Alberta Rules of Court as follows:—

"393. In the absence of an 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, but the Court or Judge may at any time for sufficient reason "order that any particular fact or facts may be proved by affidavit or "that the affidavit of any witness may be read at the trial on such "conditions as may seem just or that any witness, whose attendance

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" for some sufficient cause ought to be dispensed with, be examined " before an examiner ; but where the other party *bona fide* desires the " production of a witness for cross-examination and such witness can " be produced, an order shall not be made authorising his evidence to " be given by affidavit."

O. 37, R. 1.

This rule is similar to Section 46 of the Matrimonial Causes Act 1857, and to English Marginal Rule 483. If the application for a rule nisi in a divorce action is a trial of an action (which it will hereinafter be submitted it is not) then under Rule 8 it would be irregular for a trial Judge sitting in Chambers to hold such a trial without declaring that he was sitting in Court, or if such declaration, if made, were ineffective. Provision for such irregularities is, however, made by Rule 273 as follows :—

App. p. 5.

" 273. Unless the Court or a Judge so directs, non-compliance " with the Rules shall not render any act or proceeding void, but the " same may be set aside either wholly or in part as irregular or amended " or otherwise dealt with as to the Court or Judge may seem just."

It is submitted that notwithstanding the expressions of their Lordships of the House of Lords in *Scott* v. *Scott* (supra) it could not have been intended by them to declare that the improper holding of a Court in camera deprived the Court so acting of jurisdiction. No one suggested that Mr. and Mrs. Scott were not divorced.

31. The Respondent further submits that even if the judgments in the Court below are wrong in concluding that Mr. Justice Tweedie was in fact sitting in open Court on 22nd April, 1931, the application for decree nisi in the former action was properly brought before Mr. Justice Tweedie in Chambers ; that he had the right to and did declare that he was sitting in Court ; that such Court was an " open public court " from which the public could not be excluded ; that the words " in open Court " mean a Court to which the public have a right to be admitted (per Lord Reading in *Rex* v. *Lewis Prison*, L.R. (1917), 2 K.B. at p. 271) ; and that in the absence of any allegation or proof of active efforts made by the Respondent to hold or to collude with the trial judge in holding a Court in a secret place there is nothing irregular in such a proceeding ; that, even if the element of collusion were imported into the consideration of the matter, the same, if established, would not go to the question of the jurisdiction of the Court, but would, at most, constitute an irregularity giving any person adversely affected thereby the right to set aside the decree nisi, and that neither the Appellant nor anyone else was adversely affected by the holding of the hearing where it was heard ; and that the issue of the jurisdiction of Mr. Justice Tweedie to pronounce the decree nisi in the circumstances being the only issue before Mr. Justice Ewing on this trial was properly found against the Appellant.

App. p. 9 (sec. 88).

32. The Respondent further submits that in any event Mr. Justice Tweedie had jurisdiction to hear and determine the application for the rule nisi in Chambers ; that the application is for a default judgment which can be so heard ; but that in any event and if it be considered that the form of the order nisi set out in the Rules of Court has the effect of consti-

App. p. 7, l. 27 *et seq.*

tuting such an application a trial of an action which cannot be held in Chambers and if it be considered that Mr. Justice Tweedie was still in Chambers notwithstanding his statement that he was sitting in open Court then the result that follows is that such trial had been irregularly held in Chambers contrary to Rules 8 and 273, which irregularity does not render the decree nisi there pronounced void but only gives the right to any person affected by it to set it aside or have it amended as to the Court or Judge may seem just. Record. App. p.4, l.20, p. 5, l. 40.

33. The Respondent therefore respectfully submits that the judgment of the Appellate Division of the Supreme Court of Alberta is right and should be affirmed, and also that the judgment of the Honourable Mr. Justice Ewing at the trial of this action is right and should be affirmed for the following, amongst other,

REASONS.

1. Because the decree absolute of 28th July, 1931, finally dissolving the marriage between the Respondent and the Appellant is an absolute bar to the relief claimed by the Appellant in this action.

2. Because the provisions of Section 57 of the Matrimonial Causes Act, 1857, providing that parties finally divorced may marry again as though their former marriage had been dissolved by death governs the status of divorced persons in the Province of Alberta.

3. Because a decree absolute of a Court competent to administer the law of divorce until set aside is a valid and binding decree which may be acted upon after the time for appealing therefrom has expired where no appeal has been taken.

4. Because the Appellant cannot be heard to deny that such decree absolute did finally dissolve the marriage between herself and the Respondent.

5. Because the decree nisi of the 22nd April, 1931, was a good and valid decree in the action (No. 22420) by the Respondent against the Appellant.

6. Because even if such decree nisi be not a good and valid decree in such action the decree absolute therein is good, valid and binding upon the Appellant.

7. Because there is no suggestion either in the pleadings or in the evidence that such decree absolute was not made regularly and in open Court and in the absence of evidence to the contrary it must be taken to have been so made.

8. Because the decree absolute effected a change in the status of the parties.

9. Because Helen McPherson, the wife of the Respondent, who married the Respondent about a year after such decree absolute was made, is a necessary party to any action such as the present action to declare such decree null and void.

10. Because the making of a decree nisi without jurisdiction by a Court does not affect the competence or jurisdiction of the Court to make a decree absolute in the same proceeding.

11. Because the judgments of Mr. Justice Ewing and of the Appellate Division of the Supreme Court of Alberta on appeal from his judgment are right and should be affirmed.

12. Because the matter complained of by the Appellant, viz., that the application for decree nisi and the decree thereon was not made in open Court does not go to the matter of the jurisdiction of the Court, but, if established, is merely an irregularity.

13. Because the application for decree nisi was properly brought before Mr. Justice Tweedie in Chambers who properly declared that he was sitting in Court and that such Court was an open Court from which the public could not be and were not excluded.

14. Because in any case Mr. Justice Tweedie had jurisdiction under the Alberta Divorce Rules to hear and determine the application for the decree nisi in the former action in Chambers.

S. B. WOODS.

In the Privy Council.

No. 25 of 1934.

On Appeal from the Supreme Court of Alberta (Appellate Division).

BETWEEN

CORA LILLIAN McPHERSON
(*Plaintiff*) *Appellan*

AND

ORAN LEO McPHERSON
(*Defendant*) *Respondent*

RESPONDENT'S CASE.

BLAKE & REDDEN,
17, Victoria Street,
S.W.1.