Privy Council Appeal No. 25 of 1934

Cora Lillian McPherson - - - - - - - - *Appellant*

v.

Oran Leo McPherson - - - - - - - - *Respondent*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH DECEMBER 1935.

Present at the Hearing:

LORD BLANESBURGH.
LORD MACMILLAN.
LORD WRIGHT.

[*Delivered by* LORD BLANESBURGH.]

Questions of wide general importance—of interest in some of their aspects to the whole Dominion and even beyond—are raised by this appeal from the Supreme Court of the Province of Alberta. The questions discussed in the judgments appealed from are concerned with the degree of publicity called for at the trial of divorce suits—in particular undefended divorce suits in the Province: their Lordships, however, will have to deal, in addition, with the effect upon a decree nisi made at such a trial and upon a decree absolute following thereon when it is shown—as in this case is alleged, that the proceedings at the trial were devoid of sufficient publicity—were, in short, not held in " Open Court ".

The facts which raise these questions are not in the present case in dispute and may be stated as follows:—

The appellant and the respondent—they will throughout be generally so referred to—were married on the 17th April, 1908, in the United States. Their subsequent matrimonial domicil, however, was in Alberta. They lived at Edmonton where they must have been prominent citizens—the respondent in 1931, being, or shortly afterwards succeeding to the office of, Minister of Public Works for the Province.

On the 17th March, 1931, he instituted in the Supreme Court of Alberta, divorce proceedings against his wife. He accused her of misconduct with one Roy Mattern. She made no answer to the charge. She put in no defence. She filed no demand of notice. Accordingly the action was appointed for trial without further intimation to her. It was tried on the 22nd April, 1931, by Mr. Justice Tweedie, sitting in the Judges' law library of the Court House at Edmonton. The learned Judge, on that day and in that place after taking the evidence of the respondent and of

two witnesses called on his behalf pronounced a decree nisi and gave to the respondent the custody of the four children of the marriage—all of them sons, the youngest then a boy of seven.

It is not unlikely, if one may judge from passages in the record, that the retention by the respondent of the custody of that youngest son, lies at the root of much of the later troubles between the parents.

In due course however, there having been no intervention by the appellant or anyone else, the decree nisi was by decree of the 28th June, 1931, made absolute and the marriage between the appellant and respondent was, at least apparently, finally dissolved, with this statutory result, that, after the time for appeal had expired, it became lawful for both parties to marry again as if their prior marriage had been dissolved by death—all in terms of section 57 of the Matrimonial Causes Act, 1857—a section which has always been part of the law of Alberta.

And of that privilege the respondent in due course availed himself. In July, 1932—long after the time for any appeal from the decree absolute had expired, he married Mrs. Mattern, the former wife of Roy Mattern already mentioned. She had obtained a divorce from her husband on account of his misconduct with the appellant. Three months after the respondent's marriage to Mrs. Mattern—in October, 1932—the appellant commenced against him the action out of which this appeal proceeds.

As originally framed the action was not directed to the questions with which their Lordships are now alone concerned. Its claim was to have rescinded and set aside the decrees nisi and absolute obtained by the respondent in the divorce action on the allegations, in effect, that these decrees had resulted from the respondent's perjury in stating in evidence at the trial that there had been no collusion between himself and the appellant whereby the necessary evidence of her adultery had been obtained and that there had been no condonation of that adultery.

In the statement of claim as first delivered, it is recorded, almost casually, that the trial at which these alleged false statements were made took place in the law library of the Court House at Edmonton. But none of the relief asked is grounded on that statement. Moreover, it is important to observe that the relief so far claimed was based upon the footing that the impugned decrees were voidable only and that the intervention of the Court for their rescission was necessary. It was not until the 13th November following that the questions now in contest were raised by amendment: then for the first time was it alleged that the trial of the divorce action in the library was not a trial in open court—and as a result that the decrees in question were actually

null and void—an allegation and a claim of peculiar seriousness not only to the respondent, in view of his second marriage, but to the wife of that marriage who, be it noted, is no party to this appeal.

By order dated the 28th November, 1932, this new issue was directed to be tried before the earlier issues in the cause.

And it has been so tried, with the result that by an order of the Supreme Court (Ewing J.) of the 20th December, 1932, affirmed, on appeal, by an order of the Appellate Division of the 21st February, 1933, it has in effect now been found that the divorce trial did take place in open court and the appellant's action so far as it questions the sufficiency of that trial has been dismissed.

The present is an appeal from these orders of dismissal. The appellant has by special leave been permitted to present and prosecute her appeal *in forma pauperis*. By it she challenges the finding in question. The trial, she contends, did not take place in open Court, and once the finding that it did is displaced, it results, so she asserts, that the decrees following thereon being null and void should now be so declared.

It may be stated here that the original issues in the appellant's action have now also been tried and in the Court of first instance have resulted in a judgment adverse to her. But that judgment is the subject of a pending appeal to the Appellate Division, and their Lordships accordingly do not further refer to it. They confine their attention exclusively to the questions raised by the issue separately tried, and it will they think be convenient first to deal with the actual finding of the Courts below. Was the trial really held in open Court, or was it not? An important question as will presently be seen.

The Judges' library at Edmonton in which the trial took place is not one of the regular Courts of the Court House there, and it is a circumstance on which reliance has been placed by the appellant that at the time of the trial in that room and indeed throughout the afternoon of that day one or more of these Courts was available. Up to a point, however, this fact is of little or no importance. There is at Edmonton no announcement with reference to a trial in a regular Court that would be withheld in the case of a trial in the Judges' library. There is there no daily cause list. No printed or written notice of the business in progress is apparently exhibited. Information on that subject is, it seems, obtained from the orderlies in attendance, and they, apparently, would know as much about a case appointed to be heard or being heard in the Judges' library as about one appointed to be heard or proceeding elsewhere. Had the learned Judge on the occasion in question directed this divorce case to be taken in one of the empty Courts no greater degree of

publicity would apparently, so far, have attended the proceedings.

In the matter of facilities for public access to the Court rooms on the one hand and to the Judges' library on the other there is, however, a very great difference to be noted: to the Court rooms direct public access is provided from a public corridor which encircles the entire second floor of the Court House. But there is no such direct access to the Judges' library. It is approached through a double swing door in the wall of the same corridor immediately opposite the top of the stairway. One wing of the door is always fixed—the other although swinging close is usually unfastened. On the fixed wing is a brass plate with the word " Private " in black letters upon it. As to the unfastened swing door—the door to which alone when it is open the word " Private " has any sensible application—it opens on to an inner corridor in which, opposite, is a door of the Judges' library.

It was in evidence that the word " Private " on the outer door did not in fact deter or hinder entry to the inner corridor by practitioners and other familiars of the building and the door unfastened is not usually officially guarded. It was accepted too that the opening wing of the swing door was unfastened during the trial and it was proved, as will later appear, that the inner door of the library was kept open throughout. But there remains the serious question, to which their Lordships must return, whether these swing doors with " Private " marked upon one of them were not as effective a bar to the access to the library by an ordinary member of the public finding himself in the public corridor as would be a door actually locked.

On the day of the trial, Mr. Justice Tweedie was not a Judge in attendance at the Court House. For the convenience of one of the witnesses who was coming from a distance, he had arranged to take the case himself on that day. It was only a few minutes before the hour appointed that he definitely selected the Judges' library as the place for the hearing, and he so informed the Clerk of the Court.

The proceedings took place during the luncheon interval, probably as the most convenient hour for all concerned. They were in one respect less formal than those of an ordinary trial in open Court. The learned Judge was not robed. Neither was Counsel. In other respects the proceedings seem to have been quite regular. Tweedie J. entered the library from a door accessible only to Judges. He was attended by an official short-hand writer and by the Assistant-Clerk of the Court—Mr. Mason. Before taking his seat at the head of the table in the library he stated that he was sitting in open Court, a statement suggested, no doubt, by section 5 of the Judicature Ordinance of the North West Territories later to be mentioned. He directed Mr. Mason to open and to

keep open the door already mentioned leading from the library to the inner corridor. He evidently overlooked the swing-door outside, with its appearance of being closed and its warning against public intrusion, for he gave no direction with regard to that door. Probably, the door being rarely closed it was the legend upon it that he forgot. Had he recalled that word "Private" and appreciated its significance, then, judging by his action with reference to the inner door he must either, it would seem, have had it plainly opened or he must have sat elsewhere.

In point of fact no member of the public entered the library while the trial proceeded. Only the learned Judge and Counsel, the respondent with his two witnesses, called in one after the other, and the Court officials already mentioned were there.

Having now closed their account of the proceedings, their Lordships pause, to join with every one concerned, in affirming their own belief in the complete bona fides of the learned Judge in everything he did on this occasion. He stated to Mr. Justice Ewing, the trial Judge of this separate issue, that it was his desire to restrict publicity but not in any way out of regard for the feelings or in deference to the position of the respondent personally. The suggestion that the procedure adopted on this occasion is traceable to the fact that the respondent was a Minister of the Crown is one easily made and readily accepted by credulous minds. It is right therefore that being unfounded, it should be definitely repelled. Their Lordships unreservedly accept the statement of the learned Judge on this subject. For the rest, they believe that it was unhealthy notoriety rather than normal publicity that he really desired to restrict. It could hardly have been anything else. The respondent, after all, was plaintiff and not defendant in this undefended suit. He needed no protection, and in view of his position it is a satisfaction to place it upon record that learned Counsel for the appellant disclaimed making any kind of reflection on the respondent in relation to any incident attending the trial. In that matter at any rate he is the victim of misfortune. Their Lordships, reading his evidence—the evidence, they assume, of a layman—are very ready to conclude that to him there appeared to be nothing in the proceedings of that day in any way out of the normal.

Now, the learned Judges in Alberta, applying to the case the principles enunciated in *Scott* v. *Scott* (*post*) as those by which they were bound have, as already stated, reached the conclusion—McGillivray J. with some hesitation—that the trial in the library, as just described, was a hearing in open Court, and their Lordships are impressed by the weighty considerations that can be ranged in support of that view. The facts of this case, for example, have little correspondence with those in *Scott* v. *Scott* [1913]

A.C. 417—the authority constantly referred to in argument as the foundation for the appellant's claim. That suit was heard in camera by direct order of the Registrar, his justification being that he was thereby merely following well established and authentic practice. As a result the public were deliberately as well as effectively excluded from the Court. Here, on the other hand, there was no actual exclusion of the public, although there was no actual public attendance. No such exclusion was intended nor, possibly, even desired. The learned Judge would probably have been gratified by the presence of a small audience. But, even although it emerges in the last analysis that their actual exclusion resulted only from that word " private " on the outer door, the learned Judge on this occasion, albeit unconsciously, was, their Lordships think, denying his Court to the public in breach of their right to be present, a right thus expressed by Lord Halsbury in *Scott* v. *Scott* (*supra* at p. 440) : " Every Court of Justice is open to every subject of the King."

To this rule, there are, it need hardly be stated, certain strictly defined exceptions. Applications properly made in chambers and infant cases may be particularised. But publicity is the authentic hall-mark of judicial as distinct from administrative procedure, and it can be safely hazarded that the trial of a divorce suit, a suit not entertained by the old Ecclesiastical Courts at all, is not within any exception.

The actual presence of the public is never of course necessary. Where Courts are held in remote parts of the Province, as they frequently must be, there may be no members of the public available to attend. But even so the Court must be open to any who may present themselves for admission. The remoteness of the possibility of any public attendance must never by judicial action be reduced to the certainty that there will be none.

And their Lordships in reaching the conclusion that the public must be treated as having been excluded from the library on this occasion have not been uninfluenced by the fact that the cause then being tried was an undefended divorce case. To no class of civil action is Lord Halsbury's statement more appropriate. In no class of case is the privilege more likely to be denied unless every tendency in a contrary direction, whenever manifested is definitely checked.

So long as divorce, in contrast with marriage, is not permitted to be a matter of agreement between parties, the public at large—their Lordships are not now referring to the prurient minded among them who revel in the unsavoury details of many such cases—but the public at large are directly interested in them affecting as they do, not only the status of the two individuals immediately concerned but,

not remotely when taken in the mass, the entire social structure and the preservation of a wholesome family life throughout the community.

And their Lordships are not surprised to find disclosed in the record traces of a practice existing in Edmonton, one not in their experience confined to Alberta, which seems to regard too lightly the duty of hearing these suits in public and with all appropriate ceremony. The trial of undefended suits in the Judges' library with its warning off notice, although perhaps infrequent has been by no means unknown. Mrs. Mattern's suit, for instance, was heard there. Such suits seem to have been heard, on occasion, in a Judge's private room and, very probably, because no public attendance was anticipated, it appears that in the present case the discarding of the robe of ceremony was regarded both by Judge and Counsel as a matter of course.

And there is perhaps no available way to correct these tendencies more effectively than to require that the trial of these cases shall always take place and in the fullest sense in open Court. This requirement must be insisted upon because there is no class of case in which the desire of parties to avoid publicity is more widespread. There is no class of case, in which in particular circumstances, it can be so clearly demonstrated even to a Judge that privacy in that instance would be both harmless and merciful.

Again publicity goes far to prevent the trial of these actions, where one is superficially so much like another from becoming stereotyped and standardised so that the ability to dispose of them with a minimum expenditure of judicial time is even now apparently regarded in some quarters as the convincing test of judicial efficiency.

Moreover the potential presence of the public almost necessarily invests the proceedings with some degree of formality. And formality is perhaps the only available substitute for the solemnity by which, ideally at all events, such proceedings especially where the welfare of children is involved should be characterised. That potential presence is at least some guarantee that there shall be a certain decorum of procedure. If at other public sittings of the Court it is the rule for both Judge and Counsel to be robed it is *pessimi exempli* that for the trial of an undefended divorce case the gown of ceremony should be discarded.

These are some of the considerations which have led their Lordships to take a more serious view of the absence of the public from the trial of this divorce action than has obtained in the Courts below. Influenced by them their Lordships have felt impelled to regard the inroad upon the rule of publicity made in this instance—unconscious though it was—as one not to be justified and now that it has been disclosed as one that must be condemned so that it shall not again be permitted.

It will be seen that in reaching this conclusion their Lordships, like the learned Judges in Alberta, have dealt with the case as if the principles applicable were those enunciated in *Scott* v. *Scott* (*supra*). In taking that course they have not forgotten the elaborate and careful argument by which Mr. Woods for the respondent sought to establish that in view mainly of the section of the ordinance already referred to and the Divorce Rules of the Supreme Court the rule of publicity in divorce suits was less rigid in Alberta than it is in England, maintaining indeed that in Alberta, for the trial of undefended divorce suits, no publicity was required. Their Lordships do not discuss this suggestion. They think that the answer to it made by Mr. Greene in reply was complete and they leave it there, referring only to the decision of the Judicial Committee in *Board* v. *Board* [1919] A.C. 956 as the source of the law of Alberta on this subject.

But what is the result of the irregularity in procedure now disclosed. This question had not to be dealt with in the Courts below. It must now be disposed of by the Board. The appellant claims that the irregularity operates to render the supervening decrees null and void : she advances the position that inevitably and with no power of rectification in any provincial authority, judicial or otherwise, the change of status effected on the face of it by the decree absolute does not result : that to this decree absolute section 57 of the Matrimonial Causes Act 1857 has no application and that any subsequent marriage of either party to it, not being entitled to the protection of that section and contracted in the lifetime of the other, is bigamous and its offspring illegitimate : that this inescapable result ensues, whatever be the breach of the rule in its attendant circumstances—whether, at one end of the scale, it be a calculated and interested secrecy : or whether, at the other end of the scale—and as here—the result of mere forgetfulness : and finally, but separately, that a declaration to the effect stated can properly here be made in the absence, as respondent, of Mr. McPherson's second wife.

It is agreed however that there is no case to be found in the books justifying these propositions. And their Lordships are of opinion, that neither on principle nor by authority can they be supported, that the decrees here in question were voidable only, and not void, and that the time for avoiding them has long gone by.

Their Lordships would observe, in passing, that they are not in this case dealing with a decree nisi pronounced after a travesty of judicial proceedings—a mere stage trial. The quality of a decree pronounced after such an idle ceremonial may be left to be dealt with when it is produced. Here their Lordships are dealing with a decree pronounced after a serious trial free from every other defect in procedure, and one entered and remaining on the Court files

as regular in every respect. To say that such a decree is void would seem to be out of the question. If the law were so to treat it, the remedy would be far worse than the disease it was designed to cure. To say that it is voidable states a result which their Lordships think entirely meets the case.

And that that is the true result emerges from an authority which, although not direct, is, in their judgment, completely analogous—the case of *Dimes* v. *Grand Junction Canal*, 3 H.L.C. 759, in which it was held that an order made by a Lord Chancellor who was personally interested in the result was, while voidable, not void. In that case the Judges were consulted and their opinion was given by Mr. Baron Parke. It was to the effect that the Lord Chancellor by reason of his interest was disqualified from judging in the cause but that his decree was not in consequence absolutely void. It was voidable only, and, challenged on appeal it was set aside by the House of Lords.

Learned Counsel for the appellant did not find it possible to distinguish *Dimes's* case (*supra*) from the present case except upon the ground that the objection there taken to the decree was one which, as it merely affected property could have been waived by the appellant and was therefore voidable only: but that the decrees here involved questions of status in which the public was interested: that there could be no waiver of the public right and that accordingly the decrees here were void. But this presupposes that no intervention in due time on the part of the public is, in such cases as the present possible, and that supposition is, their Lordships think, mistaken. In the present case it was open to the Attorney-General of the Province or the King's Proctor on his behalf had he in the public interest thought fit to move by way of appeal, or before time for appeal had expired to move the Trial Judge himself to discharge the impugned orders on the ground that the trial, from which both resulted had not been held in open Court. In other words the public through the Attorney-General had the fullest right of intervention.

But any such intervention had to be made before time for appeal had expired or before the rights of third parties had intervened. Just as a contract to take shares in a company induced by fraud, and being voidable only, may be set aside before winding up commenced but not later, after the rights of the company's creditors have intervened—so here the order absolute cannot be touched after the time for appeal therefrom has passed, and a new status has been acquired, or in this case after the respondent having remarried is entitled as is also his wife to the protection afforded by section 57 of the Matrimonial Causes Act 1857. It follows in their Lordships' judgment that the appeal fails: the order absolute, although originally voidable, having become unassailable by the time the appellant's claim was made.

In these circumstances it is unnecessary for their Lordships to consider whether any declaration that the decree was void could in any case have been made in a proceeding to which the present Mrs. McPherson was no party. Nor is it necessary for them further to examine the case of *Scott* v. *Scott* (*supra*) for the purpose of showing that the order there made was not regarded by any of the noble Lords concerned nor by the Attorney-General nor by either of the parties to the appeal as affecting in any way the order absolute which had in fact been made and at the instance of the appellant too while her appeal to the House of Lords was pending. The decree absolute in *Scott* v. *Scott* (*supra*) as their Lordships have ascertained, still stands on the files of the Court intact: and so stands along with many another previous decree in a nullity suit made after a hearing *in camera*. In fact the decree was in no way affected by the judgment of the House notwithstanding that in its opinion the order directing the proceedings at the trial to be held in camera was so completely beyond the powers of the Court that, although obtained at the instance of the appellant herself, it might be disobeyed by her with impunity.

On the whole case, their Lordships are of opinion that this appeal should be dismissed. And they will humbly advise His Majesty accordingly.

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In the Privy Council.

CORA LILLIAN McPHERSON

v.

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DELIVERD BY LORD BLANESBURGH

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