Privy Council Appeal No. 65 *of* 1916.

Andrew Joseph Drewry and Others - - *Appellants,*

v.

Phœbe Jane Drewry - - - - - *Respondent,*

FROM

THE SUPREME COURT OF ALBERTA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST AUGUST, 1916.

Present at the Hearing:

THE LORD CHANCELLOR.
VISCOUNT HALDANE.
LORD ATKINSON.
LORD SHAW.
LORD PARMOOR.

[*Delivered by* LORD SHAW.]

This is an appeal from an order of the Appellate Division of the Supreme Court of Alberta, dated the 24th March, 1916, which order dismissed an appeal from the judgment of the Supreme Court of Alberta, dated the 17th January, 1916.

The question in the case depends upon the view which is taken of certain provisions of the Married Women's Relief Act of the Province of Alberta.

The late John Climie Drewry, whose executors are the appellants, and the respondent, Mrs. Drewry, were married on the 6th June, 1883. They lived together till the 9th June, 1890. On that day Mrs. Drewry left her husband. She remained separate from him during the remainder of his life. He died on the 28th December, 1914. It appears from the facts as set out in the judgment of the learned Walsh J. that the wife's separation from and declinature to live with her husband were without legal justification. The separation lasted for over twenty-four years. The wife was possessed of certain means of her own, and made no claim for alimony or otherwise upon her husband during his life. Apart from certain requests by the husband for her return and from certain letters by her to him, the parties led entirely separate and independent lives.

After the separation he acquired a certain fortune; and he died leaving a will in which no provision was made for his wife.

By the law of Alberta there is a certain invasion of the unlimited power of testacy. Under the law of Scotland, and of those nations which have followed the principles of the law of Rome, such a limitation is definite, and in certain countries, particularly in Northern Europe, is very large. The limitation has not been adopted by the law of England, and the power of disinherison both of wife and children there remains to a testator. By the law of Alberta a middle course is adopted. As the appellants state in their case: "Prior to the passing of the Married Women's Relief Act a husband could by his will omit to leave any part of his estate to his wife, and she would have no relief whatever. This occasioned some hardship, and relief was thought advisable."

Such relief was conferred by the Married Women's Relief Act of Alberta, the material sections of which are these:—

"2. The widow of a man who dies leaving a will by the terms of which his said widow would in the opinion of the Judge before whom the application is made receive less than if he had died intestate may apply to the Supreme Court for relief."

"8. On any such application the Court may make such allowance to the applicant out of the estate of her husband disposed of by will as may be just and equitable in the circumstances."

"10. Any answer or defence that would have been available to the husband of the applicant in any suit for alimony shall equally be available to his executors or administrators in any application made under this Act."

It is admitted that under the law of Alberta—there being no issue of the marriage—the widow would have succeeded to all the property of her deceased husband had he died intestate. The facts accordingly bring the situation within the scope of section 2 as one in which the widow "may apply to the Supreme Court for relief," and in which, under section 8, the Court might make a just and equitable allowance to her, if her claim was not open to and excluded by the answer or defence set forth in section 10.

It is this last-mentioned section which raises a question of construction not free from difficulty. The Courts below have held that the circumstances are not such as would have permitted alimony to be granted. But they have, notwithstanding this, reached the conclusion that it is open to them to make an allowance under the statute, although section 10 thereof already stated expressly makes available to the executors any defence which would have been open to the husband in any "suit for alimony." It is suggested that, although this result appears to do violence to the language of the Act, that language must be construed according to, and if necessary must give way to, the view entertained as to the intention of the legislature in passing this statute.

This result is startling, and their Lordships are not prepared to hold that it is justified by law. Their view of the Act is this: The facts as to the situation and relations of the married persons must be taken just as they were. It is to be observed that the defence, which is to be open to the husband's executors, is a defence which would have been open to the husband himself, upon the figurative case that a suit for alimony had been brought against him, but this figurative case involves that the parties had been separated from each other. The difficulty, accordingly, which is raised in the Courts below, does not arise, namely, that the defence to a "suit for alimony" would have been complete if the parties had been living together, and that, accordingly, the innocent and disinherited wife could obtain no allowance from the Court. It is not so; in the case which is thus figured there would have been no defence, because there would have been no suit, and it is a contradiction of ideas to suppose such a suit by the wife or defence by the husband when the facts of the case were that they were living together without any cause of action having arisen.

When, however, the parties are separate, and when they have been living independent lives, it is then that the figurative situation has arisen, when a suit may be imagined to have been brought by the wife and the husband may be imagined to have been defending it.

So judged, the present case is clear. Had Mrs. Drewry, on the day of or immediately before her husband's death, brought a suit against him for alimony, it appears to their Lordships that his defence would have been complete. In this the Board is in entire agreement with the learned Judge who tried the case, and who observes: "I would have to dismiss her action for alimony if that was what I was trying." There is no suggestion upon the facts that on the day of or immediately before his death Mrs. Drewry's attitude towards her husband had altered, and it does not, in the view of the Board, appear to be open to the Courts to make an allowance out of the estate of a husband, upon whom during his life a wife separated from him and declining to adhere could have obtained no decree of alimony. In the present case it would be, in their Lordships' opinion, a reversal of the express provision of the statute to permit the respondent, after twenty-four years' separation—unjustifiable upon her part—from her husband, to make a claim upon his estate such as could be made by a wife living in family with him or having a just right to alimony from him.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the judgments of the Courts below should be reversed, and that the action should be dismissed; the respondent to pay the costs here and in the Courts below.

In the Privy Council.

ANDREW JOSEPH DREWRY AND OTHERS

v.

PHOEBE JANE DREWRY.

DELIVERED BY LORD SHAW.

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1916.