Privy Council Appeal No. 87 *of* 1918.

Mary Board - - - - - - - - *Appellant*

v.

William Board, and - - - - - - - *Respondent*

AND

The Attorney-General for the Province of Alberta - - - *Intervener.*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD JULY, 1919.

Present at the Hearing:

VISCOUNT HALDANE.
LORD BUCKMASTER.
LORD DUNEDIN.
LORD SHAW.
LORD SCOTT DICKSON.

[*Delivered by* VISCOUNT HALDANE.]

This is an appeal from a judgment of the Supreme Court of Alberta, by which it was held that there was jurisdiction in the Court to entertain proceedings on a petition for divorce on the ground of adultery.

The Province was established in 1905 by a Dominion Act of that year, being formed out of the North-West Territories. By section 16 of the Act it was provided that the laws previously in force in the North-West Territories included in the New Province should continue subject to certain reservations which are not material. No law relating to marriage or divorce has been enacted by the Dominion Parliament since the Province was established, and it is therefore necessary to ascertain what was the law relating to marriage and divorce in the Territories before the Province was constituted.

In the appeal, immediately previous to this one, of *Walker* v. *Walker*, their Lordships have referred to the legislation by which

the Parliament of the Dominion acquired power to make laws relaitng to the North-West Territories. In 1886, the Dominion Parliament passed, under the powers it had so acquired, an Act to amend the law respecting them (49 Vict. c. 25). By section 2 of that Act, all its statutes which were not inapplicable were to be in force in the Territories, and by section 3 the laws of England relating to civil and criminal matters, as the same existed on the 15th July, 1870, were to be in force in the Territories, in so far as the same were applicable, unless excluded by Imperial or Dominion statute, or by ordinance of the Lieut.-Governor in Council.

For the reasons given in their judgment in *Walker* v. *Walker* their Lordships are of opinion that the effect of the Act of 1886 was to make the English law of divorce as established by the Divorce Act of 1857, apply to the Territories as well as to Alberta.

But there is another question which has been raised in this appeal, which is whether the Supreme Court of the Province of Alberta has been so constituted as to have jurisdiction in matrimonial causes, including divorce.

The Dominion Act of 1886, by section 4, established in the Territories a Supreme Court of record of original and appellate jurisdiction, called the Supreme Court of the North-West Territories. By section 14, this Court was, for the administration of the laws within them, to possess all such powers and authorities as by the law of England are incident to a Superior Court of civil and criminal jurisdiction, and was to have and exercise all the rights, incidents and privileges of a Court of record, and all other rights, incidents and privileges, as fully to all intents and purposes as the same were on the 15th July, 1870, used, exercised and enjoyed by any of Her Majesty's Superior Courts of Common Law, or by the Court of Chancery, or by the Court of Probate in England, and was to hold pleas in all, and all manner of actions causes and suits, as well criminal and civil real and personal and mixed, and was to proceed in such actions, causes and suits by such process and course as are provided by law, and as should tend with justice and despatch to determine the same, and should hear and determine all issues of law, and should hear and (with or without a jury as provided by law) determine all issues of fact that might be found, and give judgment and award execution, in as full and ample a manner as might at the date mentioned be done in Her Majesty's Courts of Queen's Bench, Common Bench, or, in matters which regarded the Queen's Revenue (including the condemnation of contraband and smuggled goods), by the Court of Exchequer, or by the Court of Chancery or the Court of Probate in England.

It will be observed that in the above enumeration of Courts the Court of Divorce and Matrimonial Causes, established by the English Divorce Act of 1857, is not mentioned.

By section 91 of the British North America Act 1867, the subjects of marriage and divorce are among the matters as to which the Dominion Parliament has exclusive jurisdiction. It

has never passed any general Act relating to divorce, but it is obvious that it had power to, and did establish the substantive right to divorce in the Territories, if the general words of section 3 of its Act of 1886, putting into force there the law of England as it was on the 15th July, 1870, were wide enough to cover this subject. Their Lordships have already intimated that they are of opinion that these general words had this effect.

Under section 92 of the British North America Act of 1867, the administration of justice, including the constitution, maintenance and organisation of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in these Courts, belongs exclusively to the Provincial Legislatures. Acting under this power, the Legislature of Alberta in 1907 passed a Supreme Court Act, establishing a Supreme Court of Alberta as a Superior Court of Civil and Criminal jurisdiction in, and for the Province. By section 9 of that Act, it was provided that this Court should, within the Province, and for the administration of the laws for the time being in force within it, in addition to any other jurisdiction which before the Act was vested in, or capable of being exercised within the Province by the Supreme Court of the Territories out of which it had been carved, possess the jurisdiction which on the 15th July, 1870, was vested in, or capable of being exercised in England by (1) the High Court of Chancery, as a Common Law Court, as well as a Court of Equity, including the jurisdiction of the Master of the Rolls as a Judge or Master of the Court of Chancery, and any jurisdiction exercised by him in relation to the Court of Chancery as a Common Law Court ;

(2) The Court of Queen's Bench ;
(3) The Court of Common Pleas at Westminster ;
(4) The Court of Exchequer as a Court of Revenue as well as a Common Law Court ;
(5) The Court of Probate ;
(6) The Court created by Commissioners of Oyer and Terminer, and of Gaol Delivery, or of any of such Commissions.

Section 9 of this Supreme Court Act of 1907 further provided that the jurisdiction aforesaid should include the jurisdiction which, at the commencement of the Act, was vested in or capable of being exercised by all or any one or more of the Judges of the said Courts respectively, sitting in Court or Chambers or elsewhere, when acting as Judges or a Judge in pursuance of any statute, law or custom ; and all powers given to any such Court or to any such Judges by any statute ; and also all ministerial powers, duties and authorities, incident to any and every part of the jurisdiction so conferred.

It will be observed that in the above enumeration of Courts, the Court for Divorce and Matrimonial Causes, set up by the English Divorce Act of 1857, is again omitted.

Turning to this English statute, their Lordships observe that

its effect is as follows:—It transfers to a new statutory Court which it sets up all the jurisdiction of the existing Ecclesiastical Court (which did not extend to divorce *a vinculo matrimonii* for adultery, but did comprehend divorce *a mensâ et thoro* and lesser matters). This new Court was to be called the Court for Divorce and Matrimonial Causes, and was to sit in London or Middlesex. The right was given to present a petition for dissolution of marriage, for adultery, and for certain other causes, and the decree might include not only such dissolution, but damages as at Common Law. As regards the composition of the new Court, it was to consist of the Lord Chancellor, the Lord Chief Justices of the Queen's Bench and Common Pleas, the Lord Chief Baron of the Exchequer, the senior Puisne Judge in each of these Courts, and the Judge of the Court of Probate, then about to be established. The last named Judge was to be the Judge Ordinary of the new Matrimonial Court, and was to exercise all its ordinary jurisdiction except trials of petitions for nullity of marriage and divorce, and applications for new trials.

During his temporary absence the Lord Chancellor was empowered to authorise the Master of the Rolls, the Judge of the Admiralty Court, either of the Lords Justices, or any Vice-Chancellor, or any Judge of the Superior Courts of Law at Westminster, to act as Judge Ordinary of the new Court, and to exercise all the jurisdiction of the Judge Ordinary. The Divorce Act of 1857 was amended by a further Act in 1859, under which all the Judges of the three Common Law Courts were to be Judges of the new Divorce Court.

Their Lordships think that the way in which the Act of 1857, as it stood originally unaltered by subsequent legislation such as the Judicature Acts, constituted the existing Judges of other Courts Judges of the new Court detracts from the weight of any inference based on the omission of a reference to it in the Acts setting up the Supreme Courts of the North-West Territories and of Alberta. Had it been intended to exclude jurisdiction in divorce it would have been necessary to say so; for the language of section 9 of the Act of 1907 in particular is so comprehensive that it confers on the Supreme Court of Alberta all the capacity given by the Divorce Acts to the Judges of the other Courts in England to act as the Court established by those Acts. Their Lordships would arrive at this conclusion even if the words "at the commencement of this Act" in section 9 of the Act of 1907 were treated as rendered nugatory by the changes effected by the English Judicature Act.

But the matter does not rest here. The right to divorce had, before the setting up of a Supreme and Superior Court of record in Alberta, been introduced into the substantive law of the Province. Their Lordships are of opinion that, in the absence of any explicit and valid legislative declaration that the Court was not to exercise jurisdiction in divorce, that Court was bound to entertain and to give effect to proceedings for making that right

operative. Had the legislature of the Province enacted that its tribunals were not to give effect to the right which the Dominion Parliament had conferred in the exercise of its exclusive jurisdiction, a serious question would have arisen as to whether such an enactment was valid. But not only is there no such enactment but, on the mere question of construction of the language of the Provincial Act of 1907, their Lordships are of opinion that a well-known rule makes it plain that the language there used ought to be interpreted as not excluding the jurisdiction. If the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the King's Courts of Justice. In order to oust jurisdiction, it is necessary, in the absence of a special law excluding it altogether, to plead that jurisdiction exists in some other Court. This is the effect of authorities, such as the well-known judgment of Lord Mansfield in *Mostyn* v. *Fabrigas* (1 Cow. p. 161), and the judgment of Lord Hardwicke in *Earl of Derby* v. *Duke of Athol* (1 Ves. Sen. 201). They are collected in the admirable opinion of Stuart, J. in the Supreme Court in the present case, from whose reasoning, as well as from the arguments employed by the other learned Judges there, their Lordships have derived much assistance. They only desire to add that independently of the rule just referred to, there is another principle of construction which would in their opinion have been by itself sufficient to dispose of the question whether the words of the Act of 1907 excluded matrimonial jurisdiction. That Act set up a Superior Court, and it is the rule as regards presumption of jurisdiction in such a Court that, as stated by Willes, J. in *Mayor of London* v. *Cox* (2 E. & I., Ap. 239, at p. 259), nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so.

As the result their Lordships entertain no doubt that the second point raised was decided correctly as well as the first one. They will therefore humbly advise His Majesty that the appeal should be dismissed. As costs have not been asked for there will be no costs of this appeal.

In the Privy Council.

MARY BOARD

v.

WILLIAM BOARD

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA.

[DELIVERED BY VISCOUNT HALDANE.]

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