Privy Council Appeal No. 54 of 1918.

Edgar Stanley Walker - - - - - - *Appellant*

v.

Catherine Walker - - - - - - - *Respondent*

AND

The Attorney-General for the Province of Manitoba - - *Intervener*

FROM

THE COURT OF APPEAL FOR MANITOBA.

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.]

The question to be decided in this case is one of much importance, and is of a class as to which their Lordships always desire that, before any topic falling within it is brought before them on appeal, that topic should have previously been submitted for consideration by the Supreme Court of Canada. However, in bringing the appeal directly from the Court of Appeal in the Province the appellant is within his legal right, and it becomes the duty of this Board to dispose of the question raised.

That question is whether the Court of King's Bench for the Province of Manitoba has jurisdiction to deal with a petition for a decree declaring a marriage null and void on the ground of impotency. The answer to this question depends on what is the law relating to dissolution of marriage in the Province, and to the jurisdiction of its Court of King's Bench.

It will be convenient in the first place to refer briefly to the history of the territory of the Province. Originally, what is now Manitoba formed part of so much of what is to-day the territory of Canada as had been included by King Charles II in the Charter which he granted in 1670 to the Hudson's Bay Company. The area comprised in this Charter was treated as extending to what became known later as Rupert's Land and the North-Western Territory. When the Dominion of Canada was formed in 1867 the Hudson's Bay Company's territory was not brought within it. Its inclusion, at all events partially, was however rendered practicable by subsequent legislation. In particular by section 146 of the British North America Act of 1867, it had been provided that the Sovereign in Council might, on Address from the Dominion Parliament, admit Rupert's Land and the North-Western Territory into the Union on terms and conditions to be set out in the Address and approved by the Sovereign. By Order in Council of 23rd June, 1870, Rupert's Land and the North-Western Territory were admitted accordingly into the Dominion. The terms and conditions are not important for the present question.

Before referring to the steps which were taken to form what became the Province of Manitoba, after this admission, it is important to see what was the state of the law in Rupert's Land and the North-Western Territory at the time when the admission took place. The Charter of 1670 enabled the Hudson's Bay Company to make laws and administer justice in the region confided to them. There is no doubt that the settlers brought with them to that region such of the laws of England in 1670 as were applicable under the circumstances. In course of time Imperial legislation took place, designed apparently for the protection of those living within Indian territories and other parts of America outside Upper and Lower Canada and the Civil Government of the United States, legislation long prior to Confederation, and which gave jurisdiction to the Courts of Upper Canada to entertain suits arising outside Upper Canada, but within these regions, and to deal with the subject matter as if (with certain exceptions) the law of Upper Canada applied. Their Lordships do not think that the provisions so made took away the general power to make laws and set up Courts conferred by the Charter of 1670 on the Company.

What afterwards became the limits of the Province of Manitoba included a part of Rupert's Land called the District of Assiniboia. For this district the Company had set up a Governor and Council, who acted as a Court of Justice. At a meeting of this body in 1851 an Ordinance was passed providing that, in place of the laws of England as they were at the date of the original Charter of 1670, these laws as they had become at the date of the accession of Queen Victoria should regulate the proceedings of the Court. In 1864 there was substituted for the laws at the date of the Queen's accession "all such laws of England of subsequent date as may be applicable."

Whatever relevance these steps in legislation might possess were the answer to the present question dependent on how far the law of England, as it stood at the time of Confederation, was applicable in Manitoba or in part of it, the point becomes unimportant in view of what followed after Confederation. For the Dominion Parliament in the first place passed an Act in 1869 which provided *ad interim* that all the laws which should be in force in Rupert's Land and in the North-Western Territory at the time of their admission, which was then likely to take place, should, so far as consistent with the British North America Act of 1867, remain in force until altered. Shortly after this, in 1870, the Dominion Parliament passed a second Act by which the Province of Manitoba was formed out of Rupert's Land and the North-Western Territory, and the provisions of the British North America Act (except those parts which were inapplicable to the Provinces generally then composing the Dominion) were made to apply to the new Province of Manitoba in the same way and to the like extent as if this Province had been originally included at Confederation, with provisions for the representation of Manitoba in the Dominion Parliament and for the establishment of a legislature in the Province. In order to get rid of doubts as to the power of the Dominion Parliament to enact these statutes an Imperial Act was passed in 1871, which confirmed them as from the dates at which the Governor-General assented to them in the Queen's name, and provided generally that the Dominion Parliament should have power to establish new provinces in territory within the Dominion but not included in any of its existing provinces, and to make provision for administration and for the peace, order and good government of any such provinces, and for any territory not for the time being included in any province.

The most important of these statutes for the purposes of the present question is the second of the Dominion Acts, that of 1870, providing for the formation and Government of Manitoba, and confirmed as from its date by the Imperial Act of 1871. By section 2 of this Dominion Act it had been enacted, as their Lordships have already stated, that the provisions of the British North America Act of 1867 (excepting those not applicable to the whole of the Provinces of the Dominion) should apply to the new Province of Manitoba. The effect of this was that the legislature of the Province was enabled, when set up, to pass an Act in 1871 establishing a Supreme Court with jurisdiction over all matters of Law and Equity. As far as possible, consistently with the circumstances of the country, the laws of evidence and the principles which governed the administration of justice in England were to obtain in this Supreme Court of Manitoba. Moreover by section 52, so much of the laws of the Governor and Council of Assiniboia as were not inconsistent with the Act were to be extended to the whole of the Province of Manitoba.

It may be that the effect of the amending Ordinance already referred to, passed by the Council of Assiniboia and declaring

that the laws of England not only down to but subsequent to Queen Victoria's accession were to regulate the proceedings of the General Court, taken together with the statutes just referred to, and with section 52 of the Manitoba Act of 1871, were sufficient to make all existing English law, except so far as inapplicable, extend to the new Province. But their Lordships are of opinion that it is unnecessary to consider this point, in view of the provision made by an Act of the Dominion Parliament passed in 1888 to remove doubts as to the application of certain laws to the Province of Manitoba. This Act, if it extended to the subject of marriage and divorce, was, in so far as it did so, plainly within the exclusive power of legislation conferred on the Dominion Parliament by section 91 of the British North America Act of 1867. It provided by section 1 that, with an exception that is not material, the laws of England relating to matters within the jurisdiction of the Parliament of Canada, so far as the same existed on the 15th July, 1870, had been, as from that date, and were in force in Manitoba, in so far applicable to the Province and unrepealed by Imperial or Dominion legislation.

In the case of *Watts* v. *Watts* (1908 A.C. 573) it was decided by this Board that legislation in British Columbia, whereby it was declared that "the civil and criminal laws of England as the same existed on the 19th November, 1858, and so far as the same are not from local circumstances inapplicable, are and shall be in force," was sufficient to make the provisions of the English Divorce Act of 1857 apply so far at least as to enable the Court of British Columbia to grant divorce for adultery. Even if their Lordships were disposed to treat this decision as not binding on them, they see no reason to dissent from it, or to doubt the application, *mutatis mutandis*, of its principle to the present case. For the Divorce Act of 1857 did much more than set up a new Court and regulate its procedure. It introduced new substantive law, and gave to the Court it constituted not only the jurisdiction over matrimonial questions which the old ecclesiastical tribunals possessed, but a new jurisdiction, arising out of the principle, then for the first time introduced into the law of England, of the right to divorce *a vinculo matrimonii* for certain matrimonial offences. This right had thus been made part of the law of England by the 15th July, 1870, and their Lordships are of opinion that it became part of the substantive law of Manitoba. The circumstance that Ontario has no such law as to divorce does not appear to their Lordships to militate against this construction of the Dominion Act in question.

A further point has however been raised by the appellant. It is that the Dominion Parliament, even assuming that it introduced new substantive law on the subject, had committed no jurisdiction to the Courts of Manitoba to apply such law, and that the Legislature of Manitoba had not, when constituting its Supreme Court, endowed it with power to do so. It is sufficient that their Lordships should point out that in 1913, prior to the

proceedings in the present case, the King's Bench Act of that year passed by the Legislature of the Province had provided that the Court of King's Bench, which had taken the place of the former Supreme Court, was to be a Court of Record of original jurisdiction, and to possess and exercise all such powers and authorities as by the laws of England are incident to a Superior Court of Record of civil and criminal jurisdiction in all matters civil and criminal whatsoever, and was to possess all the rights and privileges of such Courts, as fully as the same were on the 15th July, 1870, possessed by any of her late Majesty's Superior Courts of Common Law at Westminster or by the Court of Chancery at Lincoln's Inn, or by the Court of Probate, or by any other Court in England having cognisance of property and civil rights and of crimes and offences. The Act goes on to direct the Court to hold plea in all manner of actions, suits and proceedings, whether at law or in equity or probate or howsoever otherwise.

Their Lordships find nothing in the context of the Act to limit the natural meaning of these words, and they are therefore of opinion that the case is indistinguishable from what was decided in *Watts* v. *Watts* by this Board. It appears to them to be clear that, in the absence of words limiting its jurisdiction under the Act referred to, the Court of King's Bench of the Province of Manitoba was rightly held by the learned Judges in the Court of Appeal of the Province, as the result of the careful and learned judgments they delivered, to have had jurisdiction, as contended by the respondent and the intervenant.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed. It has been agreed that nothing should be said about costs.

In the Privy Council.

EDGAR STANLEY WALKER

v.

CATHERINE WALKER,

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF MANITOBA.

[DELIVERED BY VISCOUNT HALDANE.]

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