HARRIS *v.* HARRIS

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1932
* May 16

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Appeal to Supreme Court of Canada—Jurisdiction—Appeal from judgment affirming dismissal of action for alimony—Appeal from judgment affirming the granting of decree nisi in action for divorce—"Final judgment" (Supreme Court Act, R.S.C., 1927, c. 35, s. 2(b)).

The appellant appealed from two judgments of the Court of Appeal for Ontario affirming, in each case, the judgment at trial, granting a decree *nisi* against her in her husband's action for divorce, and dismissing her action for alimony.

Held: There was jurisdiction in this Court to entertain the appeal in the alimony action; but not the appeal in the divorce action, as the decree *nisi* was not a "final judgment" within s. 2 (*b*) of the *Supreme Court Act.*

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MOTIONS by way of appeal, in each case, from an order of the Registrar affirming the jurisdiction of this Court to hear an appeal from the judgment of the Court of Appeal for Ontario, in the one case affirming the granting, at trial, of a decree *nisi* in an action against the appellant for divorce, and in the other case affirming the dismissal of the appellant's action for alimony. In each case the Court of Appeal for Ontario granted leave to appeal to this Court.

R. H. Wilson for the motions.

O. M. Biggar, K.C., contra.

The judgment of the court was delivered by

ANGLIN C.J.C.—These are two motions made by the (defendant) appellant in the first action, and (plaintiff) appellant in the second action, by way of appeal from an order of the Registrar affirming the jurisdiction of this Court to hear appeals from the judgments, in two matrimonial causes, of the Court of Appeal for Ontario. In the first action the husband sued the wife and two co-respondents for divorce and was successful in maintaining his action. This judgment was upheld by the Court of Appeal. In the second case, the wife sued for alimony and her action was dismissed by the trial judge, whose judgment was also affirmed by the Court of Appeal. In both cases the wife is the appellant here.

We are of the opinion that there is jurisdiction in this Court to entertain the appeal in the alimony action from the judgment of the appellate court; but, in regard to the divorce action, it is quite different. The only judgment pronounced so far in that action is that pronounced by the trial judge, affirmed on appeal, whereby it is provided that

> This Court doth order and adjudge that the marriage had and solemnized on the 24th day of February, A.D. 1915, at the city of Toronto, in the county of York and province of Ontario, between George Wesley Harris, the above-named plaintiff, and Marian J. Harris, one of the above-named defendants, then Marian J. Cheyne, be dissolved by reason that since the celebration thereof the said Marian J. Harris, one of the defendants, has been guilty of adultery, unless sufficient cause be shown to the Court why this judgment should not be made absolute within six months from the making thereof.

It is obvious that this is not a final judgment and cannot become such until the order is made absolute by the court. Many things may intervene before that takes place which

would prevent the court from making the decree absolute, viz., collusion may later be established, or the defendant may have further evidence to offer when the application to make the order absolute is presented to the court.

At all events, until the decree *nisi* is made "absolute" there can be no appeal to this court from it. Nor can there be a right of appeal from its affirmation by the Court of Appeal to this Court, inasmuch as only final judgments of that court are appealable here; and, in our opinion, an order *nisi,* such as that now before us, cannot be regarded as a "final judgment" within s. 2(*b*) of the *Supreme Court Act.* It does not

> determine(s) in whole or in part any substantive right of any of the parties in controversy in (this) judicial proceeding.

Thus, the wife cannot re-marry, nor can the husband, under the present order. They are still husband and wife, unless and until the order shall be made absolute. The dissolution of marriage under the terms of the order itself becomes effective only when the order or judgment is made absolute; and this is so for all purposes.

The motion by way of appeal from the Registrar will, therefore, be granted as to the divorce action, and refused as to the alimony action. Under the circumstances, there will be no order as to costs.

Motion granted as to the divorce action, and refused as to the alimony action.

Solicitors for the appellant: *McLarty & Fraser.*

Solicitors for the respondent: *Wilson & Thomson.*

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*PRESENT: Duff, Rinfret, Lamont, Smith and Cannon JJ.

(1) [1931] O.R. 418; [1931] 4 D.L.R. 203.