HARRY GORDON WEBB (DEFENDANT)...APPELLANT;

AND

MARIE JULIE WEBB (PLAINTIFF).....RESPONDENT.

1949
*Nov. 10
1950
*Jan. 30

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Criminal Law—Appeal from Summary Conviction under an order adjudging sum of money to be paid into Court—Whether condition precedent to right of appeal met, where appellant prior to date fixed for payment, deposits with the Court the amount fixed by it to cover costs of appeal.—The Criminal Code, R.S.C., 1927, c. 36, s. 750(c), as amended by 1947, c. 55, s. 23. Husband and Wife—Summary Proceedings for Maintenance—The Deserted Wives' and Children's Maintenance Act, R.S.O., 1937, c. 211.

*PRESENT: Rinfret C.J. and Kerwin, Rand, Estey and Locke JJ.

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The *Criminal Code*, R.S.C., 1927, c. 36, s. 750(*c*) as enacted by S. of C., 1947, c. 55, s. 23, provides that an appellant, if the appeal is from an order whereby a penalty or sum of money is adjudged by a justice to be paid, shall within the time limited for filing the notice of intention to appeal, in cases in which imprisonment in default of payment is not directed, deposit with such justice an amount sufficient to cover the sum so adjudged to be paid together with such further sum as such justice deems sufficient to cover the costs of the appeal.

On Feb. 17, 1948 the deputy judge of the Family Court of Toronto under the *Deserted Wives' and Children's Maintenance Act*, R.S.O., 1937 c. 211, ordered the appellant to pay his wife at the said Court the sum of $15 per week for her support, the first weekly payment to be made on March 1. On Feb. 24 appellant paid to the Court the sum of $25 as security for the costs of an appeal to the County Court, the amount fixed by the Court as such security, and on Feb. 26 served and filed notice of appeal.

His appeal to the County Court was dismissed on the ground of lack of jurisdiction, and an application for an order of mandamus made to the Supreme Court of Ontario was refused by a judge of that court and on appeal by the Court of Appeal, on the ground that the provisions of s. 750(*c*) of the *Criminal Code* were not complied with.

Held: that at the time the appellant served and filed his notice of appeal there was no "sum of money adjudged to be paid" and the appellant had done all that was required of him in order to vest jurisdiction in the County Court.

Held: also, that the appeal should be allowed, the order below set aside and a writ of mandamus directed to be issued to the County Court to proceed with the hearing of the appeal.

APPEAL from the judgment of the Court of Appeal for Ontario dismissing appellant's appeal from the judgment of Smiley J. who refused appellant's application for an order of mandamus directing a judge of the County Court to hear appellant's appeal from an order of the Toronto Family Court directing payment by the appellant of the sum of $15 per week for the support of his wife.

H. Gordon Webb in person for the appellant.

No one appearing for the respondent.

The judgment of the Chief Justice, Kerwin, Rand and Estey JJ. was delivered by:

KERWIN J.:—On February 17, 1948, the Deputy Judge of the Family Court for the City of Toronto ordered Doctor Harry Gordon Webb to pay his wife "at the Family Court, 90 Albert Street, in the City of Toronto, the sum of $15 per week for the support of the wife of the said Dr. Harry Gordon Webb, the first weekly payment to be made

on the 1st day of March, 1948." The order was made under the *Deserted Wives' and Children's Maintenance Act,* R.S.O. 1937, chapter 211. On February 24, 1948, Webb paid to the Family Court $25 as security for the costs of an appeal to the County Court (the amount fixed by the Family Court Judge as such security), and on February 26 served and filed notice of appeal. A County Court Judge decided, purporting to follow the decision of the Court of Appeal for Ontario in *Johnson* v. *Johnson* (1), that the County Court had no jurisdiction to entertain the appeal.

Webb thereupon applied for an order of mandamus directing a judge of the County Court to hear and determine the appeal. This application was dismissed by Smiley J., as was also an appeal to the Court of Appeal. In each case the application was refused on the ground that the provisions of section 750(*c*) of the *Criminal Code* as enacted by section 23 of chapter 55 of the Statutes of 1947 were not complied with. Under the *Deserted Wives' and Children's Maintenance Act,* proceedings are to be in accordance with the provisions of the Ontario *Summary Convictions Act,* R.S.O. 1937, chapter 136. By virtue of section 13 of the latter, an appeal is given in such a case as this to the County Court, and by section 3, certain sections in Part XV of the *Criminal Code,* including section 750(*c*) shall apply *mutatis mutandis.*

The only decision besides the *Johnson* case referred to, so far as we are aware, was *Fink* v. *Fink* (2). There Kellock J.A., with whom Gillanders J.A. agreed, decided that the giving of a cheque was not a "deposit" but he did not determine whether the "amount sufficient to cover the sum so adjudged to be paid" would be the sum of $7, which was the only sum falling due to be paid under the order of the magistrate at the time notice of appeal was given, or the amount of all payments that would fall due under the order between its date and the date upon which the notice of appeal was returnable, or some other amount. I do not read the judgment of the Chief Justice of Ontario as deciding anything beyond that except to point out that it was generally considered that compliance with section 750(*c*) was a condition precedent. At that time that part of section 750(*c*), dealing with appeals in cases where

(1) [1948] O.W.N. 532.

(2) [1944] O.W.N. 172; 81 C.C.C. 196.

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imprisonment in default of payment is not directed, provided for the entering into a recognizance as an alternative to the payment of the deposit. In the *Johnson* case, which was an application for prohibition, which on appeal came before the Ontario Court of Appeal, that Court granted an order of prohibition where cheques had been given instead of cash. By that time the section as we now have it had been enacted omitting the provision for entering into a recognizance. Notwithstanding this alteration, the question left open in the *Fink* case was still undecided.

It is now necessary to decide the precise point. The matter does not lend itself to extended discussion but a reading of the whole of section 750(*c*) satisfies me that the appellant had done all that was required of him in order to vest jurisdiction in the County Court. Section 750(*c*) as enacted in 1947 reads as follows:—

> (*c*) the appellant, if the appeal is from a conviction or order adjudging imprisonment, shall either remain in custody until the holding of the court to which the appeal is given, or shall within the time limited for filing a notice of intention to appeal, enter into a recognizance in form 51 with two sufficient sureties before a county judge, clerk of the peace or justice for the county in which such conviction or order has been made, conditioned personally to appear at the said court and try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as are awarded by the court or enter into a recognizance so conditioned and make such cash deposit in lieu of sureties as the justice may determine; or if the appeal is from a conviction or order whereby a penalty or sum of money is adjudged to be paid, the appellant shall within the time limited for filing the notice of intention to appeal, in cases in which imprisonment upon default of payment is directed either remain in custody until the holding of the court to which the appeal is given, or enter into a recognizance in form 51 with two sufficient sureties as hereinbefore set out, or deposit with the justice making the conviction or order an amount sufficient to cover the sum so adjudged to be paid, together with such further amount as such justice deems sufficient to cover the costs of the appeal; *and, in cases in which imprisonment in default of payment is not directed, deposit with such justice an amount sufficient to cover the sum so adjudged to be paid, together with such further amount as such justice deems sufficient to cover the costs of the appeal;* and upon such recognizance being entered into or deposit made the justice before whom such recognizance is entered into or deposit made shall liberate such person if in custody.

The part italicized deals with the situation that confronted the present appellant. I cannot conceive that, if the appellant had served and filed his notice of appeal and

deposited the sum deemed sufficient by the justice to cover the costs of the appeal, after one payment had fallen due under the order, he would have been required to pay anything more than that one payment. It might be, as in fact was the case, that some considerable time would elapse before his appeal would be heard, and it could never have been the intention that the appellant should make further deposits from time to time until the appeal was heard. In my view, there was no "sum * * * adjudged to be paid" at or before the time the appellant served and filed his notice of appeal.

The appeal should be allowed, the order below set aside and a writ of mandamus directed to be issued to the County Court to proceed with the hearing of the appeal.

LOCKE J.:—I concur in the allowance of this appeal and in the granting of a writ of mandamus.

Appeal allowed.