

THE ATTORNEY - GENERAL FOR }  
ALBERTA (INTERVENANT)..... }

APPELLANT;

1937

\* April 27.  
\* May 3.  
\* May 19.

AND

BERY KAZAKEWICH.....RESPONDENT;

AND

MARY KAZAKEWICH (RESPONDENT  
IN THE APPELLATE DIVISION OF THE  
SUPREME COURT OF ALBERTA).

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME  
COURT OF ALBERTA.

*Appeal—Jurisdiction—Status to appeal.*

On an appeal to the Appellate Division of the Supreme Court of Alberta from a District Court judgment dismissing an appeal from an order of a police magistrate under s. 26 of *The Domestic Relations Act, 1927* (c. 5) (Alta.), finding that B.K., being able wholly or in part to maintain his wife, M.K., did wilfully neglect to do so and did desert her, and ordering him to pay her the sum of \$4 a week, the Appellate Division (by a majority) held ([1936] 3 W.W.R. 699) that the province was without legislative authority to confer upon the magistrate the powers purported to be granted to him by said s. 26, and set aside the magistrate's order.

\*PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin and Hudson JJ.

1937  
 ATTORNEY-  
 GENERAL  
 FOR  
 ALBERTA  
 v.  
 KAZAKEWICH.

Before the Appellate Division the Attorney-General for Alberta intervened to support the constitutionality of the Act.

Special leave to the Attorney-General and to M.K. to appeal to this Court was granted by the Appellate Division; but M.K. failed to perfect her appeal.

*Held:* On an appeal to this Court by M.K., the Attorney-General would, in the ordinary course, have the right to appear in order to support the validity of the legislation; but he had no status to appeal to this Court; and, as M.K. had not perfected her appeal (a delay for opportunity to do so having been given by this Court but her application under s. 66 of the *Supreme Court Act* for leave now to perfect her appeal having been dismissed by the Appellate Division), this Court had not jurisdiction to hear the appeal.

MOTION by way of appeal from the order of the Registrar affirming the jurisdiction of this Court to hear the appeal.

The appeal was from the judgment of the Appellate Division of the Supreme Court of Alberta (1).

By an order of a police magistrate under s. 26 of *The Domestic Relations Act, 1927* (c. 5) (Alta.), as amended in 1928, c. 25, and 1933, c. 14, it was found that Bery Kazakewich (the present respondent in this Court), being able wholly or in part to maintain his wife, Mary Kazakewich, did wilfully neglect to do so and did desert her and he was ordered to pay her the sum of \$4 per week.

An appeal from said order was taken to the District Court and His Honour Judge W. A. Macdonald gave judgment dismissing the appeal. From his judgment an appeal was taken to the Appellate Division of the Supreme Court of Alberta (by leave granted under *The Summary Convictions Act, 1935*, c. 9, s. 15) on two questions of law, one of which was the claim that the provisions of *The Domestic Relations Act, 1927*, and, in particular, s. 26 as amended, are *ultra vires* the Provincial Legislature. On the appeal to the Appellate Division, the Attorney-General for Alberta intervened to support the constitutionality of the Act. In the Appellate Division, the majority of the Court (Harvey C.J.A., Ewing J., and McGillivray J.A.) held (Clarke and Lunney, J.J.A., dissenting) that the province was without legislative authority to confer upon the magistrate the powers purported to be granted to him by Part IV (which includes said s. 26) of *The Domestic Relations Act, 1927*, and the appeal was allowed and the police magistrate's

(1) [1936] 3 W.W.R. 699; [1937] 1 D.L.R. 548.

order set aside (1). The judgment of the Appellate Division was pronounced on December 17, 1936.

The Appellate Division granted (by order dated January 13, 1937, and on certain terms) special leave to the Attorney-General for Alberta (intervener) and to the said Mary Kazakewich to appeal to the Supreme Court of Canada.

1937  
 ATTORNEY-  
 GENERAL  
 FOR  
 ALBERTA  
 v.  
 KAZAKEWICH.

The Attorney-General for Alberta applied to the Registrar of the Supreme Court of Canada to affirm the jurisdiction of this Court to hear the appeal. The Registrar, dealing with the matter as presenting the question whether or not the appeal was one in a "criminal cause" within the exception in s. 36 of the *Supreme Court Act* (R.S.C. 1927, c. 35), held that the appeal was not in a criminal cause and affirmed the jurisdiction. On the appeal from his order coming on to be heard before this Court, on April 27, 1937, it appeared that the said Mary Kazakewich had not perfected her appeal. Judgment was reserved, and later, on May 3, 1937, the direction of the Court was delivered by the Chief Justice as follows:

**THE CHIEF JUSTICE:** The judgment of the Appellate Division of the Supreme Court of Alberta was a judgment reversing that of His Honour Judge W. A. MacDonald and setting aside the order of the Magistrate, D. C. Sinclair, dated the 31st of January, 1936. The Magistrate's order was an order directing certain payments to be made by the respondent Bery Kazakewich to his wife Mary Kazakewich on a finding that the respondent was able to support his wife and had neglected to do so, contrary to section 26 of the *Domestic Relations Act* of 1927.

The Attorney-General intervened on the hearing of the appeal in the Appellate Division and, having obtained leave to appeal to this Court, applied to the Registrar for and obtained an order affirming the jurisdiction of this Court to hear his appeal.

We have no doubt that the Attorney-General had no status to appeal to this Court from the judgment of the Appellate Division which, as already mentioned, was a judgment setting aside an order of the Magistrate direct-

1937  
 ATTORNEY-  
 GENERAL  
 FOR  
 ALBERTA  
 v.  
 KAZAKEWICH.  
 —

ing the respondent to pay to his wife certain sums of money; but, on appeal to this Court by the wife, Mary Kazakewich, against this judgment of the Appellate Division, the Attorney-General for Alberta would, in the ordinary course, have the right to appear in order to support the validity of the legislation which the Appellate Division by its judgment has declared to be *ultra vires*.

The Appellate Division has granted to the wife, Mary Kazakewich, leave to appeal to this Court, but she has not taken the necessary steps to perfect her appeal by providing security and having that security allowed, as required by the statute.

We think the proper course is to make no formal order for the present on the appeal from the Registrar in order to give the wife, Mary Kazakewich, an opportunity to perfect her appeal. The appeal from the Registrar's order must be disposed of before the final termination of the present sittings of this Court, and it may be spoken to after the hearing of the appeals has been concluded.

On the matter coming on again before the Court on May 19, 1937, and it appearing that the Appellate Division of the Supreme Court of Alberta had dismissed an application (made under s. 66 of the *Supreme Court Act*) by the said Mary Kazakewich for leave now to perfect an appeal to the Supreme Court of Canada, the appeal from the Registrar's order affirming jurisdiction was allowed.

*Motion by way of appeal allowed.*

*R. V. Sinclair K.C.* for the motion.

*D. K. MacTavish contra.*

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