Privy Council Appeal No. 58 *of* 1943

Olive French Marsh - - - - - - - - *Appellant*

v.

Norman Leslie Fitz Morris Marsh - - - - *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH JULY 1945

Present at the Hearing:

LORD PORTER
LORD MERRIMAN
LORD GODDARD
SIR MADHAVAN NAIR
SIR JOHN BEAUMONT

[*Delivered by* LORD GODDARD]

On 12th June, 1936, the respondent issued a writ in the Supreme Court of Judicature, Jamaica, claiming to be the only lawful brother, sole next of kin, and heir at law of Osmond Vincent Marsh, deceased, who died on 11th January, 1936, intestate, and claiming administration of his estate. The writ was issued against the appellant because she had entered a caveat and had alleged that she was the widow of the deceased. The statement of claim denied the interest of the appellant and alleged that she had been divorced by the deceased, a decree nisi obtained by him on 10th January, 1933, having been made absolute on 19th January, 1934. By her defence the appellant disputed the validity of the decree absolute. Concisely stated the allegations set out in paragraph 3 of the defence were that on 15th January, 1934, one E. A. L. Hodge, pursuant to section 19 of the Divorce Law of 1879 and Rule 35 of the Divorce Rules appeared in the proceedings to show cause against the decree being made absolute, but that the Court without notice to him and though the period within which under the Rules he was permitted to file affidavits in support of his intervention had not expired, proceeded to make the decree absolute. It was further alleged that Hodge applied for leave to appeal to His Majesty in Council against the making of the decree absolute and that his application was refused by the Court but that special leave was granted by Order in Council dated 14th August, 1934. Then it was pleaded that after the arguments before the Board were concluded but before judgment was delivered it was ascertained that the deceased had died, whereupon an Order in Council was passed to the effect that the appeal had abated and no order was made except that the security lodged be returned to the said Hodge. On 1st March, 1940, an order was made in the action whereby assuming the facts pleaded in the defence were established and assuming that the plaintiff is the only lawful brother and sole next of kin and heir at law of the deceased, certain points of law were set down for hearing before the trial. It is unnecessary to set out the seven points of law directed to be decided *in extenso*, as it is agreed that they all come down

to the single question whether or not the decree absolute in the circumstances is valid. As the defendant expressly referred, in paragraph 3 of the defence, to the record in the divorce proceedings and in the subsequent appeal to this Board, there is no question but that the Court in Jamaica and Their Lordships in the present appeal can refer to these documents for the purpose of elucidating the facts. The order directed that the points of law should be argued before the Court of Appeal and on 24th July, 1941, that Court (Sir Robert Furness C.J., Seton and Savary J.J.) determined all the questions in favour of the plaintiff. By Order in Council of the 22nd July, 1943, special leave to appeal against their judgment was granted.

On the hearing of the appeal Mr. Comyns Carr for the appellant formulated two questions. The first was does the fact that at the date of the death of the deceased the intervener's appeal was pending prevent the decree absolute operating so as to deprive the appellant of her status as the wife of the deceased. This of course assumes that the decree absolute was a valid decree, and on that assumption the question admits of only one answer. It dissolved the marriage from the moment it was pronounced and at the date when the appeal by the intervener abated it stood unreversed. The fact that neither spouse could remarry until the time for appealing had expired in no way affects the full operation of the decree. It is a judgment *in rem* and unless and until a Court of Appeal reversed it the marriage was for all purposes at an end. The second question was whether the failure to comply with the rules relating to intervention, in that the decree absolute was pronounced on the third instead of the fourth day after the intervener had entered an appearance, renders the decree null and void. To answer this question it is necessary to examine the facts preceding the pronouncement of the decree in careful detail.

The hearing of the petition was in January, 1933. In her answer the respondent, the present appellant, denied adultery and pleaded condonation but made no other cross charge. At the hearing she appeared in person and apparently made no attempt to prove the charge of condonation and declined any assistance from the learned Judge, stating she had no witnesses nor anything to say to the Court. He thereupon being satisfied with the petitioner's evidence pronounced a decree nisi. She seems then to have left Jamaica for England and here sought out Mr. Hodge who was an old friend of her family and, it is said, an executor and trustee of her father's will. He determined to lay certain facts before the Attorney General of Jamaica with a view to inducing him to intervene in the suit for the purpose of having the decree nisi rescinded. There is no official corresponding to the King's Proctor in the Colony and anyone who intervenes does so as a member of the public, though doubtless in a proper case the Attorney General would deem it his duty to intervene, albeit that in so doing he would technically be acting not in an official but a private capacity. It is not suggested that Mr. Hodge had any personal knowledge of the facts; the knowledge could only be derived from the information supplied by the present appellant, who it should be stated had never appealed or attempted to appeal against the decree.

It will now be convenient to set out the relevant section of the Divorce Act and the rules relating to intervention. The rules are made under section 7 of the Act and thus have statutory force. They are as follows:—

> Section 19.—" The decree shall not be made absolute till after the expiration of six months from the date of the decree nisi and during that period any person may show cause why the decree should not be made absolute, by reason of the same having been obtained by collusion, or by reason of material facts not brought before the Court. On cause being so shown, the Court shall deal with the case by making the decree absolute, or by reversing the decree nisi or by requiring further enquiry or otherwise as justice may require."
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> Rule 35.—" Any person wishing to show cause against making absolute a decree nisi for dissolution of a marriage shall enter an appearance in the cause in which such Decree Nisi has been pronounced."
>
> Rule 36.—" Any such person shall at the time of entering an appearance, or within four days thereafter, file Affidavits setting forth the facts upon which he relies."

There are other rules dealing with the filing of affidavits in answer and reply and also with the mode of trial, but it is unnecessary to set them out.

A motion to make the decree absolute was set down on 17th November, 1933, for hearing on November 20th, accompanied by an affidavit that no person had obtained leave to intervene or had entered an appearance for that purpose as required by Rule 45, and this was true. But meanwhile Mr. Hodge had forwarded to the Attorney-General the information he had obtained relating to alleged acts of connivance on the part of the petitioner, who it was said had encouraged his wife to commit adultery. It is said that this information comprised statements by nine persons, presumably resident in Jamaica, but it has never appeared in any of the subsequent proceedings how those statements were obtained, or whether they were statements actually taken from the proposed witnesses, or whether they were no more than what Mr. Hodge, from what the present appellant had told him, believed and hoped they would say if they were called. Then it appears that about 13th November, 1933, the solicitors acting for Mr. Hodge in Jamaica placed before the Attorney-General " statements and evidence " relating to the matter. In view of what happened later this is a matter of some importance for it suggests that by 13th November the solicitors had actually obtained evidence from persons in the Colony who could be called as witnesses. With this information before him the Attorney General obtained an adjournment of the motion for two months, namely till 15th January, 1934, and during the interval it is said that further information was supplied to him including statements by four out of the nine persons referred to above, so this again shows that the solicitors had some evidence in their possession. However on 12th January, 1934, the Attorney-General orally informed the solicitors that he did not propose to intervene but left it to Mr. Hodge to enter an appearance if he so desired. On the 15th the motion came on for hearing before the Full Court, and the Attorney-General informed the Court that after investigating the matter he did not intend to take any further steps. Counsel for the petitioner then asked for a decree absolute, but the Registrar informed the Court that an appearance had been entered that morning for Mr. Hodge for the purpose of showing cause. The Chief Justice then said that " as a matter of precaution " the motion would be adjourned till Friday, 19th January. It seems that both the Court and the petitioner's Counsel made the mistake of assuming that this would allow the four days within which the intervener must file his affidavits under Rule 36, whereas in fact it only allowed three, and it is this mistake which has been the cause of all the trouble that has ensued. On 17th January the solicitors for Mr. Hodge filed a motion, returnable the next day, asking that the time for filing affidavits might be extended for ten weeks or such other time as the Court should think just, and on the 18th leading Counsel appeared and supported the motion with an affidavit by the petitioner's solicitor. This stated that in consequence of the intimation from the Attorney-General that he did not intend to intervene instructions had been obtained by cable from Mr. Hodge in England in pursuance of which an appearance had been entered but that it was not possible to obtain an affidavit from him in the four days prescribed by the rule. It was further stated that an important deponent in support of the shewing cause was the respondent in the suit who was also then in England. No other intended deponent was mentioned. There was no suggestion that there was any evidence which had been or could be obtained from anyone in the Colony, and it is at least remarkable that if the persons who had given statements were still willing witnesses and the evidence they could have given was considered trustworthy that their statements were not exhibited nor was the Court even told of their existence. Moreover it appears from the judgment of Adrian Clark J., delivered on Mr. Hodge's application for leave to appeal to His Majesty in Council that his leading Counsel informed the Court when he applied for the extension of time that unless it was granted he would be unable to file any affidavits. In view of this affidavit and the statement of Counsel it seems clear that both the Court and the petitioner's representative were given to understand that unless an extension was granted Mr. Hodge would be unable to proceed with his intervention. In the

result the Court declined to grant any extension of time, and the motion for decree absolute stood for the following day. Again no one called attention to the fact that four days would not have elapsed since the appearance, and the Chief Justice said on the application for leave to appeal that had the attention of the Court been called to this fact he would have been willing to grant an adjournment to the following Monday to avoid the possibility of this point being taken though such adjournment would not have aided the intervener. In his judgment the Chief Justice when refusing leave to appeal stated that the facts which weighed with the Court in refusing an extension were—

(1) The grounds of the proposed intervention were not stated and no reason was suggested why the petitioner was not entitled to a decree.

(2) No intervention had taken place within the statutory six months; the matter had been already adjourned to enable the Attorney-General to make investigations, and after investigation, he had informed the Court that he did not propose to intervene.

(3) It was not suggested that Mr. Hodge had any personal knowledge of any facts, which would influence the decision of the Court.

(4) So far as appeared his only knowledge consisted of statements made to him by the respondent of the nature of which the Court was not informed.

Nevertheless their Lordships cannot but regret that some time was not allowed to the intervener, especially when it is remembered that his solicitors had only been informed of the decision of the Attorney-General on 12th January. That the intervention had not taken place within six months of the decree nisi was really immaterial, as it is established beyond question that, contrary to the view expressed by Adrian Clark J. in his judgment, intervention can always take place at any time before the decree is made absolute—*Bowen and Bowen* v. *Evans* (3 Sw. and T. 530). However it was within the discretionary power of the Court to refuse the extension, and as the appeal subsequently brought by Mr. Hodge to His Majesty in Council abated by the petitioner's death the fact that their Lordships think an extension should have been granted cannot help the present appellant in these proceedings. As has already been said the Court and the petitioner's advisers were left on 18th January under the impression that Mr. Hodge's intervention could not proceed, though that is not to say that he abandoned it so as to deprive himself of a right of appeal. On the following day at the sitting of the Full Court at 10.15 a.m. Counsel applied for the decree to be made absolute. The Registrar informed the Court that the intervener's solicitor had telephoned inquiring when the motion would be called and had been told that it would come after some criminal appeals from prisoners in custody had been heard, and the Court thereupon stood the motion over till later in the forenoon. When the application was renewed no one appeared to object and the decree was granted. It appears from the uncontradicted affidavit of Mr. Hart, the solicitor for the petitioner, that the solicitor for Mr. Hodge, who as already stated had inquired, and been informed, when the motion would be heard, was actually present in Court when the order was made, yet he gave no intimation to the Registrar or took any other steps to inform the Court either that he objected to the decree being made absolute before the four days had expired or that he intended to file an affidavit. Later in the day he filed an affidavit to which he himself was the deponent. Their Lordships do not think it necessary to express any opinion as to the probable reason he had for taking this step considering that the proceedings so far as the Full Court were concerned were at an end; if the decree was valid the affidavit filed after it had been made could not render it invalid; if on the other hand the decree was ineffective as being made too soon it did not require this affidavit to avoid it. But there is some significance in the fact that the affidavit is no more than a statement of the grounds on which Mr. Hodge intended to rely in support of his intervention; in truth it was no more than a pleading or particulars. No facts were stated to be within the deponent's own knowledge nor did he even

swear to his belief in any of the matters to which he deposed. Their Lordships agree with the opinion of the Court in Jamaica that such an affidavit is not one which should be regarded as complying with Rule 36, and that for this purpose the affidavit must be that of someone prepared to swear of his own knowledge to some relevant fact, or at least, in their Lordships' opinion, one which sets out the sources of information and swears to a belief therein. But whether or not the affidavit complied with the rules is in the circumstances immaterial, except that it supports the view that on 19th January the solicitors for the intervener had no material evidence available in the Colony or if they had it was not of a character which they felt they would be justified in placing before the Court. No one suggests that had the matter stood over till the following Monday the position would have been different in this respect.

Now on those facts it appears to their Lordships that there are only two possible views, and whichever is adopted the validity of the decree absolute is beyond question. The first way in which the matter may be put is that on 19th January, 1934, six months had elapsed since the decree nisi was pronounced and the Court had therefore power to make the decree absolute unless there was an intervener prepared to show cause against it. An intervener had appeared but had on the previous day given the Court to understand that he did not intend to follow up his appearance by showing cause because he had not the necessary material available and would not be able to procure it within the time allowed. While no doubt he could have resiled from that position on the 19th he did not, but stood by and allowed the Court to proceed without giving any intimation that he had any objection or desired to take any further step though he had full knowledge that the Court was proceeding to make the order. For this purpose of course there is no distinction between the intervener himself and the solicitor representing him. In this view there was in the opinion of their Lordships no irregularity, because it must be open to an intervener to say that he does not intend to show cause and the way is then clear for a decree absolute provided that the statutory period has elapsed. The other view is that as the appearance stood and had not been withdrawn it was irregular to have proceeded before four days had elapsed. But it does not necessarily follow that because there has not been a literal compliance with the rules the decree is a nullity. A considerable number of cases were cited to their Lordships on the question as to what irregularities will render a judgment or order void or only voidable. *Anlaby* v. *Praetorius* [1888] 20 Q.B.D. 764 and *Smurthwaite* v. *Hannay* [1894] A.C. 494 are leading examples of the former while *Fry* v. *Moore* [1889] 23 Q.B.D. 395 may be said to illustrate the latter. The practical difference between the two is that if the order is void the party whom it purports to affect can ignore it, and he who has obtained it will proceed thereon at his peril, while if it be voidable only the party affected must get it set aside. No Court has ever attempted to lay down a decisive test for distinguishing between the two classes of irregularities, nor will their Lordships attempt to do so here, beyond saying that one test that may be applied is to enquire whether the irregularity has caused a failure of natural justice. There is for instance an obvious distinction between obtaining judgment on a writ which has never been served and one in which, as in *Fry* v. *Moore* (*supra*) there has been a defect in the service but the writ had come to the knowledge of the defendant. *Hamp-Adams* v. *Hall* [1911] 2 K.B. 942 really depends on different considerations; it was a case depending on the application of positive law. The rule laid down in terms that before taking a certain step, namely proceeding in default, endorsement of service must be made on the writ. If this condition is not fulfilled the plaintiff cannot take advantage of this particular procedure. *McPherson* v. *McPherson* [1936] A.C. 177 is an illustration of the rule that where there has been a defect in procedure which has not caused a failure of natural justice the resulting order is only voidable. Had the wife moved in that case before all parties, including herself, had remarried, as their Lordships understand that case, the result would have been different: the decree could have been recalled and a new trial ordered; as it was, it was too late, and by herself remarrying, the wife had adopted

the decree. Then there is a third class of case. If a litigant has himself induced, acquiesced in or waived the irregularity he cannot afterwards complain of it. *Fry* v. *Moore* really falls within this class, being a case of waiver. Suppose a person knowing that another had issued or was about to issue a writ against him, wrote saying that he did not intend to appear and that so far as he was concerned judgment could be entered against him forthwith. If the plaintiff were able to persuade the Central Office to allow him on that letter to sign judgment before the time for appearance had expired, the defendant could not be heard to say that the judgment was a nullity. True before it was signed he could have resiled and entered an appearance, but if he stood by and allowed the plaintiff to do that which he had been told he might do it would be impossible to treat the judgment as void, though if the defendant discovered he had a defence he might be allowed to set the judgment aside on terms. That is what really happened here; the intervener told the Court and the petitioner that if he could not get an extension he would not, because he could not, show cause. He might have changed his mind before advantage was taken of the attitude that was taken up by him. But he did not and allowed the order to be made in his presence without protest. Then there is another very important factor to be remembered: an intervener does not take action in the interest of either party. He intervenes solely in the interest of the public. If the Court wrongly disallows his intervention no right of either petitioner or respondent is affected. The respondent could have appealed against either decree and she did not, and she could not intervene. Different considerations might well arise if the Court were deceived into stopping an intervention. That is not the case here, and the Court have stated in terms their reasons for having acted as they did. The appeal brought by the intervener was ineffectual, it matters not for what reason, so he had no further right, and as the respondent to the petition failed to appeal she has no right to complain of the decree. In the opinion of their Lordships the decree absolute is valid and subsisting and the appellant's marriage to the deceased was finally dissolved as from its date. They will humbly advise His Majesty that this appeal should be dismissed. As the appellant is proceeding *in forma pauperis* there will be no order as to costs.

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In the Privy Council

OLIVE FRENCH MARSH

v.

NORMAN LESLIE FITZ MORRIS MARSH

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