[HIGH COURT OF AUSTRALIA.]

CROWN SOLICITOR FOR THE STATE OF NEW SOUTH WALES . . . . APPELLANT;
RESPONDENT,

AND

STUBBS . . . . . RESPONDENT.
APPELLANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1929.

SYDNEY, *Aug.* 1, 2.

Knox C.J., Isaacs and Dixon JJ.

Husband and Wife—Dissolution of marriage—Decree absolute—Pronouncement in Court—Subsequent intervention by Crown Solicitor—Matrimonial Causes Act 1899 (*N.S.W.*) (*No.* 14 *of* 1899), *secs.* 21-22*, 28*, 30, 82*.

A decree nisi for dissolution of marriage is "made absolute" within the meaning of the *Matrimonial Causes Act* 1899 (N.S.W.) when it is so pronounced in Court; and, subject only to the right conferred by sec. 82 (1) upon any person aggrieved by the decree of the Court to appeal within fourteen days next after such pronouncement, the matter is then closed.

* The *Matrimonial Causes Act* 1899 (N.S.W.), sec. 21, contains the following provisions:—"(1) Every decree for dissolution of marriage shall in the first instance be a decree nisi. (2) A decree nisi shall not be made absolute until after the expiration of six months (or such shorter time as the Court fixes by special order) from the pronouncing thereof. (3) During such period any person may in such manner as the Court by a general or special order directs show cause why the said decree should not be made absolute." Sec. 22 provides that "(1) After the expiration of the time limited in that behalf the petitioner may make request in writing that such decree nisi be made absolute. (2) The Court shall upon a certificate from the Registrar that no matter in opposition to the final decree is then pending make the decree absolute as of course." Sec. 28 (1) provides that "The respective parties to a suit for dissolution of marriage may marry again as if the marriage had been dissolved by death where but not before (*a*) the time limited for appealing against a decree absolute has expired and no appeal has been presented or (*b*) any such appeal is dismissed or (*c*) in the result of any appeal the marriage is declared to be dissolved." And by sec. 82 (1) it is provided that "Any person aggrieved by any decree or order of the Court . . . may within fourteen days next after the pronouncing or making of the same enter in the prescribed manner an appeal against such decree or order to the Full Court" &c.

After a decree absolute for dissolution of marriage had been duly pronounced by the Supreme Court, the Crown Solicitor made an application to the Court that the decree nisi be not made absolute, on the ground of concealment of material facts.

Held, by the High Court, that the Supreme Court had no jurisdiction to entertain the application.

Decision of the Supreme Court of New South Wales (Full Court): *Stubbs* v. *Stubbs*, (1929) 29 S.R. (N.S.W.) 508, affirmed.

APPEAL from the Supreme Court of New South Wales.

By petition to the Supreme Court in its matrimonial causes jurisdiction dated 12th September 1927 Harold Sidney George Stubbs prayed for the dissolution of his marriage with his wife, Gertrude Mary Harboard Stubbs, on the ground that she had deserted him without reasonable cause by reason of her non-compliance with a decree for restitution of conjugal rights made against her. On 14th March 1928 a decree nisi was pronounced by *Davidson* J. returnable six months after service on the Crown Solicitor, which was effected on 5th April 1928. After the expiration of the six months Stubbs applied in writing under the provisions of sec. 22 of the *Matrimonial Causes Act* 1899 (N.S.W.) for the decree nisi to be made absolute, and, the Registrar having issued a certificate that no matter in opposition to the final decree was then pending, the decree was, on 9th October 1928, pronounced absolute in Court. On 23rd October 1928 the Crown Solicitor for the State of New South Wales entered an appearance in the suit, and subsequently filed pleas showing cause why the decree nisi should not be made absolute on the ground of concealment of material facts. Meanwhile the draft decree absolute had been filed in the Divorce Registry on behalf of Stubbs and had been sealed with the seal of the Court, but it had not been signed by the Registrar or other proper officer. To the appearance by the Crown Solicitor, Stubbs filed an answer objecting to the jurisdiction of the Court to entertain such application. At the hearing *Owen* J. held that the mere pronouncement of a decree absolute in open Court by the presiding Judge was only part of the making of the final judgment and it was not made final and was not a judgment made until the decree absolute was properly completed by the proper officer of the Court. His Honor, after

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hearing evidence, rescinded the decree nisi and dismissed the petition. The Full Court of the Supreme Court allowed an appeal by Stubbs, and ordered that the decree absolute pronounced on 9th October 1928 be drawn up and signed by the Registrar and filed as prescribed by the Rules of Court: *Stubbs* v. *Stubbs* (1). *Harvey* C.J. in Eq., in delivering the judgment of the Court, said (*inter alia*) that in the opinion of the Full Court of the Supreme Court sec. 22 of the *Matrimonial Causes Act* 1899 "indicates that upon the presiding Judge being satisfied of two things, namely, that the petitioner has, after the due date, made an application for the decree nisi to be made absolute and that the Registrar has certified that up to the day of the matter coming before the Court no matter in opposition is pending, he has no alternative but to make the decree absolute; no subsequent event can justify the Court in saying that that order ought not to have been made inasmuch as the statute says it must be made as of course. The language of the section seems to make it clear that if no matter is then pending at the time the Judge is asked to make the decree absolute, all requisites are satisfied and the decree must be made; nothing that occurs afterwards can affect the right of the petitioner to have the decree so made. In our opinion the reference to the making of the decree absolute in this section must be taken as referring to the act of the Judge who, exercising the powers of the Court, pronounces that all conditions attached to the decree nisi have been satisfied, thus establishing the petitioner's right, *ex debito justitiæ*, to the dissolution of his marriage. . . . The fact that the status of the parties is made to depend on the date on which the decree is pronounced shows that the pronouncing of the decree is the all-important factor in finally dissolving the marriage" (2).

From this decision the Crown Solicitor now appealed to the High Court.

Holman K.C. (with him *Rainbow*), for the appellant. Until a judgment has been entered or drawn up there is in every Court the power to vary its own orders or to withdraw such orders to

(1) (1929) 29 S.R. (N.S.W.) 508.
(2) (1929) 29 S.R. (N.S.W.), at pp. 512 *et seq.*

permit of the decision being reconsidered (*Halsbury's Laws of England*, vol. XVIII., par. 539, p. 213). Proceedings are not at an end until the judgment has been drawn up, and until that has been done the matter may be treated as being part heard (*Jones* v. *Williams* (1)). A Court can restore a matter to the list for rehearing where an application is made before the judgment is drawn up (*Shepherd* v. *Robinson* (2)). At common law a judgment is not complete until signed (*Colbron* v. *Hall* (3)). The Legislature intended that the Court should allow the longest possible time to a person within which to show cause under sec. 21 of the *Matrimonial Causes Act* 1899 why a decree nisi should not be made absolute. The right to remarry conferred by sec. 28 of the Act cannot be exercised until the expiration of fourteen days after the pronouncement of the decree absolute, and then only if the decree has been reduced to writing, as otherwise it is incomplete. A decree is not made absolute within the meaning of secs. 22 and 30 of the Act by a mere oral pronouncement in Court, but by such pronouncement together with the filing of the decree in writing in the office of the Registrar.

[ISAACS J. referred to *In re Suffield and Watts*; *Ex parte Brown* (4).]

It is important that the right of the Crown Solicitor to intervene should be available to him until the last moment (*Bowen* v. *Bowen and Evans* (5)). Sec. 30 has the effect of lengthening the time within which the Crown Solicitor may intervene until the decree absolute has been completed. There is no incompatibility between the language of sec. 28 and sec. 82 of the Act.

[ISAACS J. referred to sec. 22 of the *Matrimonial Causes Act* 1899.]

The mandatory operation of the provisions of sec. 22 must be deemed to be modified by the operation of sec. 21 (2) taken in conjunction with the case of *Bowen* v. *Bowen and Evans* (5). Sec. 30 empowers the Crown Solicitor to intervene after the decree has been made absolute; the essential feature is that he receive the information before it is so made absolute. Neither the granting of

(1) (1877) 36 L.T. 559.
(2) (1919) 1 K.B. 474.
(3) (1837) 5 Dowl. 534.
(4) (1888) 20 Q.B.D. 693.
(5) (1864) 33 L.J. P. & M. 129.

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the certificate by the Registrar under sec. 22 nor the pronouncement of the decree absolute in Court vests any rights in any person. Whatever the word "make" may mean, the parties are not unmarried by the mere declaration; the right to marry again vests only after the lapse of the time prescribed in sec. 28 or when the various necessary administrative acts have been performed in the Registrar's office, whichever may be the later in point of time. There are necessarily two stages in the making of a decree absolute: firstly, the pronouncement in Court, and secondly, the reduction of such pronouncement to writing by the proper officer. A final judgment is completed at the time of entering it in the Master's Book; until then it is only in an inchoate state (*Chitty's Archbold's Practice*, 12th ed., vol. I., p. 523).

Higgins and *Hastings*, for the respondent, were not called upon.

The following judgments were delivered:—

KNOX C.J. I have no doubt that the decision of the Supreme Court was right. The question is as to the true construction and meaning of sec. 21 of the *Matrimonial Causes Act* 1899, which provides, by sub-sec. 3, that during a period which may be assumed for the purposes of this case to terminate on the making of the decree absolute, any person may show cause why the decree should not be made absolute; and the only question that arises is as to the point of time at which that period terminates. In construing this Act, and every other Act, one has to have regard to the rule of construction which requires that if possible every provision of an Act must be given a meaning consistent with every other provision of that Act. But this Act is distinct from many Acts that come before the Court for construction, as it deals with a most important question of status; that is to say, it deals with the condition of persons as to whether they are married or single, and incidentally, not expressly, with the legitimacy of the children of those marriages. Having this in mind, it seems to me difficult to escape from the conclusion that sec. 28 of the Act must be given the fullest force consistent with the language used. That section sets out the

conditions under which parties to a divorce suit may lawfully remarry, and it must be taken as an authoritative determination of the status of all parties to a divorce suit as married or single. The section provides (*inter alia*) that " (1) the respective parties to a suit for dissolution of marriage may marry again as if the marriage had been dissolved by death where but not before (*a*) the time limited for appealing against a decree absolute has expired and no appeal has been presented or (*b*) any such appeal is dismissed or (*c*) in the result of any appeal the marriage is declared to be dissolved." Now that section imports that there has been a decree absolute against which one or more of the parties is empowered to appeal, and that a marriage contracted by either of the parties shall be a lawful marriage if contracted at any time after the expiration of the time limited for appeal when no appeal has been made. The section is an authorizing section and not a prohibiting section. The right of appeal is given by sec. 82 of the Act, which provides that " Any person aggrieved by any decree . . . of the Court . . . may within fourteen days next after the pronouncing or making of the same enter in the prescribed manner an appeal against such decree " &c. Mr. *Holman* very fairly stated that the practice had always been that the time for appeal ran from the time of pronouncement in open Court and not from the subsequent drawing up. This practice is in accordance with the Act, which says that an appeal must be lodged within fourteen days after the pronouncement of the decree. After the expiration of the time limited by the decree nisi the suit is put in the list for decree absolute and, there being no intervention or, to use the words of sec. 22, " upon a certificate from the Registrar that no matter in opposition to the final decree is then pending," the Judge pronounces the decree absolute " as of course," and, having done this, if any party to the suit objects he or she has, under sec. 82, a right to appeal within fourteen days. In the view I take, sec. 28 shows that when a decree has been so pronounced, if an appeal has not been lodged within fourteen days then either party to the suit may lawfully marry again.

For these reasons I think the appeal should be dismissed.

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ISAACS J. I find it difficult to improve on the way in which the matter has been dealt with by *Harvey* C.J. in Eq., concurred in by the rest of the Full Court. I agree with him that the matter is determined in particular by secs. 21 and 22 of the Act. Those sections make it plain that there is only one decree, namely, the one pronounced. In the first instance it is nisi and is subject during the period prescribed or fixed to be dealt with under sub-sec. 5 of sec. 21. But after that period has expired, on compliance with sub-sec. 2 of sec. 22, the petitioner has a right to have the decree—the same decree—made absolute as of course. That is an end of the matter. The English cases as to rehearing do not assist the appellant. The case of *In re St. Nazaire Co.* (1) declares that the right of rehearing was essentially appellate jurisdiction. Under the statute such cases are quite inapplicable. The Act provides its own statutory methods; appeals are expressly regulated by Part XVII., and once the decree is made absolute the matter is closed.

This appeal should be dismissed.

DIXON J. I agree. We are required to interpret sec. 21 (3) of the *Matrimonial Causes Act* 1899. That sub-section enables any person to show cause why the decree nisi should not be made absolute during an interval of time which it describes by the words "during such period." The period referred to is to be found in sub-sec. 2, which says: "A decree nisi shall not be made absolute until after the expiration of six months (or such shorter time as the Court fixes by special order) from the pronouncing thereof." It might perhaps be thought natural to read the words "such period" as referring to the specified period of six months or the shorter time fixed. But the provision is based upon sec. 7 of 23 & 24 Vict. c. 144, and that section has been interpreted to mean that intervention is allowable at any time between decree nisi and decree absolute (*Bowen* v. *Bowen* (2), followed in *Bruell* v. *Bruell* (3)). It is now suggested that the time which this interpretation allows for intervention does not expire until the decree absolute is drawn up, passed and filed. It is said that until the judgment or decree of a Court

(1) (1879) 12 Ch. D. 88, at p. 98. (2) (1864) 3 Sw. & Tr. 530.
(3) (1922) 39 N.S.W.W.N. 170.

is drawn up and perfected it is open to reconsideration and is not finally made although, when perfected, it becomes effective from the time it was pronounced. It may be doubted whether this is so in the case of a decree which of its own force changes status and is not confined to determining and embodying pre-existing rights. But ultimately the question must be what does sec. 21 (3) contemplate as the end of the period, and it is not conceivable that that point of time could be later than the actual dissolution of the marriage. In my opinion the period referred to in that sub-section does not extend beyond the time of the pronouncement of the decree absolute in open Court. Sec. 28 and other sections of the Act contain many material considerations which show that the Legislature intended that a decree absolute should operate immediately on its pronouncement in Court.

Appeal dismissed with costs.

Solicitor for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitors for the respondent, *Waddell, Davies & Sharpe.*

J. B.