such cases as *Taylor* v. *Taylor* (1), and *Martyn* v. *Blake* (2). Lord Chancellor *Sugden* cites a case which in principle and in result covers the present.

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WIGLEY v. CROZIER.

Judgment appealed from affirmed with variations. Respondent to pay costs of the appeal.

Solicitors, for the appellants, *Gall & Isbister.*
Solicitors, for the respondent, *Nesbit, Webb & Nesbit.*

B. L.

[HIGH COURT OF AUSTRALIA.]

DASHWOOD . . . . . APPELLANT.

AND

MASLIN AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

Husband and wife—Divorce—Intervention—Appointment of Crown Proctor —Matrimonial Causes Act 1867 (*S.A.*) (31 *Vict. No.* 3), *secs.* 28, 36, 37.*

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ADELAIDE, *September* 24.

MELBOURNE, *October* 1.

Griffith C.J., Barton, O'Connor and Isaacs JJ.

*Secs. 28, 36, and 37 of the *Matrimonial Causes Act* 1867 (S.A.) are as follow :—

"28. In every suit instituted for dissolution of marriage the Court, at the time when application is made to it to direct the mode in which the questions of fact raised and the pleadings shall be tried, or any other period of the suit, may, if it think fit, appoint some practitioner of the said Court to act as Crown Proctor in such suit ; and the Court may, if it shall think fit, from time to time remove any practitioner appointed to be Crown Proctor for any suit, and appoint some other practitioner in his stead ; and the practitioner so appointed to be Crown Proctor in any suit as aforesaid shall, until removed by the Court, perform the duties, and have and exercise the powers and authorities, in respect to the suit for which he has been appointed, which by this Act, or by the said Rules and Regulations, are or may be imposed or conferred upon the

(1) 8 Hare, 120, at pp. 126, 127.

(2) 3 Dr. & War., 125.

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The power conferred by sec. 28 of the *Matrimonial Causes Act* 1867 to appoint a Crown Proctor is a judicial power and an appeal will lie from a refusal to exercise it.

Such an application made at the instance and under the responsibility of the Attorney-General should be granted almost of course.

A reasonable suspicion entertained by the applicant is a sufficient ground for making the appointment.

Decision of the Supreme Court of South Australia reversed.

APPEAL from the Supreme Court of South Australia.

A suit was instituted in the Supreme Court of South Australia by James Frederick Maslin for dissolution of marriage against his wife, Christina Maslin, on the ground of adultery with Michael Brown, who was made a co-respondent. By her answer to the petition the respondent denied the alleged adultery, and alleged that the petitioner had committed adultery with Alice Thornton Mills, and by his reply the petitioner alleged that if he did at any time commit adultery with Alice Thornton Mills such adultery was condoned before the adultery between the respondent and the co-respondent.

The suit came on for hearing before *Homburg* J. on 17th December 1908 who made certain findings which were reported to the Full Court, and the Full Court on 23rd December made an order *nisi* for dissolution of the marriage.

On 18th June 1909 an application was made to the Full Court by Charles James Dashwood, Crown Solicitor for South Australia and a practitioner of the Supreme Court, that he or some

Crown Proctor; and the Court may, if it think fit, require the parties to the suit, or either of them, to find security for the payment of the costs to be incurred by such Crown Proctor.

"36. At any time during the progress of the cause, or before the decree is made absolute, any person may give notice to the Crown Proctor, to be appointed in any such suit, of any matter material to the due decision of the case, who may thereupon take such steps as the Attorney-General may deem necessary or expedient.

"37. If, from any information to be given as aforesaid or otherwise, the said Crown Proctor appointed to act in any suit as aforesaid shall suspect that any parties to the suit are or have been acting in collusion, for the purpose of obtaining a divorce contrary to the justice of the case, he may, under the direction of the Attorney-General, and by leave of the Court, at any time before the decree *nisi* is made absolute, intervene in the suit alleging such collusion, and may retain counsel, and subpœna witnesses to prove it, and the Court may order the costs of such counsel and witnesses, and otherwise arising from such intervention, to be paid by the parties, or such of them as it shall see fit, including a wife if she have separate property."

other practitioner of the Court should be appointed Crown Proctor in the suit. On 23rd June 1909 the application, which was opposed by the petitioner, was refused with costs.

From this judgment Mr. Dashwood now by special leave appealed to the High Court. The other material facts are set out in the judgments hereunder.

Cleland (with him *Shierlaw*), for the appellant. Leave to intervene is under sec. 37 of the *Matrimonial Causes Act* 1867 based merely upon the suspicion of the Crown Proctor. The application under sec. 28 for the appointment of a Crown Proctor is preliminary to that, and needs no more to support it than suspicion. In England the application of the Crown Proctor to intervene is granted almost of course: *Gladstone* v. *Gladstone* (1), and the application to appoint a Crown Proctor should be treated in the same way. There is no reported case in England where leave to intervene has been refused. Here the Court did not fairly consider the application, nor did they exercise their discretion fairly. They took into account reasons which were not legal reasons: See *R.* v. *Vestry of St. Pancras* (2). The only ground which would justify a refusal of the application is that it is frivolous or is an abuse of the process of the Court. The fact that the Attorney-General directed the application to be made is a guarantee of good faith and that the application was not frivolous. There was no delay either in law or in fact in making the application. It was not necessary to prove a *primâ facie* case of collusion. The petitioner has not an absolute right to his divorce after the expiration of six months from the rule *nisi*: *Hamilton* v. *Hamilton* (3); *Maxwell on Statutes*, 3rd. ed., p. 334.

[ISAACS J. referred to *Palmer* v. *Palmer* (4)].

Sir John Downer K.C. (with him *Piper* and *Badger*), for the petitioner, respondent. The refusal of the Supreme Court to appoint a Crown Proctor is not a judicial act, but is merely a departmental act, and no appeal lies from that refusal. [As to the English practice, counsel referred to *Browne & Powles on*

(1) L.R. 3 P. & M., 260.
(2) 24 Q.B.D., 371, at p. 375.
(3) 33 L.T., 462.
(4) 4 Sw. & Tr., 143; 34 L.J.M.C., 110.

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Divorce, 7th ed., p. 462.] The Crown Proctor's duty is to assist the Court in doing duties which are extra-judicial. Whether he shall be appointed depends on the necessities of the Court, When the Crown Proctor is appointed he has power to suspect collusion, but he is prevented from bringing his suspicions into operation by intervention except by direction of the Attorney-General and by permission of the Court. The fact that a person suspects collusion is a ground for not appointing him Crown Proctor. He should be a person with an open mind. If the Court wants a Crown Proctor to assist it, it will appoint him of its own motion, and it may dismiss him in the same way if it does not like him. No injustice is done by not appointing a Crown Proctor, for under sec. 35 any person may show cause why the decree should not be made absolute.

[ISAACS J. referred to *Hudson* v. *Hudson* (1).]

Any suspicion that could arise from any provision in the deed is wiped away by the circumstances under which the deed came to be executed. The person who applies for the appointment of a Crown Proctor must at any rate show facts from which the Court can say whether the appointment is necessary or not.

Cleland in reply.

Cur. adv. vult.

Melbourne, Oct. 1.

The following judgments were read:—

GRIFFITH C.J. This was an application by the appellant, one of His Majesty's counsel, and Crown Solicitor of the State of South Australia, that he might be appointed Crown Proctor in a suit instituted by the respondent, J. F. Maslin, for the dissolution of his marriage with the respondent, Christina Maslin, on the ground of adultery. In her answer she had pleaded the adultery of the petitioner and wilful misconduct conducing to her own alleged guilt. The case had proceeded to trial, and a decree *nisi* for dissolution had been pronounced on 23rd December 1908, which might be made absolute at the expiration of six months. On 10th June 1909 (within the six months), the appellant gave notice of motion for the appointment of himself or some other practitioner of the Court as Crown Proctor. The affidavits filed

(1) 1 P.D., 65.

in support of the application, to which I will afterwards refer in more detail, alleged that the appellant had ground for suspecting collusion between the parties. The Court refused the motion with costs.

The South Australian *Matrimonial Causes Act* 1867 provides (secs. 36 and 37) that if the Crown Proctor suspects that any party has been acting in collusion he may, under the direction of the Attorney-General and by leave of the Court, intervene, and the Rules of Court contained in the Schedule of the Act prescribe the procedure consequent upon intervention. These sections are a verbal transcript of sec. 7 of the English Statute 23 & 24 Vict. c. 144, under which it was always held that leave to intervene was given to the Crown Proctor on his application almost as of course. *Palmer* v. *Palmer* (1), *Hamilton* v. *Hamilton* (2), *Gladstone* v. *Gladstone* (3). But in South Australia there is not, as in England, a permanent Crown Proctor. Section 28 of the Act provides that the Court may, if it thinks fit, appoint a practitioner of the Court to act as Crown Proctor in any suit. The respondent for whom *Sir J. Downer* appeared contended that the discretionary power thus conferred is not a judicial power, but an administrative power to enable the Court to appoint an officer of its own under its own direction. I cannot accept this view. I think the power is a judicial power, the exercise of which can be reviewed on appeal. And, since it is a power the exercise of which is a necessary preliminary to an application to be made under the direction of the Attorney-General for leave to intervene, I think that it is a power the exercise of which is obligatory upon a case being made for intervention. I think, further, that the English practice as to granting leave to intervene (the formal necessity of which is now under the Rules of 1877 dispensed with) ought to be followed, and that an application for the appointment of a Crown Proctor at the instance and under the responsibility of the Attorney-General ought equally to be treated as almost of course.

It was contended by *Sir J. Downer* that a suspicion cannot be entertained for the purposes of the Act until a Crown Proctor

(1) 4 Sw. and Tr., 143. (2) 33 L.T., 462.
(3) L.R. 3 P. & M., 260, at p. 262.

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has been appointed. If this were so, it would only follow *á fortiori* that the application for appointment of a Crown Proctor should be granted almost as of course.

The Court has, however, a judicial discretion to refuse the application if it appears that there is no ground for intervention. I will now consider the case from this point of view. The application was made at the instance of the Attorney-General, and the Court was so informed. The case made by the affidavits before the Court was, shortly, as follows:—In a previous suit between the same parties instituted in 1907 the appellant had obtained leave to intervene after trial, and after all the issues had been found in favour of the petitioner, and thereupon he abandoned the suit. On 17th May 1909 the respondent J. F. Maslin executed a deed by which he covenanted that he would, within fourteen days after the time limited for appealing against the decree absolute for dissolution should have expired, if no appeal should have been presented against such decree absolute, or, if presented, should have been dismissed, deposit with a bank securities for the due payment of £500 per annum to his wife. The negotiations which resulted in this deed took place in the evening of the first day of the trial, before the petitioner's case was closed and while he was still in the witness box. It was represented to the respondent in the suit that the amount offered (£500 per annum) was more than the Court would allow for alimony after decree, and she thereupon instructed her solicitor not to make any further defence to the suit. He obeyed, and no witnesses were called for her. It appeared from the Judge's notes that the petitioner had in the box admitted his adultery, but had alleged condonation, which, according to the law of South Australia (peculiar I think to that State), is a sufficient answer to the countercharge. But it is obviously important to show that the condonation relied on is subsequent to the cessation of the adulterous intercourse, the termination of which becomes very material. There was on the petitioner's own evidence strong ground for suspicion (to say the least) that the intercourse had been resumed after the condonation alleged. The appellant deposed in his affidavit that he had reason to believe that the respondent wife was induced not to defend the suit by reason of an offer made to her by the peti-

tioner through his solicitor to pay her £500 per annum for life if she did not further defend the suit; and further that her evidence would have tended to show misconduct on the petitioner's part conducing to her adultery. He further deposed that he was not aware of these facts, or of the deed, until the day before the notice of motion was given.

In answer to these allegations it was said that the negotiations for permanent alimony were undertaken at the instance of *Homburg* J. who tried the issues. I cannot but think that the suggestion of the learned Judge has been misunderstood. I cannot bring myself to believe that at that stage of the trial, before the countercharges had been investigated (a duty which is imposed by the Act upon the Court itself) he could have suggested anything in the nature of an amicable settlement of the case in favour of the petitioner, which would have been nothing short of collusion. It is not pretended that the liberality of the offer, or the condition that it should not take effect until the marriage was irrevocably dissolved, were suggested by him.

It was also objected that the appellant deposed from information and belief only, and did not give his sources of information. In my opinion the rule as to stating the source of information has no application to a case where a high officer of State acting under the responsibility of his office in aid of the administration of justice invokes the aid of the Court, any more than in the case of an officer of police who asks for a warrant for the arrest of a suspected criminal. In my opinion the appellant was right in refusing to name his informants.

The Supreme Court thought that the application was too late, but in my opinion the only limit of time is that prescribed by the Statute—any time before decree absolute.

Upon the evidence before the Court there was in my judgment reasonable ground for suspecting collusion. It is not necessary to say more, and it is not desirable to say anything which might prejudice the future conduct of the case if leave to intervene is given.

For these reasons I think that the application ought to have been granted. And as the respondent asked for and obtained

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costs in the Supreme Court I think he ought to be ordered to pay them.

BARTON J. In England the office of Crown Proctor is permanent, and the appointment is made by the Executive. In South Australia an appointment is made from time to time as occasion requires under sec. 28 of the *Matrimonial Causes Act* 1867, which empowers the Court, if it thinks fit, to "appoint some practitioner of the said Court to act as Crown Proctor" in the suit. The practitioner so appointed is to perform in relation to that suit the duties, and have and exercise the powers and authorities which by the Act or the Rules and Regulations are or may be imposed or conferred on the Crown Proctor.

The duties, powers and authorities seem to be substantially the same in either case. It does not appear why the legislature of South Australia instituted the difference in the tenure of the office. The only result appears to be that the Court has in each suit a range of choice extending over the whole profession, that there is no salaried office of Crown Proctor, and that the practitioner appointed depends for his remuneration on any costs he may earn in the case for which he is appointed, for which costs, if it thinks fit, the Court may order the parties to find security. These results may be taken to have been intended, and there is nothing to indicate by way of construction any other purpose. A Crown Proctor, when appointed, becomes, as in England, the depositary of information "material to the due decision of the case," and on receiving it "may thereupon take such steps as the Attorney-General may deem necessary or expedient" (sec. 36), and if from any information to be so given or otherwise the Crown Proctor suspects that any party or parties "are or have been acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case," he may intervene in the suit "under the direction of the Attorney-General, and by leave of the Court, at any time before the decree *nisi* is made absolute" (sec. 37). This power to intervene under the direction of a high public officer is conferred in furtherance of public policy, and for the protection of the Court from the danger of being made the vehicle of a fraud upon the administration of justice. It is in addition to the

liberty the Crown Proctor has in common with the rest of the public to show cause against the making absolute of a decree *nisi* already granted, by reason of its having been obtained by collusion, or by reason of material facts not brought before the Court in evidence (sec. 35).

The motion, the subject of the present appeal, was made on the part of C. J. Dashwood, Crown Solicitor, for the appointment as Crown Proctor in the suit of *Maslin* v. *Maslin and Brown* of him, Mr. Dashwood, or some other practitioner of the Court. Its rejection by the Court was not merely a refusal to appoint Mr. Dashwood, but a refusal to appoint any Crown Proctor, and it must therefore be sustained by reasons applying to the appointment of any practitioner of the Court. Hence if there were any force—as I do not think there is—in the contention that Mr. Dashwood was ineligible because he had been informed and believed that there were "grounds for suspecting" collusion, that would not of itself have prevented such information and belief from forming the ground for an order appointing some other practitioner. But the argument that a practitioner who already thinks there is ground to suspect collusion should for that reason be rejected is to my mind untenable. After the appointment of the Crown Proctor it is just such a suspicion that is the only prescribed justification for his intervention. Why should an applicant, otherwise fit, become unfit simply because the information which gives rise to it has reached him before he asks for the appointment? It cannot be said that its existence saps the independence of an ordinarily impartial man. The argument if adopted would have the result that, where the ground for suspicion was so notorious and so strong that it must necessarily be in the mind of every practitioner, the disqualification would extend from end to end of the profession, and thus sec. 28 would be rendered nugatory. We cannot reasonably attribute such an intention to the legislature.

It was argued that the appointment under this section is not a judicial act; that there need not, and should not be an application for the exercise of the Court's discretionary power, but that the Court ought to act purely on its own volition; and that its refusal to appoint cannot be made the subject of an appeal. I

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cannot find in the Act or elsewhere any foundation for this argument. It cannot be based on the words "may if it think fit," which are words in frequent use for the statutory bestowal of a discretionary but not an arbitrary power, to be exercised by a Court upon a proper application. There is not in the objects of the section or in any other part of the Act anything from which we can infer that the Court is only to act *mero motu suo*. To confine the resort to the Court's power to cases in which it had not been moved to exercise it would seriously cripple that power, for there are many—it may be a majority—of cases of suspicion of which the Court could know nothing except upon information laid before it in support of a motion. A construction which would so narrow the usefulness of the power granted will not be adopted without some basis for it to be found in the terms of the Statute or in its scope and purview. Nor is there any better foundation for the view that the exercise of the Court's discretion in dealing with a motion under sec. 28 is not appealable. It is a discretion to be exercised upon ordinary judicial principles, and any failure to apply them is a proper subject of appeal.

A further argument against this appeal is that the affidavits used by the petitioner in opposition to the appellant's motion are sufficient to dissipate the grounds of his suspicion. What are those grounds? Mr. Dashwood's further affidavit, filed after the motion had been partly heard, include his information and belief that the petitioner had executed a deed (which it is admitted that he executed on 17th May 1909) covenanting to secure to the respondent wife £500 a year for her life, the security to be given fourteen days after the time limited for appealing against a decree absolute should have expired, on no such appeal having been in the meantime presented, or on such appeal having been dismissed. Thus the securing of the proposed income was to be contingent on the entire success of the petitioner in the proceedings during the contentious conduct of which the agreement to provide that income was made. That agreement was made upon a suggestion by the learned Judge who tried the case, made to the petitioner's solicitor in his chambers after the adjournment of the Court on the first day of the hearing. His Honor, however, did not suggest the conditions which accompanied it. At that stage

the petitioner had been examined and cross-examined, but had not been re-examined. He was the first witness, and, as we see by his Honor's notes, nine other witnesses remained to be called. But in the affidavit of the wife's counsel (Mr. *Anderson*) used by the petitioner on the hearing of this motion to the Full Court, she having ceased to contest the application, we find that after discussing with the petitioner's solicitor during the adjournment of 17th December the question of permanent maintenance, he had agreed to advise his client to accept the proposed allowance in lieu of applying to the Court for an alimony order. Accordingly Mr. *Anderson* says that he advised his client that he felt sure the presiding Judge would report to the Full Court that he found the allegations in the petition proved; that it was impossible for her to prove adultery on the part of the petitioner subsequent to her condonation of his adultery, of which condonation the petitioner had given evidence; that if she went into the box she would be bound to admit her own adultery (as to which see sec. 57 of the *Matrimonial Causes Act* 1867 and sec. 3 of the *Law of Evidence Further Amendment Act* 1869), and would be further exposed to public contempt by severe cross-examination; and that in his opinion the Court "would not make such a *generous* provision" for her as her husband was prepared to make. After full consideration of this advice Mrs. Maslin, he says, agreed that it would be useless for her to go into the witness box, and that the provision her husband was prepared to make for her was better than the Court would order; and she instructed her counsel not to make any further defence and to accept the £500 a year. On 18th December Mr. *Anderson* appears from the Judge's notes to have asked only a few questions, and those of no great importance. On the close of the petitioner's case no evidence was offered in defence, and the Judge reported to the Full Court in favour of the petitioner, including a finding that the petitioner's own adultery had been condoned, and that after condonation he had committed no further adultery. The Full Court five days afterwards granted a decree *nisi* for the dissolution of the marriage. Both Mr. *Anderson* and Mr. *Pope*, the petitioner's solicitor, emphatically deny that it was arranged or suggested between them that the respondent wife should not be called, or the suit

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further defended. It does not at present appear, however, to what extent, if any, the proposed provision or its liberality induced the wife to agree to abandon her defence.

As to what constitutes collusion I quote a passage from the judgment of *Sir Francis Jeune* P. in the case of *Churchward* v. *Churchward* (1):—"It must always be remembered that, on grounds of public policy, second, perhaps, to none in importance, the marriage status cannot, however much the parties to it may otherwise desire, be altered, except on the fulfilment of certain conditions prescribed by law, conditions which relate to the conduct not only of the person against whom, but of the person by whom, relief is sought. Hence, it arises that in matrimonial proceedings, this Court has imposed on it, by the previous practice, and by the provisions of the Act of 1857, the peculiar duty of ascertaining for itself, so far as it can, whether in any case there exist bars, absolute or discretionary, to the petitioner's claim. I am not, therefore, prepared to say that the reason underlying what I think is the effect of the decision in the House of Lords, and of the Acts of 1857 and 1860, may not be that, when the parties to a suit are acting in complete concert, the Court is deprived of the security for eliciting the whole truth, afforded by the contest of opposing interests, and is rendered unable to pronounce a decree of dissolution of marriage with sufficient confidence in its justice. If this be so, the expression in sec. 7 of the Act of 1860, 'collusion for obtaining a divorce contrary to the justice of the case,' may be understood to indicate that, by such an agreement, justice is imperilled, but not to require that it must be affirmatively shown that, having regard only to the matrimonial conduct of the parties, justice will not be, or has not been, done. No doubt the protection to the Court, afforded by the mutual watchfulness of hostile parties, often does not exist, because the petitioner and the respondent may, independently of each other, be of the same mind. Against results of that unanimity no legislation can guard. But it may well be worth while to prevent the parties to a suit from binding themselves by an agreement which, if there be anything to hide, renders it obligatory on both of them to keep the veil drawn.

(1) (1895) P., 7, at p. 30.

At least, if a petitioner makes the institution of his suit and its proceedings a matter of bargain, stifling defence and recrimination by a covenant of silence, he cannot wonder if the Court declines to be satisfied that it has before it all the material facts. Such a petitioner has mistaken his position. *Pacem duello miscuit.* He appears before the Court in the character of an injured husband asking relief from an intolerable wrong; but if, at the same time, he is acting in concert with the authors of the wrong, and is subjecting his rights to pecuniary stipulations, he raises more than a doubt whether, in the words of Lord *Stowell*, 'he has received a real injury and *bonâ fide* seeks relief.'"

I am clearly of opinion that at the time of the motion the question was not whether there had been collusion or not. The question was merely whether or not a Crown Proctor should be appointed. The case had not even reached the stage of considering whether leave to intervene should be given. That question does not arise until after the appointment of a Crown Proctor, and then only if that officer has the direction of the Attorney-General to make such an application. That leave has in such circumstances always been granted in England almost as a matter of form upon a mere affidavit that ground for suspicion exists. I need not consider whether any alteration of the Rules in England has rendered leave no longer necessary. No such alteration in South Australia is alleged. The Attorney-General being an officer of high standing in the administration of justice, his direction has been taken, not as a proof of any fact, for facts at that stage have not to be proved, but as some indication that the application is not made lightly or wantonly. But whatever may rightly happen on an application for leave to intervene (if made) —and I say nothing in prejudgment of such an application—it is clear to my mind that a Crown Proctor ought to be appointed if there is ground, as I think there was here, for further investigation of the suspicion alleged. I am equally clear that it is, and that it was on the part of the Full Court, premature to determine the questions of fact raised between the applicant and the petitioner; and that a discretion exercised on the ground of such determination is not properly exercised, as it does not stand on any principle by which the Court should be guided on such

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an application. The contest as to these facts and their bearing when fully expanded in evidence, and the question whether they in truth amount to collusion, are proper for determination on the investigation which will follow intervention, if the latter stage is passed. I think, therefore, that the argument on this point fails. The objection of delay is obviously untenable. The applicant was not in a position to give notice of motion until 9th June, when the Attorney-General directed him to move, and he gave notice of motion the next day. Moreover, the covenant had only been executed by the petitioner on 17th May, and the contingency on which the provision rests—which could not have been in the contemplation of *Homburg* J. when he made his suggestion of some allowance—could not have been known to the appellant before that time. Mere lateness in point of date is not material, since the application may be made at any time before the expiration of six months, after which the decree absolute could be moved for.

I am of opinion that the appellant has given sufficient reason for the appointment of a Crown Proctor, and as there is nothing to disqualify him personally from appointment, I think his application to be himself appointed should be granted.

I think therefore that this appeal must be allowed.

O'CONNOR J. British law has always recognized that maintenance of the marriage tie is in the public interest, and that its dissolution is not merely the private concern of husband and wife. In England the King's Proctor, a permanent public official, is the representative in the Divorce Courts of the public interests, and the *Matrimonial Causes Act* 1860, from which most of the provisions of the South Australian Act have been taken, charges him by sec. 7 with certain duties and functions for safeguarding the Courts from collusion of the parties. The provisions of that section are to be found substantially embodied in secs. 35, 36, and 37 of the South Australian Act, the main difference between the two Acts in that respect being that the duties and functions of King's Proctor are by the South Australian Act imposed on the Crown Proctor, who is not a permanent public official, but is appointed by the Court specially for the purposes

of any case in which it may think fit to make the appointment. Once appointed, the status and functions of the Crown Proctor in respect of the particular case appear to differ in no substantial way from those of the King's Proctor under the English Act. It is necessary to make that observation in passing in order to dispose at once of an objection taken on behalf of the husband respondent. *Sir John Downer's* argument was that the Crown Proctor was merely an officer of the Court, and that his appointment was not a judicial act, but an official or ministerial act, just as the appointment of a registrar would be, and that the refusal of the Court to make the appointment could not therefore be the subject of appeal. The learned Chief Justice in the Court below rightly, in my opinion, declined to give effect to that contention. Section 37 of the Act assumes on the face of it that the Crown Proctor when appointed is under the control of the Attorney-General, not of the Court. The Court has no power on its initiative to give him leave to intervene, much less to order his intervention. It is a condition precedent of the Court's jurisdiction to grant such leave that the Attorney-General should have first directed the Crown Proctor to intervene. When after compliance with these conditions he does intervene, it is with substantial rights as a party in the suit. To hold under the circumstances that the appointment was merely official, and that the parties and the public represented by the Attorney-General had no right to call upon the Court to exercise a judicial discretion in making or declining to make it, would be to ignore the obvious purport and effect of the provisions to which I have referred.

I turn now to sec. 28, which empowers the Court, if it thinks fit, to appoint some practitioner of the Court to act as Crown Proctor in any suit. The discretion thereby vested is, as the learned Chief Justice in the Court below pointed out, vested in the Court as a judicial tribunal, and is to be judicially exercised. In other words, it is to be exercised for some reason capable of being examined and tested on legal grounds. It would be impossible, even if it were desirable, to make an exhaustive statement of the circumstances under which the Court ought or ought not to appoint a Crown Proctor in any suit. But the

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principles on which the Court should exercise its discretion in each case are, I think, plainly deducible from a consideration of the sections to which I have referred.

The Act provides two processes for safeguarding the public interests in the making of decrees for dissolution of marriage. The first process may be set in motion without the order of the Court. After a decree *nisi* for dissolution has been granted any person may show cause to the Court against the decree being made absolute on the ground of collusion or the suppression of material facts. The other process, and it is with that only that we are concerned here, begins with the appointment by the Court of the Crown Proctor. When appointed he becomes the authorized representative of the public interests, and the repositary of information bearing on the issue of collusion; the duty is imposed on him of examining information, making inquiries, and forming an opinion as to existence or non-existence of collusion. If he suspects that the parties are acting in collusion he may under the direction of the Attorney-General apply to the Court for leave to intervene. If that leave is granted he becomes a party to the suit, and may then as a party raise the issue of collusion which thereafter may be tried and determined during the trial or at any later stage. But it must be tried in Court as any other issue in the case is tried, in the presence of all the parties, and by the ordinary methods of trial which ensure the sifting and testing of evidence. It is only at that stage of the proceedings that the issue of collusion is ripe for determination and can be determined in such a way as to bind the parties. In exercising its discretion to grant or refuse an application for appointment of a Crown Proctor the Court may well require to be satisfied that there are circumstances pointing to collusion and calling for inquiry, circumstances affording reason for belief that on further investigation they may furnish to a Crown Proctor grounds for obtaining leave to intervene, that is to say, grounds sufficiently substantial to render probable a direction from the Attorney-General to apply for leave to intervene and to justify the Crown Proctor himself in reasonably entertaining a suspicion of collusion. The Court may, of course, act on much lighter grounds; the matter may come before it at the earliest stages of inves-

tigation when nothing more appears than that the circumstances are suspicious, but yet it may be obvious that investigation by a Crown Proctor is essential in the interests of justice. Where, however, the requirements I have pointed out are fulfilled the Court would not in my opinion be exercising its discretion properly if it refused to make the appointment. Applying these principles to the present case, what were the grounds upon which the Court was asked to make the order? In the first place, the application was made by the Crown Solicitor under direction of the Attorney-General. Undue weight must not be attached to that circumstance, and in so far as the dealing with the application depends upon the view to be taken of the facts before the Court, I agree with the learned Chief Justice in the Court below that the Attorney-General's view might be, if the Court thought fit, entirely disregarded. But on the other hand, the fact that the aid of the Court is sought not by an individual citizen, but by the Crown Solicitor under the Attorney-General's authority, has a significance to which full weight must be given. The Attorney-General is recognized in all Courts as the representative of the whole community, and the Court was bound to assume, in the absence of evidence to the contrary, that the appointment of a Crown Proctor was asked for in the public interest and not for the benefit of an individual or the gratification of private malice. It was also I think bound to assume that the Attorney-General's direction to apply for leave to intervene would, as a matter of course, follow the appointment of the Crown Solicitor as Crown Proctor.

Turning now to the statement of facts upon which the application was based, the Crown Solicitor's two affidavits taken together constitute in my opinion a strong *primâ facie* case—a case on which a Crown Proctor might reasonably suspect that collusion between the parties existed—and the strength of that case for the purposes of the application cannot in my opinion be disposed of by pointing out that the names of informants were not disclosed. To insist upon disclosure at that stage would in some cases effectually defeat any attempt at further investigation. The applicant's case was, however, answered by affidavits from the solicitors of the parties and other persons setting forth facts

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tending to show that the Crown Solicitor's suspicions of collusion were entirely without foundation. The Court thereupon applied itself in effect, though not in form, to the determination of the issue of collusion or no collusion just as it would do on the trial of the suit. With information and belief on the one side, even though founded to some extent on admitted facts, and positive categorical denial by witnesses of unimpeached credit on the other, the Court as might be expected came to the conclusion not only that there was no collusion between the parties, but that nothing was proved upon which a suspicion of collusion could reasonably be founded. In so taking on itself the determination of the question whether or not collusion existed, the Court in my opinion exercised its discretion in a wrong direction. It is not at that stage nor by that method that the issue of collusion is directed by the Act to be determined. If on the application for appointment of Crown Proctor it were necessary to establish the existence of collusion, the whole purpose of sec. 28 would be defeated. Its object is merely to constitute an authority for making investigations essential before the existence of collusion can be definitely ascertained, and for preparing the evidence necessary to establish its existence at the trial. No doubt the Court is entitled to investigate facts upon which the applicant relies and to weigh the inferences he seeks to draw. It may find the alleged facts non-existent or the inferences improbable and unreasonable. In such a case a Court would be justified in refusing to act upon such evidence and such inferences, no matter how strongly the Crown Solicitor might state his suspicions. But where, as in this case, facts are admitted from which *primâ facie* a fair inference may be drawn of the existence of grounds which would reasonably justify suspicion of collusion, the Court is not in my opinion entitled to enter upon the inquiry whether those facts have been so satisfactorily explained that the proper inference to be drawn is that the parties have not been guilty of collusion. The time to deal with the defence of the parties on that charge is at the trial of the issue of collusion in the suit, when the whole case on the part of the public is before the Divorce Court, and the tests of oral examination and cross-examination can be applied to the witnesses. Under the cir-

cumstances of this case the Court below were no more entitled to dismiss the application on the ground that the evidence for the respondent explained away every ground of suspicion than a magistrate would be entitled to refuse committal for trial on the ground that the evidence for the defence satisfied him that the accused was innocent. The arrangement of the terms of settlement during the trial, the altered conduct of the defence after the terms were agreed to, the provisions of the deed of settlement itself, the petitioner's own evidence as to his doings and his whereabouts long after any possibility of condonation on the part of the respondent, are all facts upon which a reasonable suspicion of collusion might well be founded, and the Court ought to have so held. The explanation of the parties and their legal advisers may, if adopted by the Court, be such as to remove every trace of suspicion from the mind of any reasonable man, but that explanation must be given later when, if the Crown Proctor gets leave to intervene, the issue of collusion is being heard by the Divorce Court. The merits of the explanation can then be determined. For these reasons I am of opinion that the decision of the Court below, being based on a wrong exercise of its discretion, must be set aside, and that this Court should make the order which the Court below ought to have made, namely, that the Crown Solicitor, Mr. Dashwood, be appointed Crown Proctor in the suit.

ISAACS J. I am also of opinion that this appeal should be allowed.

Sir John Downer contended that the refusal of the Supreme Court to appoint a Crown Proctor was not a judicial decision, but merely a departmental determination. In other words, it was in his view a mere question of executive action. That would be quite abnormal, and is not sustained by the Statute. Section 28 prescribes that the Court may appoint a Crown Proctor "at the time when application is made to it to direct the mode in which the questions of fact raised and" (query, whether this should be read as "on") "the pleadings shall be tried," that is when the Court is called upon to give the direction under secs. 50 and 54.

That is a clear judicial act, and, "at the time" the Court is engaged in performing that judicial act, it may also proceed to

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do the further act of appointing the Crown Proctor. The appointment may by the same section be made at any other period of the suit. The section also provides in its concluding words that the Court may require the parties, or either of them, to find security for the payment of costs to be incurred by the Crown Proctor. That is again clear judicial action. It is true sec. 29 requires the Court to satisfy itself as to certain matters, but that does not identify the Crown Proctor with the Court any more than the King's Proctor in England is identified with the tribunal there. That objection consequently fails.

Then it was contended that the appointment, however regarded, was to be made by the Court *ex mero motu*, and not upon the application of the Attorney-General.

There are no words so declaring. The words used to describe the person appointed are significant. He is to act as Crown Proctor, and to be Crown Proctor in and for that suit.

The legislature, *primâ facie*, intended him to act for the Crown—that is to represent the Crown or the general community. That is completely borne out by secs. 36 and 37. Section 36 declares that at any time during the progress of the cause, or before the decree is made absolute, any person may give notice to the Crown Proctor, who is only to take such steps as the Attorney-General deems necessary or expedient.

Section 37 says that should the Crown Proctor suspect collusion for the purpose of obtaining a divorce contrary to the justice of the case, he, under the direction of the Attorney-General, and by leave of the Court, may intervene. Rules 67 and 68 regard him as a suitor, and not as an executive officer of the Court.

If, therefore, an appointment is made, it is plain that the Crown Proctor is moved or stayed by the Attorney-General in the first instance. If the Crown Proctor receives information which leads him to consider that some fact material to the case exists not amounting to collusion, he may intervene on the direction of the Attorney-General; but if it be collusion for the purpose of obtaining a divorce contrary to the justice of the case, the leave of the Court must also be obtained. That leave is almost a matter of course when the Attorney-General gives such a direction: *Hud-*

son v. Hudson (1); *Palmer* v. *Palmer* (2); *Hamilton* v. *Hamilton* (3). *Sir Gorell Barnes P.*, said, in *Westcott* v. *Westcott* (4):— "It may be said that the King's Proctor always acts reasonably, because he acts upon the *fiat* of the Attorney-General." And his Lordship maintained that view in the judgment. The Court has of course a final controlling power, but it may be taken as established that that control will be exercised in favour of further investigation unless the circumstances transparently negative its propriety.

These considerations evidence to my mind the intention of the Act that the application is properly made by the Attorney-General in the public interests. There are others of a practical nature which may well dissipate any remaining doubt. Who is to pay the Crown Proctor? He has a statutory duty laid upon him by his appointment. He is certainly not expected to bear the costs personally. If the parties are unable to find security, then on the respondent's view either the Court pays the costs (which it has no funds to do), or the Crown Proctor bears them himself (which is beyond contemplation), or he pays them personally in the first instance and the parties or one of them may be required to find security to refund. The parties may be unable to do so, and then either the suit may be stopped—which would possibly be agreeable to a co-respondent—or the appointment abandoned, which would defeat the purpose of the Act. It is evident that the Crown must have been expected by Parliament to find the means in the first instance for its proctor *pro hac vice* instead of finding a permanent salary for a permanent officer, and the Court may or may not order the security.

As to the facts, the respondent argued that the facts do not show collusion. That is not the issue at this stage. The issue is, do the facts show a fair case for investigation by a Crown Proctor as to collusion? "I think there is collusion," says *Cotton* L.J. in *Butler* v. *Butler* (5), "independently of the question of whether it is proved ultimately that the petitioner has committed a matrimonial offence, where the parties agree

(1) 1 P.D., 65.
(2) 4 Sw. & Tr., 143.
(3) 33 L.T., 462.
(4) (1908) P., 250, at p. 251.
(5) 15 P.D., 66, at p. 72.

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together not to bring before the Court facts which are relevant to the case, and which will enable the Court to decide one way or the other if brought before it."

The main fact there was, as the learned Lord Justice stated, that the husband agreed with the wife that he should not support his charge against her, that he would not cross-examine her, and that he would withdraw his countercharge.

In *Hunter* v. *Hunter* (1), Lord *Gorell* (then *Sir Gorell Barnes*) made these important observations:—" It does not matter . . . . whether the facts which by collusion are suppressed are such as would have made a difference in the decision or not. If they were, by agreement between the parties, suppressed, that is collusion, and there is an end of the case." It was strongly contended that in any event Mr. Dashwood's affidavit should be rejected because it rested only on information and belief. Undoubtedly, with certain well-recognized exceptions, the rights of the parties are not to be determined except upon direct evidence of personal knowledge. But the rules of evidence have been adopted for practical purposes with the object of securing, so far as human methods will allow, the pure and perfect administration of justice. They are, however, only means to attain an end, and are not to be used so as to defeat it.

Exceptions have accordingly been introduced for the furtherance of the main intent. While preserving the general rule in respect of the final and ultimate adjudication upon the rights of litigants, the Courts have permitted statements of information and belief on interlocutory applications. They have usually insisted for their own satisfaction to have stated the source of information and the grounds of belief.

That is really on the ground of necessity and to promote justice by preserving the *status quo* during the proceedings, or preventing irremediable mischief pending the ultimate decision: See *Gilbert* v. *Endean* (2); *In re Anthony Birrell Pearce & Co.*, *Doig* v. *Anthony Birrell Pearce & Co.* (3).

It is only an application of this recognized principle to the exigencies of the situation, that the Court should act upon the

(1) (1905) P., 217, at p. 225. (2) 9 Ch. D., 259, at pp. 265-269.
(3) (1899) 2 Ch., 50, at p. 52.

statement of Mr. Dashwood's information and belief in the present case.

Admittedly he has not the requisite strict evidence of collusion appropriate at the trial, he does not yet know if any such can be obtained, and it is not now sought to finally affect the rights of the litigants. He has, however, so he swears, some information which leads him to believe in the existence of certain facts which, for the reason I have already stated, are very material. To require him to do more at the present stage would defeat the Statute law, and possibly in the end defeat justice altogether, because it would insist upon his doing now what he has not yet the means of doing, and what the law does not expect to be done at this juncture; and if he were to be compelled to disclose the names of his informants, even that might easily result in an ultimate miscarriage of justice.

Consequently there is no real ground for the objection, and, in accordance with legal principles and practice, the affidavit is one which in such an application as the present may well be acted upon.

Without again recapitulating the facts already adverted to by my learned brothers, and without expressing any further view as to their ultimate effect when fully investigated, I am of opinion that the legal considerations to which I have referred as applied to those facts lead to an allowance of this appeal.

Appeal allowed. Order appealed from discharged. Order that the appellant be appointed Crown Proctor. Respondent to pay the costs of the motion and of the appeal.

Proctor, for the appellant, *E. E. Cleland.*

Proctor, for the respondent, J. F. Maslin; *W. Pope* for *M. Budger*, Clare.

B. L.