H. C. OF A. 1912.

FERRIER v. STEWART.

Isaacs J.

when written preceded hers in point of time, and if the note were in fact previously delivered by them to her. This state of things was the conventional basis on which the parties acted, and so far as they are concerned it must be taken to be the true one. If so she is, for the purposes of this case, an indorser within the meaning of the Statute.

For this reason, the judgment of *Hodges* J. should be affirmed.

Appeal dismissed with costs.

Solicitors, for the appellant, *D. H. Herald & Son* for *A. C. Palmer & Son*, Hamilton.

Solicitor, for the respondents, *W. Bruce* for *J. B. Westacott* Hamilton.

B. L.

FOLL 39 A CRIM R 395

[HIGH COURT OF AUSTRALIA.]

THE ATTORNEY-GENERAL OF QUEENSLAND . . . . . } APPELLANT;

AND

HOLLAND . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1912.

BRISBANE, *May* 3, 6, 7.

SYDNEY, *May* 17.

Griffith C.J. Barton and Isaacs JJ.

Divorce—Costs — Collusion — Intervention — Liability of Crown for costs —Matrimonial Causes Jurisdiction Act 1864 (*Qd.*) (28 *Vict. No.* 29), *secs.* 22, 46—*Matrimonial Causes Act* 1875 (*Qd.*) (39 *Vict. No.* 13), *sec.* 7.

Sec. 22 of the *Matrimonial Causes Jurisdiction Act* 1864 (Qd.) provides that notice must be given to the Attorney-General of the presentation of a petition for dissolution of marriage, and sec. 7 of the Act of 1875 (Qd.) amending the *Matrimonial Causes Jurisdiction Act* 1864, provides that any person may at any time during the progress of the cause or before the decree is made absolute give information to the Attorney-General of any matter material to the case, and that the Attorney-General may thereupon intervene.

Sec. 46 of the Act of 1864 provides that "The Court on the hearing of any suit or on the hearing of any appeal may make such order as to costs as to the Court may seem just."

Held (*Isaacs* J. dissenting), that the Attorney-General intervening is not liable to pay or entitled to receive costs.

Decision of Supreme Court of Queensland: *Holland* v. *Holland*, *Attorney-General Intervening*, 1912, St. R. Qd., 1, reversed.

H. C. OF A. 1912.

ATTORNEY-GENERAL OF QUEENSLAND v. HOLLAND.

APPEAL from the Supreme Court of Queensland.

The respondent brought an action for dissolution of marriage against her husband. A judgment *nisi* was pronounced on the grounds of adultery and desertion, but before it was made absolute the Attorney-General intervened on the grounds of the adultery of the plaintiff and concealment of material facts. On the trial of the issues thus raised the Attorney-General asked and obtained leave to withdraw his defence. The case was thereupon struck out and costs were given against the Attorney-General. The Attorney-General appealed against the order for costs to the Full Court, which dismissed the appeal: *Holland* v. *Holland, Attorney-General Intervening* (1).

From this decision the Attorney-General now, by special leave, appealed to the High Court.

O'Sullivan, A.-G. for Queensland, and *Hart*, for the appellant, referred to secs. 21, 22, 29, 46, 47 and 56 of the *Matrimonial Causes Jurisdiction Act* 1864 (Queensland), also to sec. 7 of the *Matrimonial Causes Act* 1875, and compared it with the English Act. The Crown is not bound by the provisions of any Statute unless it is specially mentioned therein or unless it appears to be bound by necessary implication: *Roberts* v. *Ahern* (2); *Affleck* v. *The King* (3); *Dashwood* v. *Maslin* (4); *Gray* v. *Gray* (5); *Lautour* v. *Her Majesty's Proctor* (6). The Attorney-General must enter an appearance: Order XII., r. 18, of Supreme Court Rules (Queensland); *In re Mills' Estate*; *Ex parte Commissioners of Works and Public Buildings* (7). Neither in equity nor at com-

(1) 1912, St. R. Qd., 1.
(2) 1 C.L.R., 406, at p. 417.
(3) 3 C.L.R., 608, at p. 630.
(4) 9 C.L.R., 451.
(5) 6 L.T., 336.
(6) 10 H.L.C., 685.
(7) 34 Ch. D., 24.

H. C. OF A. 1912.

ATTORNEY-GENERAL OF QUEENSLAND v. HOLLAND.

mon law, nor in any other jurisdiction, could the Court award costs against the Crown in Queensland apart from statutory enactment, and there is no enactment to meet this case: *In re Madden's Estate* (1); *Le Sueur* v. *Le Sueur* (2). There is no provision in this Act as to forwarding the papers to the Attorney-General, as is provided for by sec. 5 of the English Act: *Wilson* v. *Wilson* (3). A public officer party to a suit is not in the same position with respect to having costs given against him as a private individual, and before costs can be given against him good cause must be shown: *In re Hardy's Crown Brewery Ltd. and St. Philip's Tavern, Manchester* (4); *Vivian* v. *Vivian* (5); *Wood* v. *Wood* (6). The Attorney-General may intervene at any time before judgment under the original Act: Order XII., r. 55, of the Supreme Court Rules (Queensland): *R.* v. *Archbishop of Canterbury* (7); *Reg.* v. *Beadle* (8). *Moore* v. *Smith* (9) has no application to the matter now before the Court. In this case the Attorney-General intervening is in the same position as a person objecting under the *Licensing Act* that a licence is not for the public benefit, and he is not a party to the action: *Boulter* v. *Kent Justices* (10). Sec. 46 of the Act of 1864 is confined to the original parties to the litigation: *R.* v. *Justices of Staffordshire* (11). It is a recognized practice that costs were not given against the Crown on the old Chancery side. [The following cases were also cited:—*Lord Advocate* v. *Lord Dunglas* (12); *Lord Advocate* v. *Hamilton* (13); *Johnson* v. *Rex* (14); *In re Powell* (15).]

Stumm K.C., *O'Rourke* and *Macrossan*, for the respondent. If the Attorney-General comes in merely for the purpose of informing the Court, he does not become a party; but if he takes an active interest and fights the case, thereby causing the petitioner further costs—as he did in this case—he becomes a party. *Lautour* v. *Her Majesty's Proctor* (16), merely lays down that

(1) (1902) 1 Ir. R., 63.
(2) 36 L.T., 276.
(3) L.R. 1 P. & M., 180.
(4) (1910) 2 K.B., 257.
(5) L.R. 2 P. & M., 100.
(6) 4 Q.S.C.R., 136.
(7) (1902) 2 K.B., 503.
(8) 7 E. & B., 492.
(9) 1 E. & E., 597.
(10) (1897) A.C., 556, at p. 568.
(11) 4 A. & E., 842.
(12) 9 Cl. & F., 173.
(13) 1 Macq. H.L., 46.
(14) (1904) A.C., 817.
(15) 6 Q.L.J., 36.
(16) 10 H.L.C., 685.

costs may be given when the intervention is on the ground of collusion but on no other ground. This case also shows that there is no provision for costs in the Principal Act, but that provision has been made for them by the Amending Act. If the Amending Act had been passed when *Lautour's Case* was heard it would have been decided the other way. *Hudson* v. *Hudson* (1); *Jackson* v. *Jackson* (2); *Dering* v. *Dering* (3); *Vivian* v. *Vivian* (4); *Wilson* v. *Wilson* (5). The English Amending Act is not adopted here. Our rules do not draw any distinction between the Attorney-General and any other intervener: *Higgins* v. *The King's Proctor* (6). Under sec. 22 the petition must be served on the Attorney-General but he may please himself whether he will intervene or not. Under our earlier Act we had the very widest powers: *Molloy* v. *Hallam* (7); *Justices Act* 1886 (Qd.).

O'Sullivan, in reply.

Cur. adv. vult.

The following judgments were read:—

May 17.

GRIFFITH C.J. The Act which we are called upon to construe, although called the *Matrimonial Causes Jurisdiction Act* 1864, was passed in March 1865, and we must construe it according to the intention of the legislature of that day so far as we can discover it. Whatever the Act meant then it still means, notwithstanding that the general point of view as to the Crown's liability for costs has greatly changed in the interval. It is, indeed, not always easy to project oneself mentally backward through a period of transition. In 1865 the rule that the Crown neither pays nor receives costs was generally accepted and recognized, although it might be excluded by necessary implication. As Lord *Campbell* C.J. had said in 1859, in *Moore* v. *Smith* (8), if it is clear that the legislature when authorizing an award of costs meant to include every case, whether the Crown were interested or not, the Crown by giving assent to such legislation is bound.

(1) 1 P.D., 65.
(2) (1910) P., 230.
(3) L.R. 1 P. & M., 531.
(4) L.R. 2 P. & M., 100.
(5) L.R. 1 P. & M., 180.
(6) (1910) P., 151.
(7) (1903) S.R. Qd., 282.
(8) 1 E. & E. 597; 28 L.J.M.C., 126.

H. C. OF A. 1912.

ATTORNEY-GENERAL OF QUEENSLAND v. HOLLAND.

Griffith C.J.

That was a case of an Excise prosecution, and stood, I think, alone as a decision in favour of the Crown's liability.

The Queensland Statute of 1865 was based upon the English *Matrimonial Causes Act* 1857 (20 & 21 Vict. c. 85) as amended by the *Matrimonial Causes Acts* 1858 and 1860 (21 & 22 Vict. c. 85 and 23 & 24 Vict. c. 144).

The Act of 1857 did not make any provision for intervention by the Crown Law Officers or any private person, but it imposed upon the Court (sec. 29) the duty of satisfying itself in cases of dissolution, not only as to the facts alleged but also whether the petitioner had been accessory to or connived at the adultery or had condoned it, or whether there was collusion (sec. 30).

By sec. 51 the Court was empowered on the hearing of any suit, proceeding or petition under the Act to make such order as to costs as to it might seem just.

By sec. 34 an adulterer named as co-respondent might be ordered to bear the whole or any part of the costs of the proceedings.

Under that Act a decree for dissolution was absolute in the first instance. But by sec. 7 of the Act of 1860 it was provided that such a decree should in the first instance be a decree *nisi*, not to be made absolute till after the expiration of a period to be directed, and that during that period any person should be at liberty, in accordance with general or special orders of the Court, to show cause why the decree should not be made absolute by reason of collusion or by reason of material facts not brought before the Court. The same section provided that at any time during the progress of the cause or before the decree was made absolute the Queen's Proctor, if he suspected that the parties were acting in collusion, might, under the direction of the Attorney-General and by leave of the Court, intervene in the suit alleging collusion, and retain counsel and subpœna witnesses to prove it, and that the Court might order the costs of such counsel and witnesses and otherwise arising from the intervention to be paid by the parties or any of them.

In March 1864 the case of *Lautour* v. *Lautour*, Her Majesty's Proctor intervening (1), came before the House of Lords. In

(1) 10 H.L.C., 685.

that case the Queen's Proctor had intervened, alleging collusion and also adultery of the petitioner. The petitioner's adultery having been proved, the Judge Ordinary directed him to pay the Queen's Proctor's costs of the intervention. But it was held by the House of Lords that he had no jurisdiction to do so, either under sec. 51 of the Act of 1857 or sec. 7 of the Act of 1860. Lord *Westbury* L.C., in moving the judgment of the House, said (p. 699):—"The Queen's Proctor is not regularly a party to the suit. The Queen's Proctor becomes a party to the suit under the circumstances and in the manner defined by the Statute of the 23 & 24 Vict. c. 144. Now that Statute has two objects; one is to give to the whole of the public the power to give information to the Court in the interval between the decree *nisi* and the decree absolute, which should relieve the Court from being misled by the petitioner, and from pronouncing a decree under circumstances where the petitioner was not entitled to such a decree. Another and a special power is contained in the section, that where the Queen's Proctor has the power to intervene in a case of collusion, he may intervene and become a party to the suit to prove that case of collusion. And then it says that the Queen's Proctor shall be entitled to his costs. The Court shall have power to order the costs of the counsel and witnesses of the Queen's Proctor to be paid by the parties, or such of them as it shall seem fit.

"In the present case the Queen's Proctor intervened, and alleged not only a case of collusion, but alleged also the existence of material facts under circumstances contemplated in the first part of the clause, which circumstances had not been brought before the Court, and the Court made an order that he should give the particulars of those material facts. Those particulars were embodied in affidavits filed by the Queen's Proctor. But there was no attempt on the part of the Queen's Proctor to make out that case of collusion which was the subject of his first allegation. The Queen's Proctor, therefore, I submit to your Lordships, must be treated here as one of the public, coming in to bring before the Court material facts for the Court's information, which had not been presented to it, either by the petitioner or by the respondent. But, my Lords, I think you will agree with me,

H. C. OF A. 1912.

ATTORNEY-GENERAL OF QUEENSLAND v. HOLLAND.

Griffith C.J.

that the latter part of the section is not so worded as to take in the case of the Queen's Proctor acting merely for the purpose of bringing material facts before the Court, and that the Court has no power to give the costs of his so doing, under and by virtue of the authority contained in that section."

The Lord Chancellor did not specifically mention sec. 51, but it had been quoted by the Solicitor-General (Sir R. P. Collier) in argument. This was, in effect, a decision that the provisions of sec. 51 of Act of 1857 did not apply to a party intervening under sec. 7 of the Act of 1860 other than the Queen's Proctor, and to him only when he intervened and succeeded on the ground of collusion. And it was so interpreted by Lord *Penzance* in *Wilson* v. *Wilson* (1).

It may be doubtful whether the report of *Lautour's Case* (2) had reached Queensland when the Act of 1865 was introduced. But the English Act of 1860 must have been present to the mind of the legislature. The provision of sec. 7 of that Act requiring a decree for dissolution to be a decree *nisi* in the first instance was not adopted, but by sec. 22 it was provided that every person presenting a petition for dissolution of marriage should, on the day of presenting it, deliver a copy to the Attorney-General, and that it should be lawful for that officer, if he should think fit, or, by leave of the Court or a Judge (to be granted only for cause of connivance) for any other person to oppose the petitioner's obtaining a decree of dissolution. This provision was evidently intended to be in substitution for the latter part of sec. 7 of the English Act of 1860, which is, indeed, referred to in the marginal note.

Secs. 46 and 29 of the Queensland Act corresponded to secs. 51 and 34 of the English Act of 1857.

This being the state of the English law when the Act of 1865 was passed the question arises whether it was the intention of the legislature that if the Attorney-General "opposed" the dissolution asked for he should be liable to pay costs. I have already referred to the general rule accepted at that time.

The only exceptions to it then known in Queensland were those made by the Act 20 Vict. No. 3 (passed in December 1856) by

(1) L.R. I. P. & M., 180. (2) 10 H.L.C., 685.

which costs might be awarded for and against the Crown in suits relating to the Crown's property or revenue in New South Wales, and the Act 20 Vict. No. 15 (passed in February 1857) which made provision for enforcing claims against the Government of New South Wales, and enacted (sec. 5) that the costs of suit should follow on either side "as in ordinary cases between suitors any law or practice to the contrary notwithstanding." The legislature may also be taken to have been aware of the decision in *Moore* v. *Smith* (1) to which I have already referred. The subject of the proceeding in that case was an offence against an Excise Act, and the Statute under which costs were claimed made it clear both that the Crown might be in form as well as substance a party and also that in every case costs might be awarded against the parties.

In my opinion the words of Lord *Westbury* in *Lautour's Case* (2), "The Queen's Proctor is not regularly a party to the suit," as applied to sec. 7 of the Act of 1860, are equally applicable to the Attorney-General under the Queensland Act of 1865. And I cannot bring myself to believe that in 1865 any Court would have held that the general words of sec. 46 (sec. 51 of the English Act of 1857) would have been held sufficient to impose a liability upon the Crown to pay costs in cases in which neither Crown property nor Crown revenue was concerned.

In 1875 the Queensland legislature passed an Act (39 Vict. No. 13), by which (sec. 7) the provisions of sec. 7 of the English Act of 1860 were adopted so far as regards the interposition of a decree *nisi* before the decree absolute for dissolution. For the provisions as to intervention by the Queen's Proctor and other persons the following provisions were substituted :—

"At any time during the progress of the cause or before the decree is made absolute any person may give information to the Attorney-General of any matter material to the due decision of the case who may thereupon take such steps as he may deem necessary or expedient

"And if from any such information or otherwise the Attorney-General shall suspect that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce

(1) 1 E. & E., 597. (2) 10 H.L.C., 685.

H. C. OF A. 1912.

ATTORNEY-GENERAL OF QUEENSLAND v. HOLLAND.

Griffith C.J.

contrary to the justice of the case or that any material facts have not been pleaded or brought before the Court he may intervene in the suit alleging such collusion or other material facts." The provisions as to the Queen's Proctor's costs were not adopted.

The legislature must, I think, be taken to have been at this time acquainted with the decision in *Lautour's Case* (1), and to have known therefore that an intervention by the Attorney-General under sec. 7 of the Act of 1875 would not subject him to any liability for costs. Sec. 22 of the Act of 1865 was not repealed, but I think that the specific provisions of sec. 7 of the later Act are to be read as an amplification of, and, to some extent, a substitution for, the somewhat vague provision of sec. 22 that the Attorney-General and other persons might "oppose" the petitioner's obtaining a decree for dissolution. I cannot distinguish between the liability to costs under sec. 22 of the earlier Act and sec. 7 of the later Act, or differentiate against the Crown in favour of private interveners under either section.

The intervention in the present case was made under the powers conferred by sec. 7 of the Act of 1875, although probably it might have been made also under sec. 22 of the earlier Act. Under these circumstances I am unable to see any satisfactory ground for holding that the general rule is excluded.

I am confirmed in this view by the case of *Bain* v. *Attorney-General* (2), which arose under the *Legitimacy Declaration Act* 1858. By that Act, which was to be read with the Act of 1857 as one Act, every petition was to be served on the Attorney-General. Sec. 7 provided that:—"Where any application is made under this Act to the said Court such person or persons (if any) besides the said Attorney-General as the Court shall think fit shall, subject to the rules made under this Act, be cited to see proceedings or otherwise summoned in such manner as the Court shall direct, and may be permitted to become parties to the proceedings, and oppose the application." The Court of Appeal held that any person who was permitted to become a party to the proceedings and who did actually oppose the application became liable to costs under sec. 51 of the Act of 1857. But the

(1) 10 H.L.C., 685.

(2) (1892) P., 217, 261.

President held (and his decision was not appealed from) that the Attorney-General was not entitled to receive costs. He thought that when sec. 51 of the Act of 1857 was enacted there was no notion of including the Crown in the provisions as to costs, and pointed out that the Crown was not expressly mentioned in that section. But, remembering that the Act of 1858 was to be read as one with the Act of 1857, I cannot think that this distinction is conclusive. When both Acts are read together the Crown is expressly mentioned in the combined legislation, and sec. 51 would naturally apply if it was so intended.

It is true that other parties cited "besides the Attorney-General" might "become parties"—so assuming that the Attorney-General was in a sense already a party. But this was not thought sufficient to render him liable to costs.

In my opinion the Attorney-General intervening under sec. 7 of the Queensland Act of 1875 or under sec. 22 of the Act of 1865 does not become a party in the true sense of the word, but comes in to prevent a perversion of justice and in aid of the Court.

I am therefore of opinion that the operation of the general rule of law to which I first adverted is not excluded by any necessary implication, and that the Attorney-General intervening is not entitled to receive or liable to pay costs.

BARTON J. In *Roberts* v. *Ahern* (1) the Chief Justice, delivering the judgment of this Court, stated the general rule of construction that "the Crown is not bound by a Statute unless it appears on the face of the Statute that it was intended that the Crown should be bound," and he quoted a well-known passage from the judgment of the Court of Exchequer, *per Alderson* B. in *Attorney-General* v. *Donaldson* (2), which puts the rule on the reason that "it is inferred *primâ facie* that the law made by the Crown with the assent of the Lords and Commons is made for subjects and not for the Crown." The Court also referred to the opinion of *Story* J. in *U.S.* v. *Hoar* (3), that it is a safe rule founded on the principles of the common law that the

(1) 1 C.L.R., 406, at p. 417. (2) 10 M. & W., 117, at p. 124.
(3) 2 Mason, 311.

H. C. OF A. 1912.

ATTORNEY-GENERAL OF QUEENSLAND v. HOLLAND.

Barton J.

general words of a Statute ought not to include the Government "unless that construction be clear and indisputable upon the face of the Act."

The application of this rule to the question, arising under particular Statutes, whether the Crown is liable to pay costs in legal proceedings, was considered in *Affleck* v. *The King* (1), where the Chief Justice, again delivering the judgment of this Court, said:—"There is no doubt that at common law the Crown is by its prerogative exempt from the payment of costs in any judicial proceeding, and that this right cannot be taken away except by Statute. The words of the Statute need not, however, be express: It is sufficient if the abolition of the privilege appears by necessary implication."

It is to be observed further that if the Crown is not in the strict sense a party to the litigation, the implication of its liability to pay costs, where the Statute does not create the liability in express words, is of course more difficult to draw. Words imposing the liability on the parties may from the scope of the enactment necessarily intend the Crown if it is clearly one of the parties, but if expressly or inferentially the words are limited to the parties, and the Crown's part in the litigation is not that of an ordinary party, then the liability of the Crown to costs is hard to establish.

It is further necessary to point out that the words used by the legislature in 1864 must be taken to have now the meaning with which they were first employed, unless it has been affected by later enactments. It cannot be said that they bore one sense in 1864 but that they bear another to-day. At the time when the Act was passed it was the ordinary rule that the Crown did not accept costs and did not pay them, although if it were made clear by enactment that the power to award costs applied to every party, whether the Crown or another, and whether the Crown were interested or not, the Crown was held to have bound itself by its assent to the enactment (see *per* Lord *Campbell* C.J. in *Moore* v. *Smith* (2)). Under the Excise Act applicable to that case it was clear that the Crown when taking or resisting proceedings was a party, and the Act gave power to award costs

(1) 3 C.L R., 608, at p. 630. (2) 1 E. & E., 597.

against any party. There are, of course, cases in which the Crown has under particular Statutes been made liable to costs in cases involving its property or revenues, as by the New South Wales Act 20 Vict. No. 3, remaining in force in Queensland after the separation. There was also in force in that State in 1864 the New South Wales Act 20 Vict. No. 15, which provided that in claims against the Government thereby made justiciable either party was entitled to costs as in ordinary cases between suitors, "any law or practice to the contrary notwithstanding." It is worthy of note that the words quoted were thought necessary by the legislature. But I am not satisfied that in the Act of 1864 or in that of 1875 it was intended that when the Crown "opposed" or "showed cause" against a decree, as in the present case, it was to be treated as an ordinary suitor in respect of liability to costs.

The Act of 1864 (28 Vict. No. 29) constituted a jurisdiction within the Supreme Court in matters matrimonial. By sec. 46 it empowered the Court, on the hearing of "any suit proceeding or petition or on the hearing of any appeal" under the Act, to "make such order as to costs as to such Court may seem just." Taking the whole Act together, is the *primâ facie* inference that the law "is made for subjects and not for the Crown," displaced as to sec. 46 by a stronger implication? Is the latter conclusion "clear and indisputable upon the face of the Act?" It is not enough that the Statute gives the Attorney-General certain rights. It must be made clear that he takes those rights coupled with the liability which an ordinary party incurs as an unsuccessful litigant. Under sec. 22 a petitioner for dissolution must deliver a copy of the petition to the Attorney-General on the day of its presentation to the Court. That officer is permitted, in any case and without asking leave, to "oppose" the grant of a decree; and he is not limited as to the grounds on which he will oppose, though of course they must be such as would justify the Court in refusing a decree. A subject, on the other hand, can only oppose by leave of the Court or a Judge, who must be satisfied by affidavit "that there is reasonable ground to believe that the petitoner has been in any manner accessory to or conniving at the adultery."

H. C. OF A. 1912.

ATTORNEY-GENERAL OF QUEENSLAND v. HOLLAND.

Barton J.

Sec. 46 must be considered in close relation with secs. 29 and 56. By sec. 29, when a husband petitioner has alleged and proved adultery against a co-respondent, the Court may order the adulterer to pay all or any part of the costs of the proceedings. Under sec. 56, if the alleged adulterer is joined as a co-respondent by a husband petitioner, or if the alleged adulteress is joined as a respondent by a petitioning wife, the Court may, on the close of the petitioner's evidence, dismiss the person so joined from the suit, and, if it thinks fit, with costs. And it may be clearly inferred, apart altogether from sec. 46, that if the Court dismisses any person so joined from the suit on the close of the whole case, it may also award him or her costs. Thus the Act has, by secs. 29, 56 and 46, provided for the costs of the parties to the marriage and of all persons not parties to the marriage who may by the action of such a party be made parties to the suit. Does sec. 46 give a similar power to the Court as to "opposers" availing themselves of sec. 22? If a subject opposing under that section is not liable to costs it is not easy to see how the Attorney-General can be held so liable, for if the words of sec. 46 do not include the subject so acting, the Attorney-General can rely similarly on its words, as if he were a subject, and he has the additional support of the ordinary implication that such a provision was not intended to include the Crown. In 1864 there were three Acts in force in England relating to matrimonial causes. I will refer to two of them. The Act of 1857 (20 & 21 Vict. c. 85), by sec. 51 empowers the Court "on the hearing of any suit proceeding or petition under this Act" to "make such order as to costs as to such Court . . may seem just." Here we have the very words of sec. 46 of the local Act. Sec. 34 enables the Court to order an adulterer co-respondent to pay the whole or part of the costs of the proceedings. The English Act of 1857, however, contains no provision similar to sec. 22 of the Queensland Act, and so, of course, did not originally touch the Crown or any person except the petitioner, the respondent, and any person joined as having committed adultery with a respondent. But in 1860 the Act 23 & 24 Vict. c. 144 was passed in England; sec. 7 of which, after enacting that a decree for dissolution of marriage should be a decree *nisi* in the first instance,

made the further provision quoted by my learned brother. The House of Lords in *Lautour* v. *The Queen's Proctor* (1), decided in 1864 that this section gave no power to the Court to order a petitioner to pay the Queen's Proctor his costs of establishing adultery against a petitioner. The Proctor in his intervention alleged collusion, but made no attempt to prove it. But the section had only given him expressly the right to obtain costs if his successful intervention was on that specific ground. That he had also in his intervention alleged and proved adultery on the part of the petitioner, was held to give him no right to costs, because in coming in to prove adultery he was merely in the position of one of the public, showing cause under the first part of the section why the decree should not be made absolute in view of material facts not brought before the Court either by the petitioner or by the respondent. The second part of the section related only to the cases in which the Proctor intervened alleging collusion.

Now this decision involved more than one very important conclusion. One was that a member of the public coming in to show cause was not entitled to costs upon success, and it would follow that he was not liable to costs upon failure. If the House of Lords had been able to hold that, on reading together the 51st section of the Act of 1857 and the first part of the 7th section of the Act of 1860, an intention was shown that a member of the public, showing cause on the ground of previously undisclosed material facts, should be entitled to receive costs if successful, or be reciprocally liable to pay them on failure, their reasoning shows that the Queen's Proctor, acting under the same branch of sec. 7, would have been similarly entitled and liable, because he had placed himself in the position of such a subject. But they were not able to hold that the subject had such a right or incurred such a liability, and six years later *Vivian* v. *Vivian* (2) decided against it. In *Lautour's Case* (1), then, they could not give the Proctor his costs, because he was in the same position as a member of the public. Obviously, then, they attributed to sec. 51, even when read with sec. 7, no such effect as is claimed for sec. 46 of the Queensland Act, that is, so far as the citizen's intervention is concerned. But the reasoning of *Lautour's Case* (1), as it

(1) 10 H.L.C., 685. (2) L.R. 2 P. & M., 100.

H. C. OF A. 1912.

ATTORNEY-GENERAL OF QUEENSLAND v. HOLLAND.

Barton J.

affects a subject showing cause, is not confined to the English Acts. True, the legislature of Queensland cannot be presumed to have known of the decision or its ground when they passed their first Act in the same year. But it is clear from the internal evidence that they were well aware of all the previous English enactments when they passed the sections to which reference has been made. I very much doubt whether they could have intended by sec. 46 to place a subject alleging connivance under sec. 22 in any better position than the English secs. 51 of 1857 and 7 of 1860 together placed the subject showing non-disclosure of adultery as cause. In that respect I see no reason to apply different considerations to sec. 22 and sec. 7. But in 1875 the Queensland Act 39 Vict. No. 13 was passed, and sec. 7 of it is up to a certain point identical with sec. 7 of the English Act of 1860, except that it adds to collusion, as a ground of intervention by the Crown, the non-disclosure of material facts. The peculiarity is that the local Act omits the concluding part of the English one, the part providing for costs to the Crown on successful intervention. This discrimination was exercised eleven years after *Lautour's Case* (1) had been decided, and the legislature may be taken to have known of it. They therefore had in memory the effect given by the Supreme tribunal to two provisions, one of which they had copied and the other of which they were about to copy, though with a significant omission. They knew that in England a subject coming in under sec. 7 to show cause was not such a party as to be entitled, if successful, to costs, upon the construction of words in sec. 51 identical with those of their own sec. 46 in conjunction with those of the local sec. 7. And there is no rule of construction which could lead them to think that a subject opposing for connivance (and "opposing" is not a stronger term to indicate a party than "showing cause") could be in any different position as to costs from that of a subject coming in under sec. 7. There is every reason to conclude that both legislatures intended that a member of the public taking steps to prevent a fraud upon the administration of justice, by concealment, connivance or collusion, should not be exposed to the risk of being mulcted in costs, and this I think applied to the Queens-

(1) 10 H.L.C., 685.

land legislature in respect of sec. 22 as well, and the knowledge that the private intervener would have to bear his own costs was no doubt regarded as an effective deterrent to precipitate or dishonest entrance into the quarrel. I regard it then as the only probable conclusion that the legislature here, like the Imperial Parliament, have not shown any intention that a person coming before the tribunal to prove fraud on the part of the petitioner, or on the part of both petitioner and respondent, should be regarded as a party to the suit in such a sense as to be entitled to receive or to be subject to pay costs. The question follows, whether, this being so, the Attorney-General, intervening as a high and responsible officer for the protection, not of the Crown's revenue or property but of the pure administration of justice, is to be either penalized in costs or entitled to reap them. Is there any more reason to hold him a party in this broad sense than there is in the case of the subject opposing or showing cause? I think not. Had the Imperial Parliament passed the Act of 1860, omitting only the concluding part of sec. 7 as to the costs of the Crown, I cannot suppose that any English Court, paying full regard to the 51st sec. of the Act of 1857, would have held the Queen's Proctor either entitled or liable to costs on an intervention. Here the case is, if anything, stronger, because the legislature finds in the English law a provision entitling the Crown to costs in a certain event; it omits that provision, and leaves the Crown, so far as express words are concerned, in no better position than a subject who in a similar event has no claim to costs. Is it to be said that, despite this deliberate alteration, the Crown is to be held liable to costs where, if it had succeeded, it was the evident intention of the legislature that it should have no claim to them? The Attorney-General was here an intervener alleging material facts under sec. 7 of the Act of 1875; but I do not think there would have been any material difference if he had opposed under sec. 22 of the Act of 1864, for I do not conclude that the former section repeals the latter, which is very wide. If, as is clear, the subject who comes into Court under sec. 7—or, for that matter, under sec. 22—is not to have costs or to pay them, it is equally true that the Crown is not put by those sections in a position differing from that of the subject exercising the right

H. C. OF A. 1912.

ATTORNEY-GENERAL OF QUEENSLAND v. HOLLAND.

Barton J.

granted. If the subject is not liable to costs, neither is the Crown; for otherwise it would be in a worse position than he, without any enactment to require it. I think the reasoning in *Lautour's Case* (1) clearly leads to the conclusion that the Crown is in no worse position than the subject, if it is not in a better.

But apart from comparisons of the position of the Crown with that of subjects acting under sec. 22 or sec. 7, it is compatible with the words of sec. 46 and the context that it was not intended to apply to the Crown, and that sec. 46 was a law "made for subjects"; there is not, in my judgment, any "clear and indisputable implication" overthrowing the ordinary presumption that the Crown is not intended to be affected. I am therefore of opinion that the appeal ought to be allowed.

ISAACS J. I regret I cannot come to the same conclusion. My opinion, briefly put, is that this case falls within the principle of *Moore* v. *Smith* (2), which is the decision of a powerful Court and is cited as good law in *Maxwell on Statutes*, 3rd ed., pp. 191-2. I think it ought to be followed. There, it was held, costs could be given against the Crown because the Statute in one section enabled the Attorney-General to have a case stated, and so expressly named him. In a separate section, namely sec. 6, which did not refer to the Crown, it was provided that the Court "may make such order as to costs as to the Court may seem fit." It does not, I think, matter whether the Crown is directly interested or not. The judgments in that case did not bring the Crown within the costs section because it was interested, but because a case in which the Crown was interested was expressly included in the appeal procedure section. Then as all appeals were within the costs section the Crown was included. Lord *Campbell's* words are more distinct. He said:—"It is a maxim that the Crown is not bound by an Act of Parliament without express words. But I think that there is express language in this Statute to show it includes all cases of appeal, and therefore those in which the Crown is interested." So far he was speaking of the procedure section. Then he continues:—"And if such cases are within the Statute for purposes of appeal,

(1) 10 H.L.C., 685. (2) 1 E. & E., 597.

sec. 6" (that is the costs section) "shows that in them, as in all other cases under the Act, costs may be awarded, either to or against the Crown." *Crompton* J. said:—"Sec. 4, giving the Attorney-General the right to require a case to be stated, clearly contemplates Crown proceedings as within the Act. Then sec. 6, respecting costs, is clearly applicable to all cases within sec. 4, and therefore includes Crown cases." The other judgments were similar. That case, it may be noted, was under an Act passed in 1857.

The Crown cannot be less bound by an Act passed in 1865. Sec. 46 of that Act is couched in language so comprehensive that no doubt can remain after reading it, as to the intention of the legislature to include within its terms every form of legal action authorized by the Statute. "Proceeding" includes "proceeding to dissolve any marriage" (sec. 12): "petition" is the precise word to denote the method of initiating it (sec. 21).

The "hearing" of such a proceeding or petition necessarily involves consideration of any opposition to it, from whomsoever that opposition comes. To "oppose" the petition according to the *cursus curiae* may involve pleadings. Compare *Lowe* v. *Lowe* (1). And as the Statute contemplates by sec. 22 opposition by the Attorney-General or any other person permitted, it naturally follows that the Crown is expressly named (which is all the rule requires) and that the all-embracing words of sec. 46 are not meant to exclude either of those classes of opponents. *Moore* v. *Smith* (2) directly applies. Indeed, it must have been well within the mind of the legislature that these special opponents might be the only opponents to a petition. It would therefore do some violence to the natural meaning of the words used to exclude either the member of the public or the Attorney-General. The Attorney-General may find it to be his public duty to stand as the only opponent of a manifest fraud upon the Statute. There may be patent collusion when the facts are known, but without him, acting in the public interest, the Court would never know the facts, and so would be imposed upon, and made the unconscious instrument of a conspiracy. If the scheme is unmasked I can conceive of no reason why the legislature

(1) (1899) P., 204, at p. 209. (2) 1 E. & E., 597.

H. C. OF A. 1912.

ATTORNEY-GENERAL OF QUEENSLAND v. HOLLAND.

Isaacs J.

should wish to restrict the natural import of the words it selected, so as to allow the fraudulent petitioner to escape liability for costs. On the other hand if the information on which the Attorney-General acts, however probable it seems to him, turns out to be utterly misleading, why should the petitioner be compelled to bear the burden of a successful but costly defence of his honesty? These considerations do not of course suffice to alter the law, but they are cogent reasons for not narrowing the primary sense of an enactment so as to exclude such cases as those referred to. Their strong claims upon the ground of natural justice—always a material factor when a Statute is ambiguous—is forcibly recognized in *Higgins* v. *The King's Proctor* (1). As for the Attorney-General not being a party—that is true in the strict sense. His status is not concerned in the result; but for the purposes of the proceeding in which he appears and opposes, the effect on the expense he occasions and incurs is the same, and the section makes no reference to parties but to proceedings, which as I have said includes those who take part in them. I would only add, I see nothing in *Lautour's Case* (2) conflicting with what I have said.

I would dismiss the appeal.

Appeal allowed.

Solicitor, for appellant, *T. W. McCawley*, Crown Solicitor.
Solicitor, for respondent, *John W. O'Mara.*

N. McG.

(1) (1910) P., 151.

(2) 10 H.L.C., 685.