[HIGH COURT OF AUSTRALIA.]

SMITH . . . . . APPELLANT;
PETITIONER,

AND

THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA . . . . RESPONDENT.
INTERVENER,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1925.

MELBOURNE, *Oct.* 16, 26.

Knox C.J., Isaacs, Higgins Rich and Starke JJ.

Husband and Wife—Divorce—Intervention by Attorney-General—Leave to intervene—Entry of appearance within time limited—Whether entry of appearance a sufficient showing cause—Marriage Act 1915 (*Vict.*) (*No.* 2691), *secs.* 136, 139, 140, 141 —*Marriage Act* 1923 (*Vict.*) (*No.* 3282), *sec.* 11.

If, within the time limited by a decree nisi for the dissolution of a marriage the Attorney-General for Victoria, pursuant to an order giving him leave to intervene in the suit and to show cause why the decree nisi should be reversed, enters an appearance in the suit, he has sufficiently complied with sec. 140 of the *Marriage Act* 1915 (Vict.) (as amended by sec. 11 (2) of the *Marriage Act* 1923 (Vict.)) so as to prevent the decree being made absolute until after his opposition is concluded.

Decision of the Supreme Court of Victoria (Full Court): *Smith* v. *Smith*, (1925) V.L.R. 173; 46 A.L.T. 171, affirmed

APPEAL from the Supreme Court of Victoria.

On the petition of Thomas John Smith, by a decree nisi made on 13th November 1924 by *Macfarlan* J., it was decreed that the petitioner's marriage with Hilda May Smith should be dissolved, unless within three months from the date of the decree nisi sufficient

cause should be shown to the Court why the decree nisi should not be made absolute. On a motion made on 5th February 1925 pursuant to a notice dated 30th January 1925, *Mann* J. on 10th February 1925 made an order that the Attorney-General should be at liberty to intervene in the suit and show cause against the decree nisi being made absolute and to enter an appearance in the suit within twenty-four hours from the date of the order, and that particulars of the acts of the petitioner relied upon by the Attorney-General should be filed and delivered to the petitioner within seven days after an appearance had been entered. Pursuant to that order an appearance was on 10th February 1925 entered on behalf of the Attorney-General, and on 14th February 1925 particulars were filed and delivered to the petitioner. On 23rd February 1925 the petitioner by summons applied for an order that the Attorney-General be stayed from further intervention in the suit and from showing cause why the decree nisi should be reversed or not made absolute, and that all further proceedings by the Attorney-General in the suit should be stayed, on the ground that the period limited by sec. 140 of the *Marriage Act* 1915 (Vict.), as amended by sec. 11 of the *Marriage Act* 1923 (Vict.), as the time within which the Attorney-General was at liberty to show cause why the decree nisi should be reversed, expired on 13th February 1925. The summons, being referred by *Mann* J. to the Full Court, was, by a majority (*Irvine* C.J. and *Macfarlan* J., *Mann* J. dissenting), dismissed with costs: *Smith* v. *Smith* (1).

From that decision the petitioner now, by leave, appealed to the High Court.

Eager, for the appellant. The entry of appearance by the Attorney-General was not a showing cause within the meaning of sec. 140 of the *Marriage Act* 1915 (Vict.) as amended by sec. 11 of the *Marriage Act* 1923 (Vict.), and, no more having been done towards showing cause, the appellant had on the expiration of the three months an indefeasible right to have the decree nisi made absolute. The obtaining of leave to intervene is not a showing cause (*Crowder* v. *Crowder* (2)), and an appearance pursuant to such

(1) (1925) V.L.R. 173; 46 A.L.T. 171. (2) (1924) V.L.R. 28; 45 A.L.T. 86.

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leave is no more than a statement by the Attorney-General of his intention to take advantage of the leave by proceeding to show cause. The entry of appearance was not, at the expiration of the three months, "matter in opposition" within the meaning of sec. 136 (3) and (4), for nothing could then under sec. 140 follow upon such entry of appearance, and the Prothonotary was bound to make the decree absolute. Sec. 141 does not give an independent right to the Attorney-General to intervene (*Hudson* v. *Hudson* (1); *Jackson* v. *Jackson* (2)).

Clayton Davis, for the respondent. Any step taken by the Attorney-General within the time limited for the purpose of showing cause is a sufficient compliance with sec. 140, and an entry of appearance is such a step. Otherwise the efficacy of the section would depend on the state of the business of the Court. Where there has been an entry of an appearance by the Attorney-General and nothing further has been done, there is at the expiration of the time limited "matter in opposition" then "pending" within the meaning of sec. 136 (3) (*a*) and (4), and the Prothonotary is not entitled to make the decree nisi absolute. Sec. 141 gives an independent right to the Attorney-General to intervene when the decree nisi comes before the Full Court pursuant to sec. 136 (4). As soon as the Attorney-General obtains leave to intervene under sec. 140 the matter is then pending, and *Crowder* v. *Crowder* (3) was wrongly decided. [Counsel also referred to *In re Leonard Heat Electric Co.*; *Ex parte Barnes* (4).]

Eager, in reply, referred to *In re Doria* (5).

Cur. adv. vult.

Oct. 26.

The following written judgments were delivered :—

KNOX C.J. On 13th November 1924 the appellant obtained a decree nisi for the dissolution of his marriage with the respondent, Hilda May Smith. The time limited by the decree for showing cause why it should not be made absolute was three months expiring

(1) (1875) 1 P.D. 65.
(2) (1910) P. 230, at p. 232.
(3) (1924) V.L.R. 28; 45 A.L.T. 86.
(4) (1923) V.L.R. 659; 45 A.L.T. 70.
(5) (1902) 28 V.L.R. 464; 24 A.L.T. 118.

on 13th February 1925. On 10th February 1925 an order was made giving the Attorney-General leave to intervene in the suit and show cause why the decree should not be made absolute. On the same day appearance was entered in the suit for the Attorney-General. No further step was taken in the proceedings before 14th February 1925. The appellant on 23rd February 1925 applied to the Supreme Court for an order that the Attorney-General should be stayed from further intervention in the suit, and from showing cause against the decree nisi being made absolute, on the ground that the period limited by sec. 140 of the *Marriage Act* 1915, as amended by sec. 11 of the *Marriage Act* 1923, as the time within which the Attorney-General should be at liberty to show cause, expired on 13th February 1925.

This application was referred to the Full Court of the Supreme Court and was dismissed, the majority of the Court (*Irvine* C.J. and *Macfarlan* J., *Mann* J. dissenting) being of opinion that the Attorney-General had complied with the requirements of the Act by obtaining leave to intervene and entering an appearance in the suit before the expiration of three months from the date of the decree nisi. I agree in that conclusion, and in the reasons given by *Macfarlan* J. in support of it.

In my opinion the appeal should be dismissed.

ISAACS J. The concrete question is whether the mere entry of the appearance by the Attorney-General on 10th February 1925, that is, within the time limited by the decree nisi, was sufficient to satisfy the words "show cause" within the meaning of sec. 140 of the *Marriage Act* 1915. It is not denied by the appellant that a negative answer to that question would probably reduce the statutory provisions to futility. Still, he contends that this cannot be escaped from in view of the words of the Act; which have, therefore, to be carefully examined.

Sub-sec. 1 of sec. 140 now says: "By leave of the Court or a Judge the Attorney-General or any other person shall in any proceeding for a decree of dissolution of marriage be at liberty, at any time before the expiration of the time limited by the decree nisi and in such manner as the Court by general or special order in that behalf

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directs, to show cause why the decree nisi should be reversed " &c. The Legislature has thereby left the procedure to be regulated by the general or special practice of the Court itself. I am disposed to agree with the decision in *Crowder* v. *Crowder* (1) that the mere order of leave is not within the words " show cause," though it is not necessary in this case to pronounce upon that definitely. Obtaining that order is not *per se* an entry into the contest. Wherefore, as at present advised, I think it is not an " intervention " but merely a preparatory act. *Crickitt* v. *Crickitt* (2) is somewhat analogous, should it ever be necessary to reconsider the point. But in any event the sub-section provides, as is seen, for the Court directing the *manner* of intervention. The manner actually directed was by " appearance " within a time which was within the time limited by the decree nisi. The question here turns on what is the legal meaning and effect of an " appearance " since even that, it is argued, is no part of the intervention. An appearance is a technical term, and as used in the Rules of Court and therefore in the order for leave to intervene it carries with it an essential signification that has come down through the centuries as part of our legal system. Its essential meaning is that the party or other person " appearing " enters the Court as a contestant ready to maintain, according to the practice and procedure and convenience of the Court, the position he asserts.

The Attorney-General, though apparently regarded by sec. 136 (3) as not a *party* to " the proceeding " mentioned in sub-sec. 1 of sec. 140, is an *intervenant* to protect public interests (see *Dodd and Brooks' Probate Practice*, pp. 616, 619) when he " appears," because in the eye of the law he thereby presents himself in Court for the purpose of showing the necessary " cause " why the decree nisi should be reversed. An " appearance " is not mere preparation. In *Tidd's Practice*, p. 238, it is said: " Appearance is the first *act* of the defendant in Court." In *Comyns' Digest* (Pleader B1) it is said: " The first act of parties in Court is, that the defendant appears to the process against him. And the appearance is, when the defendant shows himself in Court, in person, or by his attorney, *ready to answer to the action.*" In the days when actual personal

(1) (1924) V.L.R. 28; 45 A.L.T. 86. (2) (1902) P. 177.

appearance in Court was proper and even compulsory to answer the plaintiff's suit, the defendant was not regarded as failing to appear if the business of the Court prevented it. In *Bret and Sheppard's Case* (1) *Nelson* J. said: "Where at the day of appearance no Court is holden, or the Justices do not come, &c., he who was bound to appear, ought to have an appearance recorded in such manner as it may be." There were always forms of entry of appearances for special cases where a defendant was bound to appear in Court. The personal appearance was to fight the matter out there and then, or at such other time as the Court appointed. It was a part of the process of contesting the claim. This essential and inherent meaning is still wrapped up in the technical "appearance." Later practice has accommodated itself to modern requirements, and the appearance has become a formal clerical act in the office of the Court awaiting the convenience of the Court to hear the suitor personally. But it is still the first step in the contest, and part and parcel of the whole continuous process of showing cause against whatever claim the "appearing" person denies. These considerations establish to my mind that the process of showing cause had commenced before 13th February 1925 within the meaning of sec. 140 (1), and also that a matter in opposition to the final decree was then pending within the meaning of sec. 136 (3) (*a*). I agree with my brother *Starke* that it would remain pending until finally disposed of. I rest wholly on sec. 140. For reasons unnecessary now to amplify, I would add that I am not persuaded that sec. 141 gives a separate and independent power to intervene, additional to that given by secs. 139 and 140. Sec. 136 (3) (*a*) and (*b*) refers only to sec. 140.

The appeal should, in my opinion, be dismissed.

HIGGINS J. In my opinion, the decision of the Full Court of Victoria was right. Under sec. 140, "by leave of the Court or a Judge the Attorney-General . . . shall in any proceeding for a decree of dissolution of marriage be at liberty, at any time *before the expiration of the time limited* by the decree nisi . . . to show cause why the decree nisi should be reversed." The Attorney-

(1) (1587) 1 Leon. 90.

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General here, having obtained leave, entered appearance as intervening on 10th February; and the time limited by the decree nisi expired on 13th February, before the attempt to reverse the decree nisi could be dealt with. The question is, has the attempt to intervene failed, because the decision was not given on or before 13th February. The most direct answer is that afforded by sec. 136 (3) and (4):—"(3) At the expiration of the time limited by the decree nisi the Prothonotary shall enter the said memorandum" (that he has made the decree absolute), "unless (*a*) pursuant to the provisions of section one hundred and forty of this Act . . . matter in opposition to the final decree is then pending . . . . (4) If at the expiration of the time limited by the decree nisi matter in opposition . . . to the final decree is then pending . . . the decree nisi shall not be made absolute except by the Full Court on motion made thereto, and the Prothonotary shall not enter the said memorandum." These provisions show, as plainly as possible, that on 13th February when the decree nisi expired, the decree nisi should not be made absolute, but should await the decision of the Full Court as to opposition of the Attorney-General to the final decree. The matter is still pending.

But, I may add that, apart from sec. 136—if it were a mere question between the two interpretations of sec. 140—I should be strongly inclined, on broad principles of interpretation of statutes, to say that the words "be at liberty, at any time before the expiration of the time limited by the decree nisi and in such manner as the Court by general or special order in that behalf directs," do not mean that the Attorney-General's attempt to intervene lapses by the failure of the Court to call on the case, and decide the question raised, before 13th February expired. It must be assumed that the Legislature knew the ways of the Courts, and did not intend to enact what is unreasonable and absurd. In the time of Cromwell an Act was passed imposing on the Courts a duty to hear and decide every action on the day that it was commenced; but it was soon discovered that the Act was futile.

RICH J. I agree that the appeal should be dismissed. The words "intervening" in sec. 136 (3) (*b*) and "intervention" in secs.

139 (3) and 140 (2) (*a*) of the *Marriage Act* 1915 interpret what is meant by the words " show cause " in sec. 140 (1). By obtaining the order in question and entering an appearance within the time limited, the Attorney-General became an intervener and instituted or initiated the proceedings (cf. *Crickitt* v. *Crickitt* (1)). Intervention cannot usually be completed *uno ictu*, but the various steps necessarily occupy some time and go to make up the process. The conclusion may take place at a later period than the time limited and relates back to the initial step.

STARKE J. The decision of the Supreme Court is, in my opinion, right. A decree nisi for the dissolution of marriage, in the State of Victoria, is not to be absolute until after the expiration of such time, not less than three months from the pronouncing thereof, as the Court shall direct (*Marriage Act* 1915, sec. 132). The decree becomes absolute upon the Prothonotary entering on the petition a memorandum that he has made the decree absolute. And at the expiration of the time limited by the decree nisi, the Prothonotary shall enter the memorandum unless, pursuant to sec. 140 of the Act, matter in opposition to the final decree is then pending (sec. 136). Then sec. 140 provides that, by leave of the Court, the Attorney-General or any other person shall be at liberty, at any time before the expiration of the time limited by the decree nisi, to show cause why the decree nisi should be reversed. A legal proceeding is pending, I apprehend, from the time it commences until it is concluded. So the opposition provided for by sec. 140 must similarly be pending from the time it commences until it is concluded. The effect of the decision in *Crowder* v. *Crowder* (2) is that the opposition under sec. 140 does not commence with the order giving leave to show cause, but upon the taking of some step in the direction of showing cause before the time limited for the expiration of the decree nisi. It is unnecessary to express any opinion upon that case, for here the Crown Solicitor appeared for the Attorney-General " for the State of Victoria who by order . . . was granted liberty to intervene in this suit and show cause against the decree nisi . . . being made absolute "

(1) (1902) P. 177.

(2) (1924) V.L.R. 28; 45 A.L.T. 86.

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within the time limited for the expiration of the decree nisi. The opposition under sec. 140 had clearly commenced at that time, if at no earlier point of time. When, then, did the opposition conclude? Unless sec. 140 requires the whole proceeding to be completed within the time limited for the expiration of the decree nisi, the answer must be that the opposition is not concluded. The Court has not heard and determined the opposition, and the Attorney-General has never abandoned or discontinued it. So far as sec. 140 is concerned, I entirely subscribe to the view of *Macfarlan* J. that a party does not fail to show cause within the time limited because he has not completed his whole case within that time or because the exigency of the Court's business is such that the opposition cannot be heard within that time, or because it may be necessary to hear the answering case of another party; and so on. A party shows cause within the time prescribed if he commences his proceeding within that time.

The appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *A. C. McLean.*

Solicitor for the respondent, *E. J. D. Guinness*, Crown Solicitor for Victoria.

B. L.