[HIGH COURT OF AUSTRALIA.]

BROWN . . . . . APPLICANT AND APPELLANT; INTERVENER,

AND

WALTERS . . . . . RESPONDENT; RESPONDENT,

IN RE WALTERS v. WALTERS.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1931.

SYDNEY, *Nov.* 17; *Dec.* 3.

Gavan Duffy C.J., Starke, Dixon, Evatt and McTiernan JJ.

Husband and Wife—Dissolution of marriage—Motion for decree absolute—Adultery by petitioner after decree nisi alleged—Material facts not having been brought before the Court—Leave to intervene—Application by father of respondent—After period limited in decree nisi—Period within which application may be made—Competency of applicant and application—Adultery "during marriage"—Discretionary bar—"During that period"—Evidence in support of allegation—Consideration by Court—Matrimonial Causes Jurisdiction Act 1864 (*Q.*) (28 *Vict. No.* 29), *sec.* 26—*Matrimonial Causes Act* 1875 (*Q.*) (39 *Vict. No.* 13), *sec.* 7*—*Rules of the Supreme Court* (*Q.*), *Order XII., rr.* 18-20*; *Order XLIII., r.* 2*.

Held, (1) that the expression "by reason of material facts not having been brought before the Court" in sec. 7 of the *Matrimonial Causes Act* 1875 (Q.) includes facts, not otherwise brought to the Court's knowledge, which have occurred after decree nisi, and are material to be known upon the motion for decree absolute (*Hulse* v. *Hulse*, (1871) L.R. 2 P. & D. 259, and *Howarth* v. *Howarth*, (1884) 9 P.D. 218, referred to);

* The *Matrimonial Causes Act* 1875 (Q.) provides, by sec. 7, that "Every decree for a divorce shall in the first instance be a decree nisi not to be made absolute till after the expiration of such time not being less than three months from the pronouncing thereof as the Court shall by general or special order from time to time direct and during that period any person shall be at liberty in such manner as the Court shall by general or special order in that behalf from time to time direct to show cause why such decree should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not having been brought before the Court. And on

(2) that the words "during that period" in sec. 7 of the *Matrimonial Causes Act* 1875 mean the period between the making of the decree nisi and the making of it absolute, and that cause may be shown at any time until the decree absolute is made notwithstanding the expiration of the time limited by a special or general order of the Court (*Bowen* v. *Bowen*, (1864) 3 Sw. & Tr. 530; 164 E.R. 1381, followed);

(3) that any person not a party to the suit may show cause upon the ground that material facts have occurred since the decree nisi was pronounced, and he is not limited to giving information of such facts to the Attorney-General;

(4) that a person is not disqualified from intervening by reason only of close relationship to one of the parties, and because he is acting in the interests and forwarding the wishes of such party.

The proviso to sec. 26 of the *Matrimonial Causes Jurisdiction Act* 1864 provides that upon any petition for dissolution of marriage the Court shall not be bound to pronounce a decree declaring the marriage dissolved if it finds that the petitioner has "during the marriage been guilty of adultery."

Held, that adultery by the petitioner after decree nisi and before decree absolute is adultery "during the marriage" within the meaning of sec. 26 of the *Matrimonial Causes Jurisdiction Act* 1864, and therefore affords a discretionary bar (*Hulse* v. *Hulse*, (1871) L.R. 2 P. & D. 259, and *Ellis* v. *Ellis*, (1883) 8 P.D. 188, followed).

Decision of the Supreme Court of Queensland (Full Court) reversed, and order of *Henchman* J. restored.

APPLICATION for special leave to appeal and APPEAL from the Supreme Court of Queensland.

By a writ of summons issued out of the Supreme Court of Queensland on 29th January 1931, Percival Leslie Walters commenced an

cause being so shown the Court shall deal with the case by making the decree absolute or by reversing the decree nisi or by requiring further inquiry or otherwise as justice may require. 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," &c.

The *Rules of the Supreme Court* 1900 (Q.), by Order XII., provide as follows:—"18. When the Attorney-General desires to intervene in a matrimonial action, he must enter an appearance. 19. Any other person desiring to intervene in a matrimonial action must make application, on affidavit, to the Court or a Judge for leave to do so. 20. A party so intervening shall enter an appearance pursuant to the leave, and shall join in the proceedings in the action at the stage in which they then are, unless the Court or a Judge otherwise orders." Order XLIII., rule 2, provides that "When the Attorney-General or any other person desires to show cause against the making absolute of a judgment nisi for dissolution of marriage, he must enter an appearance in the action, and must within eight days after appearance file his defence, which, in the case of the Attorney-General, need not be verified, setting forth the grounds upon which he desires to show cause; and on the same day shall cause a copy thereof to be served on the party in whose favour the judgment has been pronounced."

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action for dissolution of marriage against his wife, Eva Annie Walters, on the ground of her alleged adultery with the co-defendant named therein. The action came on to be heard on 21st April 1931 before *E. A. Douglas* C.J. and a jury, and, the issues having been proved, a decree nisi was pronounced by his Honor on 24th April 1931 that the marriage should, upon motion to be made to the Court in that behalf, be dissolved unless cause to the contrary be shown to the Court within three months from the date of the service of the decree nisi on the Attorney-General for the State of Queensland. Service of the decree nisi on the Attorney-General was effected on 15th May 1931.

On 17th August 1931 the plaintiff husband moved, by counsel, before *Henchman* J. to have the decree nisi made absolute. The motion was opposed by the defendant wife, who by counsel moved for leave to intervene to show cause against the decree nisi being made absolute on the ground of adultery alleged to have been committed by the plaintiff on 27th June 1931. In order to permit of the filing of affidavits in support of the allegation, the matter was adjourned until 21st August, on which date the motion by the wife was not further proceeded with, but an application for leave to intervene, founded on the same allegation, was made on motion by her father, Charles Dale Brown. Three deponents, being respectively the wife, her brother and a private inquiry agent, whose affidavits had been filed in support of the application, were in agreement as to the main features surrounding the adultery alleged, but they were not in complete agreement as regards some features. The particulars as furnished in the affidavits had, prior to both applications, been brought under the notice of the Attorney-General, who had subsequently informed the defendant that he did not intend to intervene. In an affidavit filed by him, Brown stated that he was not making the application to intervene as the agent of his daughter but of his own will and volition, and with the desire of protecting his daughter's rights and interests, he having been informed that it was not competent for his daughter to intervene. He further stated that the costs and expenses of the private inquiry agent, whom he engaged early in June 1931, and also the costs of the present proceedings were being borne by himself. *Henchman* J. made an order

granting Brown leave to intervene, and adjourned *sine die* the motion for a decree absolute. On 24th August Brown entered an appearance in the action.

The Full Court of the Supreme Court allowed an appeal by Walters against the order of *Henchman* J., and dismissed the intervener, Brown, from the action; liberty being reserved to Walters to renew the motion for a decree absolute subject to Brown being granted an adjournment, if requested, to enable him to appeal to the High Court.

In the course of the judgment of *Macrossan* S.P.J. (with whom the other members of the Court agreed) it was stated by his Honor that "whatever . . . a jury might find on the evidence now propounded to the Court, it would be for the Court to decide first (1) has the discretionary bar" contemplated in sec. 26 of the *Matrimonial Causes Jurisdiction Act* 1864 (Q.) "been established; (2) should the discretion of the Court, under the circumstances, be exercised in favour of the plaintiff. I am not prepared to say, that on the affidavits there is no evidence to be submitted to a jury on the issue of the plaintiff's alleged adultery, but I think that a Judge properly directing himself to the exigencies of proof on such a charge, bearing in mind the place and position, discounting the evident exaggerations, making allowance for obvious bias, and appreciating the major discrepancies between the statements of the three witnesses, would find himself wholly unable to accept a finding of adultery on such evidence. This would appear to be the view of the Attorney-General and his advisers, and I quite agree to it. On this ground, then, I think the appeal should be allowed and the intervener should be dismissed from the suit."

From the decision of the Full Court Brown now applied for special leave to appeal to the High Court.

Other material facts appear in the judgment hereunder.

Fahey, for the applicant. The applicant is entitled, under sec. 7 of the Queensland *Matrimonial Causes Act* 1875, to intervene in order to bring before the Court certain matters which are alleged to have occurred after the decree nisi. Under sec. 7 the Court may allow any person, that is, any member of the public who is not a

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party to the suit, to intervene on the ground of "material facts not having been brought before the Court." The words "material facts" include matters which arose subsequent to the decree nisi, and they may be brought before the Court at any time during the marriage. Such a right has been availed of by the Queen's Proctor, as a member of the public, on numerous occasions (*Lautour* v. *Her Majesty's Proctor* (1) and *Hulse* v. *Hulse* (2)). The words "not having been brought before the Court" in sec. 7 have the same meaning as the words "not being before the Court" which appear in the relevant section of the English Act. Under sec. 24 of the *Matrimonial Causes Jurisdiction Act* 1864 the marriage continues until the decree absolute. That section also imposes upon the Court the duty of inquiring into all the counter-charges, and to invoke the discharge of such duty it is sufficient on an application for leave to intervene to show a prima facie case only. The finding of adultery on intervention is not a matter for the Judge but is one for the jury; and in this respect *Kretzschmar* v. *Kretzschmar* (3) and *Narracott* v. *Narracott* (4) were wrongly followed by the Full Court as different circumstances were present in those cases. As to the nature and extent of the evidence which should be before the Judge on an application for leave to intervene, see *Howarth* v. *Howarth* (5)). In granting leave to intervene the discretion of the trial Judge was not wrongly exercised, and therefore it should not be disturbed. [He was stopped.]

Hart, for the respondent. The application for leave to intervene was not made within the time prescribed by sec. 7 of the *Matrimonial Causes Act* 1875; therefore it was not competent for the Court to deal with the application.

[DIXON J. referred to *Bowen* v. *Bowen* (6).]

The words "material facts not having been brought before the Court" in sec. 7 mean that a private person, such as the applicant, is limited either to collusion or to such facts as existed and might have been brought before the Court up to the time of the decree nisi.

(1) (1864) 10 H.L.C. 685; 11 E.R. 1193.
(2) (1871) L.R. 2 P. & D. 259.
(3) (1859) 28 L.J. (P. & M.) 128.
(4) (1864) 3 Sw. & Tr. 408; 164 E.R. 1333.
(5) (1884) 9 P.D. 218, at p. 226.
(6) (1864) 3 Sw. & Tr. 530; 164 E.R. 1381.

This is not a case for the granting of special leave to appeal. The allegations upon which the application for leave to intervene is rested have been investigated by the Attorney-General as provided by sec. 7, and he has declined to intervene. To secure the aid of this Court the matter must rest on some question of law; but here it rests on a question of fact only. The intervener is the *alter ego* of the wife; therefore the Court will not grant him leave to intervene. In the circumstances it would appear that he is not an independent intervener but is acting in collusion with his daughter, the respondent in the suit (*Howarth* v. *Howarth* (1)). Neither sec. 7 nor the Rules of Court provide for leave to make applications for intervention, but by the latter a right to enter appearance is given.

[EVATT J. referred to *Supreme Court Rules* (Q.), Order XLIII., r. 2.]

After decree nisi a member of the public has no right to intervene in any way: the sole right is confined to the Attorney-General, who is charged with the duty of intervention.

Fahey, in reply. Under rule 19 of Order XII. of the *Supreme Court Rules* any person other than the Attorney-General must get leave to intervene in a matrimonial action.

GAVAN DUFFY C.J. We think that special leave to appeal should be granted; and, the parties being ready, the appeal may now be proceeded with. Nov. 17.

Fahey, for the appellant. As to the suggestion that the appellant was the *alter ego* of the wife, the affidavits show that she was his agent. This question was discussed in *Howarth* v. *Howarth* (1). The words "during that period" in sec. 7 mean the period between the making of the decree nisi and the pronouncing of it absolute (*Flower* v. *Flower* (2), *Rogers* v. *Rogers* (3), *Hyman* v. *Hyman* (4) and *Lautour* v. *Her Majesty's Proctor* (5)). Rules 18 and 19 of Order XII. are reconcilable with rule 2 of Order XLIII.

(1) (1884) 9 P.D. 218.
(2) (1893) P. 290.
(3) (1894) P. 161, at p. 168.
(4) (1904) P. 403, at p. 406.
(5) (1864) 10 H.L.C. 685; 11 E.R. 1193.

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Hart, for the respondent. On the evidence before him the Judge was wrong in granting leave to intervene. The application was not made within the time prescribed by the Act.

[DIXON J. referred to *Crowder* v. *Crowder* (1).

[EVATT J. referred to *Crown Solicitor* (*N.S.W.*) v. *Stubbs* (2).]

The words "material facts not having been brought before the Court" mean facts which existed prior to the decree nisi. After decree nisi the proper course is for the would-be intervener to inform the Attorney-General of the facts in his possession (*Howarth* v. *Howarth* (3)). The intervention referred to in rules 18 and 19 of Order XII. of the *Supreme Court Rules* is an intervention under sec. 22 of the *Matrimonial Causes Jurisdiction Act* 1864, on two special grounds. Rule 2 of Order XLIII. applies to sec. 7 of the *Matrimonial Causes Act* 1875.

Fahey referred to *Attorney-General of Queensland* v. *Holland* (4).

Cur. adv. vult.

Dec. 3.

THE COURT delivered the following written judgment:—

On 24th April 1931 the Supreme Court of Queensland pronounced a decree or judgment nisi at the suit of the respondent to this appeal for the dissolution of a marriage solemnized between him and the appellant's daughter. The Court ordered and adjudged that the marriage should, upon motion to be made to the Court in that behalf, be dissolved unless cause to the contrary be shown unto the Court within three months from the date of the service of the judgment upon the Attorney-General for the State of Queensland. More than three months after service of the decree or judgment nisi upon the Attorney-General, namely, on 17th August 1931, it was moved absolute before *Henchman* J. But upon the hearing of the motion an application was made for leave to show cause, first by the wife, and then, when it was found that cause could not be shown by the wife, by her father, the appellant. The application was founded upon the allegation that the respondent had, since the

(1) (1924) V.L.R. 28; 45 A.L.T. 86.
(2) (1929) 42 C.L.R. 312.
(3) (1884) 9 P.D., at p. 224.
(4) (1912) 15 C.L.R. 46.

decree nisi, namely, on 27th June 1931, committed adultery. The application of the appellant was granted by *Henchman* J. on 21st August 1931, and on 24th August the appellant entered an appearance in the suit. But the husband appealed to the Full Court of Queensland against the order giving leave to show cause, and the Full Court reversed it. The Court considered that the evidence in possession of the applicant to prove the adultery lacked cogency and was disfigured by some discrepancies, and that the father was acting in the interests of his daughter, whose place he took when it was discovered that she was not a competent intervenant. Upon these grounds the order of *Henchman* J. was discharged. An appeal to this Court is now brought against the order of the Full Court.

The matter turns upon sec. 7 of the Queensland *Matrimonial Causes Act* 1875, which is founded upon sec. 7 of 23 & 24 Vict. c. 144. Before these provisions were enacted a decree pronounced for the dissolution of a marriage was final in the first instance. Sec. 26 of the *Matrimonial Causes Jurisdiction Act* 1864, which was founded upon sec. 31 of 20 & 21 Vict. c. 85, provided that in case the Court should be satisfied on the evidence that the case of the petitioner had been proved and should not find connivance, condonation or collusion, then the Court should pronounce a decree declaring such marriage to be dissolved; provided always that the Court should not be bound to pronounce such a decree if it should find that the petitioner had during the marriage been guilty of adultery, or of other conduct constituting any of the familiar discretionary bars.

The first paragraph of sec. 7 of the *Matrimonial Causes Act* 1875 is as follows: "Every decree for a divorce shall in the first instance be a decree nisi not to be made absolute till after the expiration of such time not being less than three months from the pronouncing thereof as the Court shall by general or special order from time to time direct and during that period any person shall be at liberty in such manner as the Court shall by general or special order in that behalf from time to time direct to show cause why such decree should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not having been brought before the Court."

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The circumstances of this case raise several questions as to the operation of this provision, which, however, are more or less the subject of authority :—

(1) For the purposes of the proviso to sec. 26 of the Act of 1864, adultery after decree nisi and before decree absolute is adultery during the marriage, and therefore affords a discretionary bar (*Hulse* v. *Hulse* (1) ; *Ellis* v. *Ellis* (2)).

(2) Cause may be shown against the decree absolute consisting of material facts occurring after the decree nisi not otherwise " brought before the Court." The expression " by reason of material facts not having been brought before the Court," in our opinion, has the same meaning as the expression in the British section " by reason of material facts not brought before the Court." We think it should receive the construction placed upon it by Lord *Penzance* in *Hulse* v. *Hulse* (3), an interpretation which *Cotton* and *Lindley* L.JJ., but not *Baggallay* L.J., in *Howarth* v. *Howarth* (4), were also disposed to adopt. (Cf. *Rogers* v. *Rogers* (5).) This interpretation includes facts, not otherwise brought to the Court's knowledge, which have occurred after decree nisi, and are material to be known upon the motion for decree absolute.

(3) In the course of the judgment which *Macrossan* J. delivered on behalf of the Full Court in this case he said :—" Again, a consideration of sec. 7 would lead, I think, to the conclusion that a stranger to the suit who desires to take part therein on the ground of material facts which have occurred after the judgment nisi is limited to giving information thereof to the Attorney-General and that the Legislature has entrusted to that officer the exclusive right and responsibility in such a case to protect the process of the Court from abuse. *Baggallay* L.J., in *Howarth* v. *Howarth* (6), expressed that view when he said ' Now I interpret the words " not brought before the Court " as meaning not brought before the Court at or before the time when the decree nisi is made.' *Cotton* L.J. held the opposite view. In view of these divergent opinions and of the state of the authorities (cf. *Hulse* v. *Hulse* (1) ; *Lautour* v. *Her Majesty's*

(1) (1871) L.R. 2 P. & D. 259.
(2) (1883) 8 P.D. 188.
(3) (1871) L.R. 2 P. & D., at p. 261.
(4) (1884) 9 P.D., at pp. 226, 230 and 224.
(5) (1894) P., at pp. 167-168, per *Jeune* P.
(6) (1884) 9 P.D., at p. 224.

Proctor (1)), it would seem very desirable to have an authoritative pronouncement on the section. For the purpose of this appeal it is not necessary for this Court to come to a final decision." In our opinion a stranger to the suit may show cause upon the ground that material facts have occurred since the decree or judgment nisi was pronounced, and he is not limited to giving information of such facts to the Attorney-General.

(4) Cause may be shown after the decree or judgment nisi at any time until the decree or judgment absolute is pronounced, notwithstanding the expiration of such time from the pronouncing of the decree or judgment nisi as the Court may by general or special order have directed as the period within which cause may be shown, or after which the decree may be made absolute. The expression "during that period" in the first paragraph of sec. 7 of the Queensland *Matrimonial Causes Act* 1875 must, in our opinion, receive the same construction as that placed upon it in sec. 7 of the British Act in *Bowen* v. *Bowen* (2). (See *Crown Solicitor* (*N.S.W.*) v. *Stubbs* (3), and *Howarth* v. *Howarth* (4), and *Poole* v. *Poole* (5), and *Clements* v. *Clements* (6), and *Bruell* v. *Bruell* (7).) The words "during that period" mean the period between the making of the decree nisi and the pronouncing of it absolute.

(5) No general discretion appears to be given to the Court by the words "any person shall be at liberty in such manner as the Court shall by general or special order in that behalf from time to time direct to show cause."

Upon application for a special order, it may, as *Howarth's Case* (8) appears to show, enter upon some consideration of the bona fides and purpose of the applicant, and possibly the sufficiency of his grounds. What may amount to a general order directing the manner in which cause may be shown has been made in Queensland pursuant to sec. 7. It is Order XLIII., rule 2, of the *Rules of the Supreme Court*. It is not clear that Order XII., rule 19, qualifies the operation of Order XLIII., rule 2. Order XII., rules 18, 19 and

(1) (1864) 10 H.L.C. 685; 11 E.R. 1193.
(2) (1864) 3 Sw. & Tr. 530; 164 E.R. 1381.
(3) (1929) 42 C.L.R., at p. 318.
(4) (1884) 9 P.D., at p. 223, per *Baggallay* L.J.
(5) (1896) 12 T.L.R. 509.
(6) (1864) 3 Sw. & Tr. 394; 164 E.R. 1327.
(7) (1922) 39 N.S.W.W.N. 170.
(8) (1884) 9 P.D. 218.

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20, appear to be directed rather to sec. 2 of the *Matrimonial Causes Jurisdiction Act* 1864. Possibly the application for a special order was unnecessary; and an appearance might have been entered pursuant to Order XLIII., rule 2. But this rule was brought to the attention of *Henchman* J. on the hearing of the application, and he nevertheless thought it proper to make an order granting liberty to show cause.

When the Full Court reversed his order, it intended to decide that the applicant ought not to be admitted to show cause. Indeed, by its order, the appellant, who in the meantime had entered an appearance, was expressly dismissed from the suit. We are unable to agree with the view of the Full Court. There is no reason to think that the father is a mere shadow of the daughter, and the fact that he is acting in her interests and forwarding her wishes does not disqualify him. In considering the veracity of the evidence of adultery and the probable result of the intervention at any rate upon the facts and circumstances of this case, the Court went beyond the discretion allowed to it upon an application for a "special order" under sec. 7.

Henchman J. intended to decide that the applicant ought to be admitted to show cause, and we agree with him in the conclusion that the applicant is entitled to show cause. Whether a special order was strictly necessary or not, it may have been convenient in the circumstances to make an affirmative order to that effect rather than to allow the applicant to depend upon an appearance.

We think that the order of the Full Court should be discharged, and that of *Henchman* J. restored.

The appeal should be allowed.

Appeal allowed. Discharge order of the Full Court. Restore order of Henchman J. Costs of appeal to this Court and to the Supreme Court to be costs in the cause.

Solicitor for the applicant and appellant, *J. J. O'Connor*, Brisbane, by *McDonell & Moffitt*.

Solicitors for the respondent, *Leonard Power & Power*, Brisbane, by *Gill, Oxlade & Clegg*.

J. B.