

I am of opinion that the appeal should be allowed, with costs.

Appeal allowed. Order of the Supreme Court and of Court of Petty Sessions discharged, with costs. Respondent fined £5, with costs.

[Solicitors—For the appellant, Ernest Joske; for the respondent, W. E. Pearcey and Ivey.] W. P.

FULL COURT—(Gavan Duffy, C.J.)
Starke, Dixon, Evatt and
McTiernan, JJ.) Nov. 17, Dec.
3, 1931.
(Sydney.)

BROWN (Intervenant), Appellant v. WALTERS, Plaintiff Respondent.

Divorce—Intervention—Intervenant acting in interest of his daughter—Whether competent—Adultery of plaintiff between decree nisi and decree absolute—Discretionary bar—Stranger showing cause—Time for—Whether limited to giving information to Attorney-General—Discretion of Court—Interpretation—"Matrimonial Causes Jurisdiction Act 1864" (Queensland) (28 Vict., No. 29), sec. 26—"Matrimonial Causes Jurisdiction Act 1875" (Queensland) (39 Vict., No. 13), sec. 7—Order XII., r. 19; Order XLIII., r. 2.

The Supreme Court of Queensland, on the petition of the respondent, pronounced a decree *nisi* for the dissolution of a marriage, between the respondent and the appellant's daughter, and ordered that the marriage should, upon motion to be made to the Court in that behalf, be dissolved, unless cause to the contrary were shown unto the Court within three months from the date of service of the decree *nisi* upon the Attorney-General of Queensland.

Upon motion for a decree absolute being made more than three months after the above-mentioned service, the wife respondent moved for leave to intervene, under section 7 of the "Matrimonial Causes Jurisdiction Act 1875" (Queensland), upon the ground that the petitioner had committed adultery since the decree *nisi*. When she discovered that she was not entitled to move, her father, the present appellant, applied for and was granted leave upon the same ground.

The order granting leave having been discharged by the Full Court, on the grounds that the evidence in the possession of the intervenor lacked cogency and was disfigured by discrepancies, and that as the intervenor was acting in the interests of his daughter he was not a competent intervenant.—

Held, that the fact that the appellant was acting in the interests and forwarding the wishes of his daughter, did not disentitle him from intervening under section 7 of the "Matrimonial Causes Jurisdiction Act 1875" (Queensland), and that in considering the veracity of the evidence of adultery and the probable result of the intervention upon the facts and circumstances of the case, the Court went beyond the discretion allowed to it upon an application for a "special order" under that section.

Held, further.—1. That adultery committed after the decree *nisi* and before the decree absolute is adultery "during the marriage," and affords a discretionary bar within the meaning of the "Matrimonial Causes Jurisdiction Act 1864" (Queensland), section 26.

Hulsc v. Hulsc and Tracernor, L.R. 2 P. & D. 259, *Ellis v. Ellis*, L.R. 8 P.D. 188, considered and applied.

2. That the expression "by reason of material facts" not having been brought before the Court" contained in the above Act of 1875, section 7, includes facts not otherwise brought to the Court's knowledge and occurring after the decree *nisi* and material to be known upon the motion for the decree absolute.

3. That a stranger to the suit may at any time before the decree absolute is pronounced show cause upon the ground that material facts have occurred since the decree *nisi*, and is not limited by the section to giving information of such facts to the Attorney-General.

4. That cause may be shown under section 7 of the Act (*supra*) at any time until the decree absolute is pronounced.

The decision of the Full Court of Queensland reversed.

APPEAL FROM THE FULL COURT OF QUEENSLAND.

In an action for dissolution of marriage on the ground of adultery, brought by Percival Leslie Walters against his wife, Eva Annie Walters, the jury found that the alleged adultery was proved, and thereupon the trial Judge granted (*inter alia*) an order 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 *nisi* on the Attorney-General of Queensland.

Subsequent to the judgment *nisi* being pronounced, the wife caused her husband's movements to be watched, and within the time granted by the Court for making the judgment absolute she discovered certain facts which she alleged showed that her husband had committed adultery after the judgment *nisi* was granted by the Court.

The three months period for making the judgment absolute expired on the 15th of August, 1931, and on the 17th of that month Counsel for the plaintiff moved before Henchman, J., to have the judgment made absolute. On this motion the defendant wife moved by Counsel for leave to intervene, on the ground of the alleged adultery committed by plaintiff. The evidence on which the alleged adultery was based emanated from the defendant wife, her brother and a private inquiry agent. This evidence had been placed before the Attorney-General, but he declined to take any action. The application on behalf of the wife for leave to intervene was adjourned to the 21st of August, and on the matter coming up for further consideration, without explanation the wife did not continue her application, but her application was renewed by her father, who was granted leave to intervene.

An appeal was lodged against this order in the Full Court of the Supreme Court of Queensland, on the following grounds:—(1) That the said judgment or order was wrong in and contrary to law; (2) that the said judgment or order was made without and in excess of jurisdiction; (3) that the said judgment or order was made contrary to the evidence offered on the hearing of the said application; (4) that the application was made too late; (5) that the evidence

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offered on the hearing of the said application established that the said application was made on behalf of the defendant and the said applicant in making the said application was acting for and as the agent or nominee of the defendant.

The Full Court, in allowing the appeal, found that it was unable to accept the finding of adultery (a discretionary bar) resting on the evidence produced; that the father was acting in collusion with his daughter for the purpose of intervening, and it was really the daughter's application, and that he did not come within the definition of "any person" within the meaning of sec. 7 of the "Matrimonial Causes Jurisdiction Act (Queensland) 1875," viz.—"Any person shall be at liberty in such manner as the Court shall . . . 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 further, that where a stranger to a suit desires to place material facts before the Court under sec. 7 (*supra*) he is limited to giving information thereof to the Attorney-General, and to that officer the Legislature has entrusted the exclusive right and responsibility to protect the process of the Court from abuse. The Court, in dealing with the words in the section, viz., "not brought before the Court," without deciding their meaning, suggested that there was a doubt as to their meaning in that they may be interpreted as "not brought before the Court at or before the time when the decree *nisi* (was) made."

The plaintiff appealed from this decision to the High Court on the following grounds:—

1. That the judgment of the Full Court was contrary to law.
2. That the said judgment was against the evidence and the weight of evidence.
3. That the said judgment entirely disregarded the uncontradicted evidence before Henchman, J., on the hearing by him of the said application.
4. That the said judgment entirely disregarded the discretion exercised by Henchman, J., in the hearing of the said application.
5. That the said judgment in effect substituted its own opinion for that of a jury on the question as to whether there was reasonable evidence of adultery on the part of the said Percival Leslie Walters after the date of the said judgment *nisi*.

Fahey for the appellant.

Hart for the respondent.

The cases cited in argument sufficiently appear in the judgment.

Cur. adv. vult.

The following judgment of the Court was given:—

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 solemnised 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 the 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 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 and 24 Vict., c. 144. Before these provisions were enacted a decree pronounced for the dissolution of a marriage was final in the first instance. Section 26 of the "Matrimonial Causes Act 1864," which was founded upon sec. 31 of 20 and 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."

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*, (1871) L.R. 2 P. & D. 259; *Ellis v. Ellis*, (1883) L.R. 8 P.D. 188.

(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* (*supra*), at p. 261, an interpretation which Cotton and Lindley, L.JJ., but not Baggallay, L.J., in *Howarth v. Howarth*, (1884) L.R. 9 P.D. 218, were also disposed to adopt—see 9 P.D. at pp. 226, 230 and 224; and *cf. Rogers v. Rogers*, (1894) P. 161 at pp. 167-8, *per* Jeune, P. 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 section 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. Baggally, L.J., in *Howarth v. Howarth*, 9 P.D. 218 at 226, 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*, L.R. 2 P. & D. p. 259; *Lautour v. Lautour* and *Her. M. Proctor*, 10 H.L.C. 685—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*, (1864) 3 S. & T. 530. See *Crown v. Stubbs*, 42 C.L.R. at p. 318; and *Howarth v. Howarth* (*supra*), at p. 223, *per* Baggallay, L.J.; and *Pool v. Pool*, 12 T.L.R. 509; *Clements v. Clements*, (1864) 3 Sw. & Tr. 364, 164 E.R. 1327; and *Bruell v. Bruell*, 39 W.N. (N.S.W.) 170. 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* (*supra*) 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., r. 2, of the Rules of the Supreme Court. It is not clear that Order XII., r. 19, qualifies the operation of Order XLIII., r. 2. Order XII., rules 18, 19 and 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., r. 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

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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 Full Court, restore order of Henchman, J. Costs of appeal to this Court and to Supreme Court to be costs in the cause.

[Solicitors—For the appellant, J. J. O'Connor by his Sydney agents, McDonnell and Moffitt; for the respondent, Leonard, Power and Power by their Sydney agents, Gill and Oxlade.] G. E. S.

Supreme Court.

FULL COURT—(Cussen, A.-C.J. } March 2, 3.
Macfarlan and Lowe, JJ.) }

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*Police offences—Betting—Occupier of premises—Used for betting—Person having care of premises—Or behaving as such—Meaning of "care"—"Police Offences Act 1928" (No. 3749), secs. 98, 156.**

In the "Police Offences Act 1928," section 156, the word "mistress" must be taken as denoting a person with the same kind of control as that imputed by the word "master"; and the word "care" must be taken as indicating the same kind of control as the words "government or management" indicate.

ORDER TO REVIEW.

Thomas William Charles Deeley, Sergeant Detective of Police, laid an information against Amelia Stirrey, charging the defendant that she, being the occupier of a shop at Bridge Road, Richmond, the premises were used on various dates in July, 1931, for the purpose of betting. The information was heard at the

Court of Petty Sessions at Richmond on 13th October, 1931, before Mr. Stafford, P.M., and Messrs. O'Connell and Dando, Justices of the Peace.

Evidence was given that the defendant was serving behind the counter of the shop on some of the occasions in question, and received slips of paper and money in connection with the alleged bets, and was generally seen serving in the shop, and appeared to be in charge when the police were present. The defendant swore that she resided at the shop with her husband, the lessee and licensee of the shop and billiard saloon, and was only in charge of the shop in her husband's absence, and had no set time for being there, but relieved her husband during his meal time. After the close of the evidence for the prosecution, it was argued that the defendant was not the occupier, and the informant was asked if he desired to amend, and replied that he did not think it necessary.

In dismissing the information, after having heard the defendant's evidence, the Police Magistrate said—"I consider the case is proved, but my colleagues are against me. The case is dismissed." Mr. O'Connell, J.P., said—"My reasons are that the man who put the bet on on the 1st July was not called as a witness, and it is oath against oath." Mr. Dando, J.P., said—"I agree with Mr. Stafford, that the bets took place there, but I do not agree that she is the occupier. I believe the husband is the occupier." The case was dismissed.

An order *nisi* to review was granted, on the ground (*inter alia*) that the Justices were wrong in law in holding that the defendant should not be deemed to be the occupier of the premises. The order *nisi* was referred to the Full Court by Lowe, J.

Sholl for the informant to move the order absolute.
Doyle for the defendant to show cause.

CUSSEN, A.-C.J.—I think this case is very near the line, but my learned brothers have arrived at a clear conclusion that the order *nisi* should be discharged. And I am of opinion with them that we should not amend the information or send the case back to the Magistrates.

MACFARLAN, J.—In my opinion this order *nisi* should be discharged. The case depends upon what the Magistrates have found. One of them, the Police Magistrate, was in favour of a conviction, and he must be taken to have found both that the defendant was the occupier and that betting took place. Another Magistrate was not satisfied that betting took place. As to that we are bound by his decision, in this sense, that we must accept it, as he heard the witnesses, and it was for him to make up his mind. As far as he was concerned, he was the judge as to whether he would accept the evidence or not, and if the majority had so found, that would be an end of the

* "Police Offences Act 1928"—

Sec. 156. Every person who appears acts or behaves as master or mistress or as the person having the care government or management of any house or place opened kept or used in contravention of this Part or as a common gaming house shall for the purposes of this Act or any other Act or law relating thereto be deemed to be the occupier thereof or the keeper thereof (as the case requires) whether he is or is not the real owner occupier or keeper thereof.