

CANADA / JUDGMENT

Zacks v. Zacks

[1973] SCR 891

COURT

Supreme Court of Canada

DECIDED

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Zacks v. Zacks

Collection

Supreme Court Judgments

Date

1973-05-07

Report

[1973] SCR 891

Judges

Fauteux, Joseph Honoré Gérard; Abbott, Douglas Charles; Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Hall, Emmett Matthew; Spence, Wishart Flett; Pigeon, Louis-Philippe; Laskin, Bora

On appeal from

British Columbia

Subjects

Constitutional law

Family law

Decision Content

Supreme Court of Canada

Zacks v. Zacks, [1973] S.C.R. 891

Date: 1973-05-07

Josephine Teresa Zacks Appellant;

and

Louis Zacks Respondent.

1973: January 24, 25; 1973: May 7.

Present: Fauteux C.J. and Abbott, Martland, Judson, Ritchie, Hall, Spence, Pigeon and Laskin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Divorce—Maintenance—Decree nisi granted—Entitlement to maintenance—Reference to Registrar as to quantum—Whether order fixing amount of maintenance must be made contemporaneously with granting of decree—Meaning of “Upon”—Divorce Act, R.S.C. 1970, c. D-8, s. 11.

Constitutional law—Marriage and divorce—Corollary relief provisions of Divorce Act—Whether ultra vires—Divorce Act, R.S.C. 1970, c. D-8, ss. 10, 11, 12—B.N.A. Act, 1867, ss. 91(26), 92(13).

Constitutional law—Rules of Supreme Court of British Columbia—Amendment pursuant to Order in Council so as to include O. LXA, r. 32(3)—Rule providing Judge may direct reference to Registrar on application for corollary relief—Whether Order in Council ultra vires as constituting unlawful delegation to person not a judge contemplated by s. 96 of the B.N.A. Act, 1867.

The respondent's petition for divorce and a counter-petition by the appellant were heard by Gould J. on May 13, 1971. On that date he granted a decree nisi for divorce, which was signed by the Registrar on May 28, 1971. He further ordered that the wife and infant child of the marriage were entitled to maintenance and he referred the question of quantum to the Registrar for his recommendation.

A fearing was conducted by the Registrar on July 14 and 15, 1971. The matter was not then completed and by notice, dated September 30, 1971, he fixed October 21, 1971, as the date for continuance of the hearing. Prior to the resumption of the investigation the respondent, on August 16, 1971, applied for and obtained a decree absolute. By notice, dated October 13, 1971, the respondent applied for an order to stay the proceedings before the Registrar. This motion was dismissed on October 18, 1971.

The hearing before the Registrar continued. On November 21 he made an interim recommendation that the respondent pay to the appellant the sum of \$1,500. On January 1, 1972, the respondent, who, until then, had been making interim maintenance payments of \$700 per month, ceased to make such payments.

The proceedings before the Registrar continued on January 17 and 18, 1972. On the latter date he made an interim recommendation for payment of the amount of \$500 by the respondent to the appellant. The hearing continued on February 9, 1972, when a further interim recommendation for payment of \$2,000 was made.

On February 14, 1972, the appellant applied for an order requiring the respondent to pay to her the various amounts previously recommended by the Registrar and to make other payments by way of maintenance until the Registrar's investigation was completed. The respondent applied, at the same time, for an order declaring that the Registrar was without jurisdiction. The appellant's application was granted and that of the respondent dismissed. An appeal by the respondent to the Court of Appeal was granted on the ground that there was no jurisdiction to make an order for maintenance after the granting of the decree nisi.

Leave to appeal to this Court was granted to the appellant and it was subsequently directed that notice be given of two constitutional questions in the appeal: (1) Was the Supreme Court of British Columbia without power to order maintenance pursuant to ss. 10, 11 and 12 of the Divorce Act, R.S.C. 1970, c. D-8, for the reason that the said sections were ultra vires of the Parliament of Canada? (2) Was Order in Council 1811, pursuant to which the Rules of the Supreme Court of British Columbia were amended so as to include O. LXA, r. 32(3), ultra vires of the Lieutenant-Governor in Council because it unlawfully delegated powers to a person not a judge contemplated by s. 96 of the B.N.A. Act, 1867?

Held: The appeal should be allowed. The constitutional questions should be answered in the negative.

As held in *Jackson v. Jackson*, [1973] S.C.R. 205, the power to grant an order for maintenance under s. 11 of the Divorce Act is necessarily ancillary to jurisdiction in divorce and the Parliament of Canada was therefore acting within the legislative competency conferred upon it by the B.N.A. Act, 1867, s. 91(26), in legislating to this end. This principle applies equally to the matters of custody, care and upbringing of children of the marriage, under s. 11(1)(c), to the provisions of s. 10, dealing with interim orders, and to those of s. 12, which authorize the ordering of payments directed under s. 10 or s. 11, to be made to a trustee or administrator, and the imposition of terms, conditions and restrictions in an order made under either of those sections. *Whyte v. Whyte* (1969), 69 W.W.R. 536; *Papp v. Papp*, [1970] 1 O.R. 331; *Heikel v. Heikel* (1970), 73 W.W.R. 84, followed; *Attorney-General of Ontario v. Attorney-General of Canada*, [1894] A.C. 189; *Hyman v. Hyman*, [1929] A.C. 601, referred to.

Order LXA, r. 32(3) provides that "A Judge may deal with an application [for corollary or other relief by way of maintenance or for the care and custody of children] summarily or may direct a reference to the Registrar." The powers of the Registrar upon a reference directed pursuant to this Rule are not powers of adjudication. A power to inquire and report, as distinguished from a power to adjudicate, does not offend against s. 96 of the B.N.A. Act, 1867. *Attorney-General for Ontario and Display Service Co. Ltd. v. Victoria Medical Building Ltd. et al.*, [1960] S.C.R. 32, applied.

The meaning of the word "Upon", as used in s. 11(1) of the Divorce Act, must be determined in the light of the fact that legislation by Parliament in relation to alimony, maintenance and the custody of children would only be within its powers if associated with and as a part of legislation in relation to the subject-matter of divorce. When it was provided that the court could deal with

those matters “Upon granting a decree nisi of divorce” it was meant that it was only when a divorce was granted that the court acquired the necessary jurisdiction to deal with those subjects. The words did not mean that those subjects could only be dealt with at exactly the same time that the decree nisi for divorce was granted.

Accordingly, Gould J. acted within his jurisdiction in making the order which he did, and the Court was properly entitled, upon receipt of the recommendation of the Registrar, to fix the proper amount of the maintenance which Gould J. had already decided that the appellant and the infant child were entitled to receive.

Daudrich v. Daudrich, [1972] 2 W.W.R. 157; Radke v. Radke, [1971] 5 W.W.R. 113; Suriano v. Suriano, [1972] 1 O.R. 125, distinguished; Whyte v. Whyte, *supra*; R. v. Arkwright (1848), 12 Q.B. 960; R. v. Humphery (1839), 10 Ad. & El. 335; Rowe v. The King, [1951] S.C.R. 713, referred to.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], allowing an appeal from a judgment of McKay J. Appeal allowed.

W.P. Lightbody and D.P. Baron, for the appellant.

Neil M. Fleishman and J. François Lemieux, for the respondent.

C.R.O. Munro, Q.C., and H.L. Molot, for the Attorney General of Canada.

D.W. Mundell, Q.C., for the Attorney-General of Ontario.

W.G. Burke-Robertson, Q.C., and J.L. Davidson, for the Attorney-General of British Columbia.

The judgment of the Court was delivered by

MARTLAND J.—The appellant and the respondent were married on May 1, 1959. There is one child of the marriage, a daughter, born on March 3, 1963. By a petition dated July 29, 1970, the respondent sought dissolution of the marriage. The appellant filed an answer and counter-petition on September 11, 1970, claiming, among other things, interim and permanent maintenance for herself and the daughter, who was living with her in California. The appellant’s application for interim maintenance was heard by Macdonald J. on October 22, 1970. He referred the matter to the Registrar, for a recommendation. A recommendation was made, on March 23, 1971, that the respondent pay to the appellant, by way of interim maintenance for herself and her daughter, the sum of \$700 per month from February 1, 1971. An order confirming this recommendation was made on April 2, 1971.

The respondent’s petition for divorce and the appellant’s counter-petition were heard by Gould J. on May 13, 1971. On that date he granted a decree nisi for divorce, which was signed by the Registrar on May 28, 1971. He further ordered that:

...the Respondent and infant child of the marriage, JULIET ELLEN ZACKS, born the 11th (sic) day of March, A.D. 1963, are entitled to maintenance and that the claim for maintenance of the Respondent and said infant child be, and the same is hereby referred to the learned District Registrar of this Honourable Court for the purpose of recommending to the said Court a proper allowance for the maintenance of the said Respondent and infant child;

Pursuant to this order the Registrar conducted a hearing on July 14 and 15, 1971. The matter was not then completed and by notice, dated September 30, 1971, he fixed October 21, 1971, as the date for continuance of the hearing. Prior to the resumption of the investigation the respondent, on August 16, 1971, applied for and obtained a decree absolute.

By notice, dated October 13, 1971, the respondent applied for an order to stay the proceedings before the Registrar on the following grounds:

- (a) That the Decree Absolute has now been entered;
- (b) That because of the grounds alleged in Paragraph (a) herein, the Court is now functus in this matter, and further that an Order for Maintenance cannot be made in the first instance after the granting of the Decree Nisi; (c) That the conduct of the parties vis-à-vis Maintenance has not been heard and there is no Court to hear the same, the learned Deputy District Registrar having refused properly to hold a hearing on the conduct of the parties;
- (d) That in any event, Maintenance under the Divorce Act of Canada does not properly lie within the purview of Section 91 of the British North America Act.

This motion was dismissed by Macdonald J. on October 18, 1971, and there was no appeal from this decision.

The hearing before the Registrar continued. On November 21 he made an interim recommendation that the respondent pay to the appellant the sum of \$1,500. On January 1, 1972, the respondent, who, until then, had been making interim maintenance payments of \$700 per month, ceased to make such payments.

The proceedings before the Registrar continued on January 17 and 18, 1972. On the latter date he made an interim recommendation for payment of the amount of \$500 by the respondent to the appellant. The hearing continued on February 9, 1972, when a further interim recommendation for payment of \$2,000 was made.

On February 14, 1972, the appellant applied to McKay J. for an order requiring the respondent to pay to her the various amounts previously recommended by the Registrar and to make other payments by way of maintenance until the Registrar's investigation was completed. The respondent applied, at the same time, for an order declaring that the Registrar was without jurisdiction. McKay J. granted the appellant's application and dismissed that of the respondent. In the course of his reasons, he said:

The decree nisi was granted by Mr. Justice Gould on May 13th, 1971. At that time he made a finding that the wife and child were entitled to maintenance. He referred the question of quantum to the Registrar for his recommendation. The reference is, I gather, a complicated one and still far from completed. The order absolute was entered on the 16th day of August, 1971.

In my view the entering of the decree absolute finalized matters insofar as the marriage of the parties are concerned, subject to certain exception not applicable here, but has no effect on the question of maintenance which is still very much before the Court. It is to be kept in mind that Mr. Justice Gould ordered maintenance for the wife. The hearing before the Registrar and the application to confirm are merely extensions of that order. To find otherwise could result in a horrible state of affairs. Taking an example, a petition is made for the maintenance by a wife against a wealthy husband, she clearly established entitlement at the trial and the Court orders that she is entitled to maintenance but because of the wealth of the husband and the complexity of his affairs, the reference takes five or six months. In the interval, the decree absolute which refers only to the divorce is entered. Mr. Fleishman says she is forever debarred from claiming maintenance. I cannot accept that proposition. This is not the case of a wife who does not claim maintenance and then attempts, after decree absolute, to make application. She claimed maintenance for herself and the child and she was granted maintenance.

The respondent appealed from this order to the Court of Appeal for British Columbia, which allowed the appeal and set aside the order of McKay J.

The main grounds of appeal advanced before the Court of Appeal were:

1. So far as they relate to alimony and maintenance, sections 10, 11 and 12 of the Act are ultra vires the Parliament of Canada.

Alternatively,

2. There was no jurisdiction to make an interim order for maintenance after the granting of the decree nisi.
3. There was no jurisdiction to make an order for maintenance of any kind after the decree nisi had been made absolute. The Court of Appeal accepted the second ground of appeal and, in its reasons, treated it as if the word "interim" was not in it.

The sections of the Divorce Act, R.S.C. 1970, c. D-8, referred to in the first ground of appeal, read as follows:

COROLLARY RELIEF

10. Where a petition for divorce has been presented, the court having jurisdiction to grant relief in respect thereof may make such interim orders as it thinks fit and just

- (a) for the payment of alimony or an alimentary pension by either spouse for the maintenance of the other pending the hearing and determination of the petition, accordingly as the court thinks reasonable having regard to the means and needs of each of them;
 - (b) for the maintenance of and the custody, care and upbringing of the children of the marriage pending the hearing and determination of the petition; or
 - (c) for relieving either spouse of any subsisting obligation to cohabit with the other.
11. (1) Upon granting a decree nisi of divorce, the court may, if it thinks it fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them, make one or more of the following orders, namely:
- (a) an order requiring the husband to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of
 - (i) the wife,
 - (ii) the children of the marriage, or
 - (iii) the wife and the children of the marriage;
 - (b) an order requiring the wife to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of
 - (i) the husband,
 - (ii) the children of the marriage, or
 - (iii) the husband and the children of the marriage; and
 - (c) an order providing for the custody, care and upbringing of the children of the marriage.
- (2) an order made pursuant to this section may be varied from time to time or rescinded by the court that made the order if it thinks it fit and just to do so having regard to the conduct of the parties since the making of the order or any change in the condition, means or other circumstances of either of them.
12. Where a court makes an order pursuant to section 10 or 11, it may
- (a) direct that any alimony, alimentary pension or maintenance be paid either to the husband or wife, as the case may be, or to a trustee or administrator approved by the court; and
 - (b) impose such terms, conditions or restrictions as the court thinks fit and just.

The conclusion of the Court of Appeal is summarized, in its reasons, as follows:

In my view, once a decree nisi has been perfected the court is functus so far as s. 11(1)(a) is concerned. If powers under s. 11(1)(a) are to be exercised effectively, they must be exercised simultaneously with the perfecting of the decree nisi and completely; nothing, such as fixing a lump sum or periodic sums, can be left to be done later.

The judgment explains the words “perfecting of the decree nisi” as follows:

The practice in the Supreme Court of British Columbia with respect to all court orders (including decrees and other judgments) is for the judge who makes one (or another judge on his behalf) to initial it and for the Registrar both to sign it and to stamp the seal of the court on it. When these steps have been completed, the order is perfected.

Leave to appeal to this Court was granted to the appellant. By order of the Chief Justice of this Court it was directed that notice be served upon the Attorney General of Canada and upon the Attorneys General of the Provinces in respect of the following constitutional questions in the appeal:

1. Is the Supreme Court of British Columbia without power to order maintenance pursuant to Sections 10, 11 and 12 of The Divorce Act, R.S.C. 1970, Chapter D-8, for the reason that the said sections of The Divorce Act are ultra vires of the Parliament of Canada, it being a subject exclusively within the powers of Provincial Legislatures under Section 92 of The British North America Act?
2. Is Order-in-Council No. 1811, approved 11 June, 1968, (B.C. Gazette, Part II, 1968, P. 241) pursuant to which the Rules of the Supreme Court of British Columbia were amended by inserting Order LXA, Rule 32(3) of the Divorce Rules ultra vires as constituting an unlawful delegation to a person other than a judge contemplated by Section 96 of The British North America Act?

Submissions were made to us by the Attorney General of Canada and by the Attorneys General of British Columbia and Ontario. The Attorney General of Canada and the Attorney General of British Columbia both submitted that the two questions should be answered in the negative. The Attorney General of Ontario made no submission in respect of the first question. He contended that the second question should be answered in the negative.

I will deal now with the first question. Section 91(26) of the British North America Act gives to the Parliament of Canada authority to legislate on the matters of “Marriage and Divorce”. Section 92(13) of that Act gives to a Provincial Legislature authority to legislate on the matters of “Property and Civil Rights in the Province”. Alimony, maintenance and the custody of children are not specifically mentioned in either s. 91 or s. 92. The question is as to whether these subjects, which, in themselves, can be considered as civil rights, may be the subject of legislation by the Parliament of Canada, when dealing with the consequences of a divorce, as being inseparable from its jurisdiction to pass laws governing the change of status resulting from a dissolution of marriage.

This question has already been substantially answered in the reasons for judgment of this Court, delivered by Ritchie J., in *Jackson v. Jackson*[2] when he said, at p. 211: ...I am satisfied that the power to grant an order for the maintenance of the children of the marriage is necessarily ancillary to jurisdiction in divorce and that the Parliament of Canada was therefore acting within the legislative competency conferred upon it by the British North America Act, 1867, s. 91(26) in legislating to this end.

While this statement deals with the matter of maintenance under s. 11 of the Divorce Act, hereinafter referred to as “the Act”, the principle stated applies equally to the matters of custody, care and upbringing of children of the marriage, under s. 11(1)(c), to the provisions of s. 10, dealing with interim orders, and to those of s. 12, which authorize the ordering of payments directed under s. 10 or s. 11, to be made to a trustee or administrator, and the imposition of terms, conditions and restrictions in an order made under either of those sections.

Counsel for the respondent urged that the matter of the constitutionality of ss. 10, 11 and 12 of the Act should be reconsidered by the Court in view of the fact that that issue had not been argued by counsel in the *Jackson* case. He presented argument in support of the contention that those provisions were ultra vires of the Parliament of Canada. Consideration of his submissions has not persuaded me that the decision made in the *Jackson* case should be changed.

The power of Parliament to legislate in respect of the dissolution of marriage is, of course, unquestioned. The provisions of the Act, under attack, appear under the heading of “Corollary Relief”. Section 10 becomes operative where a petition for divorce has been presented and provides for interim orders. If the petition for divorce fails, there is no power to make any order as to alimony, maintenance or custody under s. 11, and any interim order under s. 10 would thereupon cease to be operative. The Act only contemplates orders as to these matters as a necessary incident to the dissolution of a marriage.

It was not until the enactment of the Matrimonial Causes Act, 1857, that courts in England were empowered to grant a decree to dissolve a marriage, validly contracted. Under that Act, the court was empowered on any such decree to order the husband, to the satisfaction of the court, to secure to the wife a gross sum of money, or such annual sum as the court determined in the light of the wife’s means and the husband’s ability to pay. The court was also empowered to make provision for the custody, care and maintenance of the children of the marriage. This was the legal situation, relating to divorce, when the British North America Act was passed.

It is proper to have regard to this in deciding the intended scope of the power to legislate on the subject of divorce given by the British North America Act to the Parliament of Canada in s. 91(26) of that Act. In *Attorney-General of Ontario v. Attorney-General of Canada*[3], the Privy Council, in considering the meaning of “Bankruptcy” in s. 91(21) of that Act, made reference to the provisions of the English Act of 1861 then in force.

In *Hyman v. Hyman*[4], the House of Lords had to decide whether a wife’s covenant, in a deed of separation, not to take proceedings against her husband for alimony or maintenance precluded an order being made by the court for permanent maintenance, when she obtained a decree of

divorce. Lord Hailsham L.C., at p. 607, referred to the statutory provisions which enabled the court to order payment of maintenance, and said: These provisions are a re-enactment of provisions first appearing in the Matrimonial Causes Act, 1857, as modified by later Acts in 1866 and 1907; and the question which your Lordships have to determine must, in my opinion, depend upon the view taken by your Lordships as to the true meaning and effect of this section.

Before 1857 it was not competent for any Court to dissolve a marriage validly contracted; in order to effect such a dissolution it was necessary to have recourse to an Act of Parliament. In 1857 the Legislature for the first time gave to the Courts the power to dissolve the marriage tie by a decree of divorce. Such a decree does not merely affect the relationship of the husband and the wife one to another, but it also changes the status of each of them. In my view, the effect of the section to which I have called attention is to give power to the Court as incidental to the exercise of these powers and as a condition of their exercise to compel the husband to make adequate provision for the support of the wife.

Lord Buckmaster, at p. 625, states:

Divorce wholly differs from any form of separation. Judicial separation, which has been the subject of much learned and weighty censure, is nothing but enforcing through an order of the Court an arrangement which the parties could—were they willing—equally effect for themselves; it merely makes in the form and with the force of a decree an arrangement for the parties to live apart, but divorce destroys the whole relationship, and only by remarriage can it be restored. It is, in my opinion, associated with and inseparable from the power to grant this change of status that the Courts have authority to decree maintenance for the wife.

Three provincial Courts of Appeal have considered the issue which is now before us. The Court of Appeal for Manitoba had to deal with the validity of the provisions of the Act relating to maintenance and custody, in *Whyte v. Whyte*[5]. In its judgment, reference was made to the *Hyman* case, and it was held that these matters were inseparable from the power to grant a change of status between the spouses.

In *Papp v. Papp*[6], the Court of Appeal for Ontario held that the provisions in s. 10 and s. 11 respecting custody were valid enactments. The judgment of the Court was delivered by Laskin J.A., who was then a member of that Court. At p. 335 he said:

Where there is admitted competence, as there is here, to legislate to a certain point, the question of limits (where that point is passed) is best answered by asking whether there is a rational, functional connection between what is admittedly good and what is challenged.

He concluded, at p. 338:

On the view I have taken of the restricted nature of the custody jurisdiction under the Canadian Divorce Act, I hold that its provisions as to custody are valid enactments under the federal power in relation to marriage and divorce. To me, they are bound up with the direct consequences of marriage and its dissolution as much as is alimony and maintenance; and, much more importantly than those it is so bound up by reason of the physical and human relationships of

parents and their children. The fact that these can exist outside of formal marriage does not affect the matter where it is dealt with in terms of marriage and its dissolution. The very concept of divorce where there are dependent children of the marriage makes the question of their custody a complementary one to divorce itself.

The Appellate Division of the Supreme Court of Alberta, in *Heikel v. Heikel*[7], held that the corollary relief provisions in ss. 10 to 12 of the Act were not ultra vires of the Parliament of Canada. I am in agreement with these decisions, and would answer the first constitutional question in the negative.

The second constitutional question which has to be considered is as to whether Order in Council No. 1811, pursuant to which the Rules of the Supreme Court of British Columbia were amended so as to include O. LXA, r. 32(3) was ultra vires of the Lieutenant-Governor in Council because it unlawfully delegated powers to a person not a judge contemplated by s. 96 of the British North America Act.

Section 96 of the British North America Act provides that:

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

Section 19(1) of the Act empowers a court or court of appeal to make rules of court applicable to any proceedings under the Act within the jurisdiction of that court, including:

- (e) prescribing and regulating the duties of officers of the court and any other matter considered expedient to attain the ends of justice and carry into effect the purposes and provisions of this Act.

Pursuant to this power the Supreme Court of British Columbia made rules of court applicable to proceedings under the Act. The Court Rules of Practice Act, R.S.B.C. 1960, c. 83, enables the Lieutenant-Governor in Council to make rules of practice and procedure in all or any of the Courts of the Province. The Order in Council incorporated into the Rules of the Supreme Court the rules which the Court had made pursuant to the power granted to it under the Act, effective on the coming into force of the Act.

The impugned rule is Rule 32(3), which provides that: A Judge may deal with an application under this Rule summarily or may direct a reference to the Registrar.

The kind of application to which Rule 32 relates is an application for corollary or other relief by way of maintenance or for the care and custody of children. The contention of the respondent is that Rule 32(3) provides for the granting of a power to the Registrar which is of a kind which can only be exercised by a judge appointed under s. 96 of the British North America Act.

The answer to this submission is that the powers of the Registrar upon a reference directed pursuant to this Rule are not powers of adjudication. It is the Judge who “may deal with an application”. The Rule merely prescribes the procedure the Judge may employ, that is, he may deal with the application summarily or by ordering a reference to the Registrar. The powers of

the Registrar are not expressly stated, but clearly what the Rule contemplates are the powers normally exercised by the Registrar upon a reference under the general practice in the Supreme Court of British Columbia. This is prescribed by s. 63 of the Supreme Court Act, R.S.B.C. 1960, c. 374, which reads:

63. (1) Subject to Rules of Court and to any right to have particular cases tried by a jury, the Court or a Judge may refer any question arising in any cause or matter (other than a criminal proceeding) for inquiry or report to any District Registrar, official or special referee.
- (2) The report of any District Registrar, official or special referee may be adopted, wholly or partially, by the Court or a Judge, and if so adopted may be enforced as a judgment or order to the same effect.
- (3) The proceedings before the District Registrar or referee upon such reference, the report of the District Registrar or referee, and the powers of the Court or a Judge with respect to the report shall as nearly as possible conform to, and be exercised in accordance with, the practice governing the matters referred to in Order 33 and in Rules 65 to 71, inclusive, of Order 55 of the Rules of the Supreme Court.

That no adjudication is contemplated by Rule 32 appears to have been the view of Gould J. when making his order in this case referring the claim for maintenance to the District Registrar. His order says that the claim

...is hereby referred to the learned District Registrar of this Honourable Court for the purpose of recommending to the said Court a proper allowance for the maintenance of the said Respondent and infant child.

That a power to inquire and report, as distinguished from a power to adjudicate, does not offend against s. 96 of the British North America Act was decided in the judgment of this Court in *Attorney-General for Ontario and Display Service Co. Ltd. v. Victoria Medical Building Ltd. et al.* [8], in which the Court was considering the validity of a provision in *The Mechanics' Lien Act* of Ontario which purported to confer on the Master of the Supreme Court jurisdiction to try certain actions. At p. 44 Judson J. said:

The judgment under appeal correctly draws a distinction between the position of the Master exercising delegated jurisdiction as a referee under ss. 67 and 68 of *The Judicature Act* and his position when he exercises original jurisdiction under s. 31(1) of *The Mechanics' Lien Act*. Anything that he does on a reference depends for its validity on the judge's original order. His findings must be embodied not in a judgment but in a report which is subject to control of the judge on a motion for confirmation, variation or appeal; *Martin v. Cornhill Insurance Co. Ltd.*, [1935] O.R. 239. On the other hand under the impugned section the Master issues a judgment which is subject to a direct appeal to the Court of Appeal.

Because Rule 32(3) does not purport to confer upon the Registrar a power to adjudicate it is my opinion that the second constitutional question should be answered in the negative. In basing my opinion on this one ground, I do not thereby express disagreement with other grounds on which the respondent's contention is attacked, such as the fact that the Rule in issue was one made by the Supreme Court of British Columbia pursuant to a federal enactment, but it is not necessary to reach a final conclusion upon them.

I now turn to the issue on the merits, which is as to the interpretation by the Court of Appeal of s. 11(1) of the Act, and, in particular, upon the words "Upon granting a decree nisi of divorce" which precede the description of the powers which the court may exercise as to alimony, maintenance and the custody of children of the marriage.

It was the opinion of the Court of Appeal that "Upon" denoted contemporaneity, and that once a decree nisi is perfected the court is functus so far as s. 11(1)(a) is concerned. It was held that if powers under that paragraph are to be exercised effectively they must be exercised simultaneously with the perfecting of the decree nisi and completely, and that nothing, such as fixing a lump sum or periodic sums, could be done later.

The effect of this judgment was, therefore, that, although Gould J. had, as a part of the decree nisi, declared an entitlement to maintenance, and directed a reference to the Registrar to recommend a proper allowance, once the decree had been signed by the Registrar and the Court seal affixed, no order could be made fixing the amount of maintenance.

The judgment of the Court of Appeal is based upon three reasons:

My conclusion is that "Upon" in s. 11(1) denotes contemporaneity. I base this mainly on the ordinary meaning of the word, on the contrasting use of "upon or after" in s. 13(2) and on the French version of the opening words in s. 11(1) "En prononçant un jugement conditionnel de divorce".

With respect to the first reason, the Court was influenced by decisions of the Court of Appeal for Manitoba and the Appellate Division of the Supreme Court of Alberta.

In *Whyte v. Whyte*, which has already been cited on the constitutional issue, Monnin J.A., delivering the judgment of the Court, refused to subscribe to the theory that if, upon granting the decree nisi, no award of maintenance was made to the former wife, she might be forever barred. However, in a subsequent decision, in a case in which Monnin J.A. also sat, that position was reversed (*Daudrich v. Daudrich*[9]). The judgment of Trites C.J.Q.B. at trial was approved in which he had supported the strict or narrow construction of the word "Upon" in s. 11(1).

The facts before him were not similar to those in the present case. A decree nisi had been pronounced which contained no order as to maintenance, and the trial judge, before making his order, had considered that issue. The motion before the Chief Justice was to vary that order so as to require the payment of maintenance and was made several months after the decree had been made absolute.

In *Radke v. Radke*[10], the Appellate Division of the Supreme Court of Alberta, by a majority decision, preferred the view expressed by *Tritschler C.J.Q.B.* in the *Daudrich* case over that stated by *Monnin J.A.* in the *Whyte* case. At the time of the judgment in the *Radke* case, the judgment of the Court of Appeal in *Daudrich* had not been delivered.

Allen J.A., who delivered the majority decision, said that “the silence of the decree nisi on the subject of maintenance bars further proceedings in this action for that relief”.

Again, in *Radke*, the facts were not similar to those in the present case. There had been a consent judgment for judicial separation, before divorce proceedings were commenced, and the judgment directed a property division and ordered the payment of maintenance. The subsequent divorce proceedings resulted in a decree nisi being granted. The trial judge, after mentioning the result of the proceedings for judicial separation, went on to say that no other relief had been asked. No order for maintenance was made in the divorce proceedings. Later, application was made to another judge for an order confirming, in the divorce proceedings, the order for maintenance made in the judicial separation action. The Appellate Division, while holding that such order could not be made, in the light of its interpretation of s. 11(1) of the Act, ruled that the provision for maintenance made in the earlier action survived the divorce proceedings.

The issue as to the meaning of “Upon” in s. 11(1) was referred to by the Court of Appeal for Ontario in *Suriano v. Suriano*[11], in which an application to claim corollary relief was made after a decree nisi had been granted, which had made no provision for maintenance. The Court expressed no decided opinion on the issue now before us, but it decided, in view of the allegation that the order nisi had been made as a result of a mistaken belief as to the facts, induced by one of the parties, to remit the case for further consideration in the light of the circumstances of which the trial judge had been unaware.

Even if the interpretation placed upon the word “Upon” in s. 11(1) in *Daudrich* and in *Radke* were the proper one, it does not follow that the conclusion reached by the Court of Appeal in this case is correct. Both of those cases dealt with a situation in which, after consideration of the question of maintenance, the judge who granted the decree nisi refused to make an order for maintenance. In the present case the trial judge not only considered the matter of maintenance, but declared the appellant’s entitlement to it. He did not, at that moment, fix the amount, because clearly, in the light of the lengthy hearings before the Registrar, that was a complicated matter which could not be determined instantaneously. The Registrar was asked to recommend the proper amount to be allowed. I agree with the view expressed by *McKay J.* that the hearing before the Registrar and the application to confirm were merely extensions of the order which had declared the entitlement. At the time the decree nisi was made there was an order, under s. 11(1), to pay maintenance in an amount to be fixed after the reference to the Registrar had been completed and his recommendation made.

I do not accept the proposition that the use of the word “Upon” in s. 11(1) compels the trial judge, in a case in which he is of the opinion that a claim for maintenance is justified, to fix the actual amount at the moment he grants the decree nisi. Chief Justice Denman, in *R. v. Arkwright*[12], at p. 970, relied upon a definition of the meaning of the word “upon” where used in a statute stated by Tindal C.J. in *R. v. Humphery*[13], at p. 370. Chief Justice Denman said:

The words “on” or “upon” (it has been decided) may “either mean before the act done to which it relates, or simultaneously with the act done, or after the act done, according as reason and good sense require,” “with reference to the context, and the subject matter of the enactment.”

The quotation from Tindal C.J. was cited and applied in this Court by Kellock J. in *Rowe v. The King*[14], at p. 719.

The meaning of the word, as used in s. 11(1), must be determined in the light of the fact that legislation by Parliament in relation to alimony, maintenance and the custody of children would only be within its powers if associated with and as a part of legislation in relation to the subject-matter of divorce. It is my opinion that when it was provided that the court could deal with those matters “Upon granting a decree nisi of divorce” it was meant that it was only when a divorce was granted that the court acquired the necessary jurisdiction to deal with those subjects. The words did not mean that those subjects could only be dealt with at exactly the same time that the decree nisi for divorce was granted.

The use of the word “upon” in s. 13(2) does present a difficulty, but it is one to which there is an answer. Section 13(1) provides that a decree nisi shall not be made absolute until three months have elapsed from the granting of that decree. Subsection (2) contains a proviso to enable a court to reduce that three-month period, or even to make the decree nisi an absolute order. It provides that “upon or after the granting of a decree nisi of divorce” where a court is of opinion that it would be in the public interest for the decree nisi to be made absolute in a shorter period it may, subject to certain conditions, fix a shorter time or may make the decree absolute. The word “upon” is here used in an entirely different context. The provision was enacted to enable the court to make the decree nisi absolute at the very time it was enacted, or, later, after the granting of the decree nisi, to reduce the three-month period. This provision is one in which, in its context, the word “upon” was intended to mean “simultaneously with the act done”. “Reason and good sense” do not require that the word should have the same meaning when used in s. 11(1). They dictate exactly the opposite.

The Manitoba Court of Appeal in *Daudrich* felt that its interpretation of s. 11(1) was required by the French version of the opening words of s. 11(1), which read: “En prononçant un jugement conditionnel de divorce...” I do not agree with this conclusion. In *Quillet*, *Dictionnaire Encyclopédique* (1958), the following meaning of “en” is given:

EN avec le participe présent constitue une locution dite gérondif, formant des compléments circonstanciels qui expriment, soit la cause: En tombant il s'est démis le pied; c'est en forgeant qu'on devient forgeron; soit le temps: En arrivant, j'irai le voir; soit la manière: Elle travaille en chantant.

Similarly in Robert, Dictionnaire de la langue française, vol. II, (1960), "en" is defined:

Gérondif, Devant le participe présent, EN sert à former le gérondif qui exprime le temps, la manière, la cause... L'appétit vient en mangeant. Ronfler en dormant. Sourire en se rappelant quelque chose. En entrant, il trouva sa maison en désordre. La situation va en s'améliorant, ou va s'améliorant.

In my opinion, the interpretation which I have placed upon the word "Upon" in the light of the constitutional position of Parliament in enacting this legislation, is not altered by reason of the French version, which is entirely consistent with it.

Applying my interpretation of s. 11(1), Gould J. acted within his jurisdiction in making the order which he did, and the Court is properly entitled, upon receipt of the recommendation of the Registrar, to fix the proper amount of the maintenance which Gould J. has already decided that the appellant and the infant child are entitled to receive.

Counsel for the Attorney General of Canada invited us, in interpreting the meaning of the word "Upon" in s. 11(1), to hold that in every case, where a decree nisi of divorce has once been granted, the court may, at any time thereafter, make an order as to alimony, maintenance and the custody of children. It was submitted that the lapse of time after the granting of a decree nisi, or the intervening grant of a decree absolute, before such an order was sought would be only factors to be considered by the court to which the application was made. It is not necessary in this case, nor do I think it would be desirable, to endorse such a broad statement. In the present appeal, it is true that a decree absolute has been granted, but the right to maintenance had been declared at the time of the decree nisi, and the procedure to fix the amount had been launched before the decree absolute was made. What the position would be if no claim for alimony, maintenance or custody was made until after a decree absolute had been granted, or if an application therefor had been refused when the decree nisi was granted, is not in issue in this case, and I express no view thereon. In my opinion, the appeal should be allowed, the judgment of the Court of Appeal should be set aside and the order of McKay J. should be restored. The appellant should be entitled to her costs in this Court and in the Court of Appeal.

Appeal allowed with costs.

Solicitors for the appellant: Braidwood, Nuttall & Co., Vancouver.

Solicitor for the respondent: N.M. Fleishman, Vancouver.

[1] [1972] 5 W.W.R. 589, 29 D.L.R. (3d) 99.

[2] [1973] S.C.R. 205.

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- [3] [1894] A.C. 189.
- [4] [1929] A.C. 601.
- [5] (1969), 69 W.W.R. 536, 7 D.L.R. (3d) 7.
- [6] [1970] 1 O.R. 331.
- [7] (1970), 73 W.W.R. 84.
- [8] [1960] S.C.R. 32.
- [9] [1972] 2 W.W.R. 157.
- [10] [1971] 5 W.W.R. 113.
- [11] [1972] 1 O.R. 125.
- [12] (1848), 12 Q.B. 960, 116 E.R. 1130.
- [13] (1839), 10 Ad. & El. 335, 113 E.R. 128.
- [14] [1951] S.C.R. 713, [1951] 4 D.L.R. 238.
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