

In re The Supreme Court Act Amendment Act,  
1964 (B.C.); The A.-G. of British Columbia v.  
McKenzie, [1965] S.C.R. 490

M.J. Coombs

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>  
Commentary

**Citation Information**

Coombs, M. J.. "In re The Supreme Court Act Amendment Act, 1964 (B.C.); The A.-G. of British Columbia v. McKenzie, [1965] S.C.R. 490." *Osgoode Hall Law Journal* 4.2 (1966) : 289-298.  
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol4/iss2/11>

This Commentary is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

## CONSTITUTIONAL LAW

*In re The Supreme Court Act Amendment Act, 1964 (B.C.); The A.-G. of British Columbia v. McKenzie*, [1965] S.C.R. 490.

CONSTITUTIONAL LAW—PROVINCIAL LEGISLATION CONFERRING DIVORCE JURISDICTION ON LOCAL JUDGES OF SUPREME COURT—WHETHER ULTRA VIRES AS INTERFERING WITH FEDERAL POWER UNDER B.N.A. ACT, 1867, ss. 91, 92, 96, 101.

This case was an appeal to the Supreme Court of Canada under section 37 of the Supreme Court Act<sup>1</sup> from a unanimous decision of the British Columbia Court of Appeal<sup>2</sup> which held, on a reference under the Constitutional Questions Determination Act,<sup>3</sup> that section 3

---

<sup>60</sup> *Supra*, footnote 2.

<sup>61</sup> *Supra*, footnote 38. For a review of the balance that the American courts have sought to achieve between the Fifth Amendment of the Federal Constitution and the American Immigration laws, see Selected Essays on Constitutional Law (1930), published under the auspices of the Association of American Law Schools, Book IV, pp. 739 *et seq.*

<sup>62</sup> Canadian Bill of Rights, *supra*, footnote 38, s. 1(a). See I. R. Rand, Except by Due Process of Law (1960-63), 2 Osgoode Hall L.J. 171.

<sup>63</sup> Canadian Bill of Rights, *supra*, footnote 38, s. 2(c).

<sup>64</sup> *Ibid.*, s. 2(e).

<sup>65</sup> *Ibid.*, s. 2(a).

\* Thomas G. Heintzman, A.B. (Harvard), LL.B. (Osgoode), is a member of the 1966 graduating class.

<sup>1</sup> R.S.C. 1952, c. 259.

<sup>2</sup> (1965), 50 W.W.R. 193, *sub nom. Re Constitutional Questions Determination Act; Re Supreme Court Act Amendment Act, 1964*. Also reported in (1965), 48 D.L.R. (2d) 447, *sub nom. Reference Re Supreme Court Act Amendment Act, 1964 (B.C.)*.

<sup>3</sup> R.S.B.C. 1960, c. 72.

of the British Columbia Supreme Court Act Amendment Act, 1964,<sup>4</sup> was *ultra vires* the Legislature of the Province. Section 3 of the amending Act would have changed section 18 of the Supreme Court Act of British Columbia<sup>5</sup> to read as follows:

(1) Judges of the several County Courts are Judges of the Court for the purpose of their jurisdiction in actions in the Court, and in the exercise of such jurisdiction may be styled "Local Judges of the Supreme Court of British Columbia," and have in all causes and matters in the Court, subject to Rules of Court, power and authority to do and perform all such acts and transact all such business, in respect of causes and matters in and before the Court, as they are by Statute or Rules of Court in that behalf from time to time empowered to do and perform.

(2) Without thereby limiting the generality of the provisions of subsection (1), it is declared that the jurisdiction of the Judges of the several County Courts as Local Judges of the Supreme Court extends to the exercising of all such powers and authorities, and the performing of all such acts, and the transacting of all such business as may be exercised, performed, or transacted by the Supreme Court or any Judge thereof under the provisions of

(d1) the *Divorce and Matrimonial Causes Act* as amended by the *Divorce Jurisdiction Act* and by the *Marriage and Divorce Act* of Canada; . . .

Two questions were raised by the original reference; the first being whether the legislation was of a type included in the subject matter set out in section 92(14) of the B.N.A. Act, which reserves legislation relating to "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts" to the Provincial legislatures, or whether it was legislation in respect of marriage and divorce, which is a field reserved exclusively to the Dominion Parliament under section 91(26) of the B.N.A. Act. The second question was, whether the legislation infringed the appointing power of the Governor-General of Canada, to whom, by section 96 of the B.N.A. Act, is given the sole authority to appoint Superior, District, and County Court Judges.

When the reference came to the Court of Appeal for British Columbia before Bird C.J.B.C., Davey, Sheppard, Norris, and Tysoe J.J.A. the learned justices were unanimous in holding that the amendment in question was *ultra vires* the Provincial legislature. All except Bird C.J.B.C., who concurred with Tysoe J.A., gave separate judgments with slight variations in reasons, though not in result.

The Supreme Court of Canada was unanimous in reversing the decision of the Court of Appeal, Taschereau C.J.C., Cartwright, Fauteux, Abbott, Martland, Hall, and Spence J.J. concurring in the reasons given by Ritchie J., and Judson J. giving separate reasons concurring in result.

This note will discuss the two points raised in the reference and the appeal under the headings (i) The Interplay of ss. 92(14) and

<sup>4</sup> S.B.C., 1964, c. 56.

<sup>5</sup> R.S.B.C. 1960, c. 374.

91(26) of the B.N.A. Act, and (ii) The Conflict with Section 96 of the B.N.A. Act.

*The Interplay of ss. 92(14) and 91(26) of the B.N.A. Act*

On this question the British Columbia Court of Appeal refused to come to any definite conclusions as a whole although Sheppard J.A. decided definitely that the provincial legislature has jurisdiction to constitute a divorce court and to designate the offices within it and their jurisdiction. Because of his decision on the s. 96 point Norris J.A. did not feel constrained to make a determination on this matter, while Davey J.A. indicated that he could see no problem arising because the legislation in question merely authorized officers of the Supreme Court to exercise a jurisdiction pre-existing in the Court.

Tysoe J.A., in a comprehensive judgment, also arrived at the conclusion that he was not bound to decide the question. He did, however, examine the arguments of counsel on the point, explaining that opinion has mainly drifted into two lines of cases extending back to 1888. One line held that the province may validly legislate to create courts having jurisdiction in divorce; the other, that the province has no power within s. 92(14) to do so since "all matters concerning divorce are expressly reserved to the Dominion Parliament."<sup>6</sup>

The cases holding that the provincial legislature may validly deal with procedure in divorce matters begin with the decision in *Regina v. Bush*,<sup>7</sup> where, in considering the propriety of the appointment of magistrates by the Lieutenant-Governor of Ontario, it was held that s. 92(14) confers "upon the Provincial Legislatures the right to regulate and provide for the whole machinery connected with the administration of justice in the Provinces, including the appointment of all the Judges and Officers requisite for the proper administration of justice in the widest sense, reserving only the procedure in criminal matters."<sup>8</sup> The only curbs superimposed upon this power by the B.N.A. Act are to be found in sections 91(27) (Criminal Procedure), 96 (Appointment of Superior, District, and County Court Judges), 100 (Payment of Salaries of s. 96 Judges), and 101 (Establishment of additional Courts by the Dominion). This view was referred to with approval in *Sheppard v. Sheppard*<sup>9</sup> where it was stated that until the Dominion creates a divorce court ousting provincial jurisdiction, the provincial legislature is quite competent to move in the field. Further, this view has been clearly accepted by the Supreme Court of Canada in *Reference re Adoption Act, etc.*<sup>10</sup> where Duff C.J.

<sup>6</sup> *Scott v. Scott* (1891), 4 B.C.R. 316, at p. 319 (C.A.).

<sup>7</sup> (1888), 15 O.R. 398; 4 Cart. 460 (C.A.).

<sup>8</sup> *Ibid.*, at pp. 403-404, *per* Street J.

<sup>9</sup> (1908), 13 B.C.R. 486, at p. 519. Approved by the J.C.P.C. in *Watts v. Watts*, [1908] A.C. 573, at p. 579.

<sup>10</sup> [1938] S.C.R. 398, at p. 408.

quoted, with obvious approval, from the judgment of Street J. in the *Bush* case.<sup>11</sup>

The other line of cases descends from the B.C. case of *Scott v. Scott*<sup>12</sup> which was applied in several subsequent decisions.<sup>13</sup> The *Scott* case held provincial legislation conferring an appellate jurisdiction in divorce on the Supreme Court of B.C. to be *ultra vires* as an infringement on the federal power in divorce and matrimonial causes, commenting that "since Confederation *all* matters concerning divorce are expressly reserved to the Dominion Parliament."<sup>14</sup> However, while refusing to decide the question positively, Tysoe J.A. indicated that there are several cases criticising *Scott*, making particular reference to the Manitoba case of *Bilsland v. Bilsland*<sup>15</sup> where the Manitoba Court of Appeal firmly refused to follow the B.C. authority, Perdue C.J.M. declaring that in his view "the learned Judges . . . did not pay sufficient regard to sub-head No. 14 of sec. 92 of the B.N.A. Act."<sup>16</sup> From his judgment it seems clear that Tysoe J.A. would have held in favour of the provincial power had he felt himself bound to act.

In the Supreme Court of Canada the judgment of Sheppard J., finding that the Legislature of British Columbia may validly legislate to constitute, maintain, and organize a court having jurisdiction in divorce, was approved and affirmed.<sup>17</sup> The case of *Watts v. Watts*<sup>18</sup> which was decided by the Privy Council in 1908 was taken as conclusive of the point, Judson J. stating that since that case "there has been no doubt that the Supreme Court of British Columbia has this jurisdiction." In *Watts* it was the decision of the Privy Council that, on British Columbia's entry into Confederation in 1871, the body of received law included the English law relating to divorce as set out in the Act of 1857, the Supreme Court of the Province then possessing jurisdiction under the Act. No federal statute having been passed to affect the law or the power of the court, such law and jurisdiction have subsisted to the present day.

The writer of this note is of the opinion that the view favoured by Sheppard and Tysoe J.A. and affirmed by the Supreme Court of Canada is unimpeachable. In a province which has divorce legislation comparable to the Act of 1857 there must, *prima facie*, exist a right, in a proper case, to the remedy of divorce. In the field of marriage and divorce the Dominion has an absolute and all-inclusive right to legislate. The federal authorities have, however, never exercised the entire scope of that general power. This then is the classic example of an "un-occupied field." The province, by turning to s. 92(14), may

<sup>11</sup> *Supra*, footnote 7, at pp. 403-405.

<sup>12</sup> (1891), 4 B.C.R. 316 (C.A.).

<sup>13</sup> *E.g. Brown v. Brown* (1909), 10 W.L.R. 15, 14 B.C.R. 142 (C.A.); *Tytler v. Jamieson*, [1935] 3 W.W.R. 510, 50 B.C.R. 263 (C.A.).

<sup>14</sup> Emphasis added.

<sup>15</sup> [1922] 1 W.W.R. 718, 31 Man. R. 422 (C.A.).

<sup>16</sup> *Ibid.*, at p. 720.

<sup>17</sup> [1965] S.C.R. 490, 51 D.L.R. (2d) 623, at p. 495 (S.C.R.), 628 (D.L.R.).

<sup>18</sup> [1908] A.C. 573 (P.C.).

take steps to create a means of enforcing the rights conferred on the subject, i.e., establish a court of appropriate jurisdiction or, allow the case to be brought before an existing court of proper gravity. Indeed as Viscount Haldane said in the case of *Board v. Board*:

Had the Legislature of the Province enacted that its tribunals were not to give effect to the right which the Dominion Parliament had conferred in the exercise of its exclusive jurisdiction, a serious question would have arisen as to whether such an enactment was valid. . . .

If the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the King's Courts of justice. In order to oust jurisdiction, it is necessary, in the absence of a special law excluding it altogether, to plead that jurisdiction exists in some other Court.<sup>19</sup>

Such power in the province would be displaced if the Dominion pursued a more complete implementation of s. 91(26) by means of s. 101. As is stated in *Power on Divorce*:

Sec. 92(14) of the B.N.A. Act gives the provinces authority over the "administration of justice in the province, including the constitution, maintenance and organization of the provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts." The provincial courts and legislatures have therefore acted on the view that the procedure in divorce actions is, at least in the absence of dominion legislation, a matter within the competence of the provincial legislature. (*Reference re Divorce Jurisdiction* (1952), 29 M.P.R. 120; 2 D.L.R. 513; 4 Abr. Con. (2nd) 683 (C.A.)). There is little doubt, however, but that procedural provisions could be included in a dominion divorce Act as necessarily incidental and ancillary to the main objects thereof as they are in the Bankruptcy Act.<sup>20</sup>

#### *The Conflict with Section 96 of the B.N.A. Act*

On the second question of the reference the unanimous answer of the British Columbia Court of Appeal was that the proposed amendment infringed s. 96 of the B.N.A. Act, which provides:

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

Davey J.A. found that although the province has the power to confer the jurisdiction, the Local Judges were not validly appointed Superior Court Judges under s. 96. Sheppard J.A. enlarged upon a similar finding by pointing out that Local Judges were limited, according to the cases,<sup>21</sup> to hearing matters in chambers. The exercise of jurisdiction in divorce is a part of the judicial power of a Superior Court. Therefore, the legislation in question purported to confer upon Local Judges a power quite foreign to their normal and usual jurisdiction; a power at the very least analogous to that of a Superior Court Judge, and in the particular field under consideration, a power identical to it. As such, the legislation is *ultra vires* the province

<sup>19</sup> [1919] A.C. 956, at p. 962 (P.C.).

<sup>20</sup> *Power on Divorce* (1964), 2d. ed., (J. D. Payne, ed.), p. 2.

<sup>21</sup> *Wakefield v. Turner* (1898), 6 B.C.R. 216; *Brigman v. McKenzie* (1897), 6 B.C.R. 56; *MacKintosh v. MacKintosh* (1961), 35 W.W.R. 288 (B.C.S.C.).

since, by s. 96, only the Governor General may appoint Superior Court Judges.<sup>22</sup>

In his approach, Norris J.A. appeared to say that this type of legislation falls either under s. 92(14) or under s. 96. That is, the appointments may be valid under either section, depending upon the "pith and substance of the legislation". Agreeing with the reasoning of Tysoe J.A. he found that the "pith and substance" of the amendment did not relate to the administration of justice within the province and declared the amendment to be *ultra vires* the Provincial Legislature because it encroached upon the powers of the Governor General, given exclusively to him by s. 96.<sup>23</sup>

In the most comprehensive of the judgments in the case, Tysoe J.A. pointed out that the issue involved here did not arise from an attempt to increase or extend the jurisdiction of the County Courts or their judges *per se*; nor from the appointing of County Court Judges to be local Judges of the Supreme Court since such appointments are in fact made by the Governor General. He stated that the true problem was whether a provincial legislature has the power to confer full Supreme Court jurisdiction in one branch of the law upon one who is not a judge of the Supreme Court. After reviewing the relevant cases<sup>24</sup> the learned Judge concluded their purview to be that if the province appoints someone to an office, which office is endowed with a jurisdiction approaching or coinciding with that of a s. 96 Judge, then, notwithstanding any right of appeal or any limitation to a specified branch of the law, the appointment is *ultra vires* as offending s. 96. In this case, he found that the powers given to the Local Judges were unlike any they had possessed before and were identical to those of a Supreme Court Judge dealing with divorce and matrimonial causes, a situation tantamount to their appointment to

<sup>22</sup> Sheppard, J.A. was applying the tests laid down in *Labour Relations Board of Saskatchewan v. John East Iron Works*, [1948] 2 W.W.R. 1055, [1949] A.C. 134:

- (a) whether the board exercised a judicial power;
- (b) if so, whether in that exercise it was a tribunal analogous to a superior, district, or county court and, therefore, within section 96 of the B.N.A. Act:

and, *Attorney General for Ontario and Display Service Company v. Victoria Medical Building Ltd.*, [1960] S.C.R. 32:

- (a) Is the jurisdiction conferred an original one (or does the matter arise by way of reference)?
- (b) Is it of a type normally foreign to the appointee's office?
- (c) Is the jurisdiction analogous or identical to that of a section 96 Judge?
- (d) Does the appointee have a power of final adjudication?

<sup>23</sup> See the case of *Gallagher v. Lynn*, [1937] A.C. 863, 106 L.J.P.C. 161, at p. 870 (A.C.), *per* Lord Atkin.

<sup>24</sup> *Colonial Investment and Loan Co. v. Grady* (1915), 8 W.W.R. 995, 24 D.L.R. 176; *Labour Relations Board of Sask. v. John East Iron Works*, *supra*, footnote 22; *Reference re Adoption Act etc.*, [1938] S.C.R. 398; *Toronto Corporation v. York Corporation and Attorney-General for Ontario*, [1938] 1 W.W.R. 452, [1938] A.C. 415; *Attorney-General for Ontario and Display Services Co. v. Victoria Medical Buildings, Ltd.*, *supra*, footnote 22; *Attorney-General for Ontario v. Attorney-General for Canada*, [1925] 1 W.W.R. 1131, [1925] A.C. 750.

be Judges of that Court. Hence the legislation invaded the s. 96 appointing power.

In the Supreme Court of Canada the views taken by the members of the Court of Appeal were totally rejected. Ritchie J. speaking for the majority adopted the attitude that the legislation was not concerned with conferring jurisdiction "upon persons" but with "defining the jurisdiction of courts".

The Provincial Legislature is by virtue of the provisions of s. 91(26) of the *B.N.A. Act* precluded from making substantive changes in the law of divorce as it existed in British Columbia at the time when that Province entered into Confederation, but the impugned legislation does not in my opinion create any substantive right or make any changes in the law or jurisdiction in that regard. The right to grant a divorce in British Columbia remains vested in the Supreme Court as it previously did and the effect of the new legislation is limited to reorganizing the administration of justice in that Court by allocating jurisdiction under the *Divorce and Matrimonial Causes Act* . . . to courts presided over by Local Judges of the Supreme Court appointed by the Governor-General. . . .<sup>25</sup>

This, he points out, is a valid exercise of provincial power under section 92(14).

In his reasons, the learned judge also disposes of two other objections to the legislation which were voiced in the Court of Appeal. The first was that Local Judges of the Supreme Court are authorized by the legislation to preside over courts exercising the jurisdiction of superior courts, but that as County Court Judges and as Local Judges they have not been appointed in accordance with section 99 of the *B.N.A. Act* which guarantees security of tenure to superior court judges. Section 99 reads as follows:

The Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor-General on Address of the Senate and House of Commons.

In answer, Ritchie J. states that in his opinion, so long as the Local Judges are appointed by the Governor-General "during good behaviour", it does not matter that the terms of their appointments are limited to the periods during which they are Judges of the County Court.

. . . [T]he provisions of section 92(14) empower the provincial legislature when reorganizing the courts of the Province to allocate jurisdiction in divorce and matrimonial causes to a court presided over by a judge who is so appointed.<sup>26</sup>

The second objection was ably stated by Davey J.A. the Court of Appeal:

The letters patent of the Governor-General appointing the several County Court Judges to be Local Judges of the Supreme Court are not valid appointments of superior Court Judges under s. 96, since the *Supreme Court Act*, passed by the Provincial Legislature specifies who the Local Judges shall be and thereby in effect requires the Governor-General to appoint the County Court Judges to be the Local Judges, or to make no appointment at all, instead of leaving the Governor-General free to exercise his power at large, subject only to the provisions of the *Judges Act*, as s. 96 intends.<sup>27</sup>

<sup>25</sup> *Supra*, footnote 17, at p. 496 (S.C.R.), 628 (D.L.R.).

<sup>26</sup> *Ibid.*, at p. 499 (S.C.R.), 631 (D.L.R.).

<sup>27</sup> *Supra*, footnote 2, at p. 449 (D.L.R.).

Ritchie J. distinguishes the present case from the leading case of *Attorney-General for Ontario v. Attorney-General for Canada*<sup>28</sup> which lies at the basis of the contention. In that reference, legislation of the Province of Ontario authorizing the Lieutenant-Governor to assign certain judges of the High Court to be judges of the Court of Appeal, and to designate certain judges to hold the office of Chief Justice of Ontario and of the High Court, was held to be *ultra vires* as inconsistent with section 96. The distinction he makes is one between "the power to designate or appoint individual judges of the Superior and County Courts which is vested in the federal authority and the power to define the jurisdiction of the courts over which those judges are to preside, which in civil matters is exclusively within the provincial field". The British Columbia legislation, he finds, represents the exercise of a power of the latter variety.

Judson J., in a separate opinion, also thought this case "widely different" from *A.-G. for Ontario v. A.-G. for Canada*<sup>29</sup>. Moreover, he had no problem whatsoever in finding that there is no conflict at all with section 96. The Local Judges can have complete control over the trial in divorce actions in their capacity as Local Judges; it is still the Supreme Court that is functioning. The fact that Local Judges have never before exercised such complete control over trials is not relevant.

It should be noted that Judson J. was prepared to go further and hold

. . . that the Province of British Columbia is competent to empower the County Courts to exercise this jurisdiction and that no constitutional limitation would arise from s. 96 of the *B.N.A. Act*, if the Province were to choose to frame its legislation in this way.<sup>30</sup>

From the above outline it may readily be seen that, in relation to the section 96 question, the Court of Appeal for British Columbia and the Supreme Court of Canada adopted widely divergent approaches to the problem and achieved diametrically opposite results. The opinion of the learned members of the Court of Appeal may be summarized in the following terms. Because legislation of British Columbia had made divorce a matter for superior courts, an attempt by the Province to give the same or similar jurisdiction to *anyone*, other than those persons lawfully appointed by the Governor-General to be superior court judges constitutes an appointment of such judges not in accordance with section 96 of the *B.N.A. Act*. It matters not that the persons upon whom the Province confers the jurisdiction are already Federal appointees. The Province is as much forbidden to empower a Local Judge of the Supreme Court to exercise the full jurisdiction of a Supreme Court Judge as it is to appoint the chairman of a Provincial board to be a superior, district or county court judge by vesting him with the same jurisdiction and function as his federally appointed colleague.

<sup>28</sup> [1925] A.C. 750.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Supra*, footnote 17, at p. 502 (S.C.R.), 625 (D.L.R.).

The answer of the Supreme Court to this approach is that the legislation under reference does no more than to re-organize the administration of justice in the Province: a valid exercise of the power granted under section 92(14). The legislature is not appointing anyone to anything by merely defining the jurisdiction of courts. This view is expressed clearly in a statement made by Ritchie J.<sup>31</sup>

He points out that in the *Adoption Act*, *John East Iron Works*, and *Display Services* cases<sup>32</sup>, which had been used as the basis for attacking the legislation here under reference, attempts had been made to confer jurisdiction on courts presided over by Provincial appointees, whereas in the present case, jurisdiction is being conferred on courts to which the Governor-General has appointed judges. In the former cases, the provincially appointed officials were precluded from exercising the "section 96 court" jurisdiction conferred by reason of the origin of their appointments. Here, however, there is no impropriety in the appointments. It is for the Province and the Province alone to define the jurisdiction of provincial courts presided over by federally appointed judges. As has been stated by Strong, J. in *In re County Courts of British Columbia*<sup>33</sup>

. . . if the jurisdiction of the courts is to be defined by the provincial legislatures that must necessarily also involve the jurisdiction of the judges who constitute such courts.

#### Conclusions

The answer given by the Supreme Court to the first question of the reference, as to whether the legislation was of a type included by section 92(14) of the B.N.A. Act, was clear and unambiguous. The Province may validly legislate in respect of procedure, but not substantive law, in divorce matters. The creation and maintenance of courts having jurisdiction in divorce is a procedural matter and included under section 92(14). This decision is consistent with the highest authority and puts the most logical construction on sections 92(14) and 91(26).

If reference is had merely to the B.N.A. Act it will be seen that those procedural matters not to be allowed to the provinces under section 92(14) are specifically excepted. Indeed, it was thought necessary to withhold the power over criminal procedure with definite and unequivocal words in two places: section 91(27) and section 92(14). The power over procedure in divorce is nowhere mentioned specifically, and should perforce fall under section 92(14), *unless* the Dominion takes clear steps under section 91(26) by means of section 101. Although the point has not really been in question since *Watts v. Watts*<sup>34</sup> was decided in 1908, this decision was necessary to quiet all debate.

<sup>31</sup> *Ibid.*, at p. 497 (S.C.R.), 629-630 (D.L.R.).

<sup>32</sup> *In re The Adoption Act*, *supra*, footnote 24; *Labour Relations Board of Saskatchewan v. John East Iron Works*, *supra*, footnote 22; *Attorney-General for Ontario and Display Services Co. v. Victoria Medical Building Ltd.*, *supra*, footnote 22.

<sup>33</sup> (1893), 21 S.C.R. 446, at p. 453.

<sup>34</sup> *Supra*, footnote 9.

In its decision on the section 96 question the Supreme Court has specifically rejected the "traditional" approach employed in the *Display Service* case.<sup>35</sup> That approach is not overruled here, but is implicitly confined to cases where provincially appointed boards and tribunals are endowed with jurisdiction usual to section 96 courts.

However, the Provinces have the power to enact legislation redistributing jurisdiction among section 96 courts. Indeed, it even appears that when jurisdiction is redistributed among section 96 courts (as between Superior Courts and County Courts),<sup>36</sup> the power lies solely in the provincial legislatures. In view of the decision on the first question of the reference this is not surprising. If the Province may *create* a section 96 court to handle divorce, then surely it may redistribute divorce jurisdiction among section 96 courts once they are created.

Because of the factual similarity between the *Display Service* case<sup>37</sup> and the present reference it is tempting to apply the tests laid down in that case. In *Display Service* the Court was dealing with an attempt to confer on Masters "all the jurisdiction, powers and authority of the Supreme Court [of Ontario] to try and dispose of" certain mechanics' lien actions. The Supreme Court responded by stating that there are two questions which it should ask itself. First, what is the nature of the jurisdiction conferred, and secondly, is the appointee given a power of final adjudication. In fine, the first query is broken down into three constituent parts. Is the jurisdiction conferred an original one (or do matters before the appointee arise by way of reference)? Is the jurisdiction of a type normally foreign to the appointee's office? Is the jurisdiction analogous or identical to that of a section 96 Judge? If the answer to all of the questions is "Yes" then it at once becomes apparent that the appointee is being given the jurisdiction, function, and office of a section 96 Judge and must be appointed by the Governor-General in order validly to exercise his attendant duties.

In this case, the Local Judges are indeed given the jurisdiction, function, and office of section 96 Judges. Their "saving grace" is that first, they are already officers of a superior court, and secondly, they are in fact appointed by the Governor-General. Thus, they are not excluded from fulfilling the duties charged to them by the Province.

The jurisdiction of the court in which a Local Judge sits and therefore the jurisdiction which he exercises, is a matter for the provincial legislatures under section 92(14). Only his appointment is a matter for the Governor-General.

M. J. COOMBS\*

<sup>35</sup> *Supra*, footnote 22.

<sup>36</sup> See the opinion of Judson J. in the final paragraph of his judgment, *supra*, footnote 17, at p. 502 (S.C.R.), 625 (D.L.R.).

<sup>37</sup> *Supra*, footnote 22.

\* M. J. Coombs, B.Sc. (Toronto), LL.B. (Osgoode), is a member of the 1966 graduating class.