THE SASKATCHEWAN SURROGATE COURTS.

II.

Motions and Citations.

In England the Registrar has, in the Probate Division, the authority and jurisdiction of a Judge in Chambers, except in a few special cases. Applications to him are made *ex parte* or on summons. The applications to the Judge are made *ex parte* or on motion. A well defined practice determines what applications are made *ex parte*, on summons or on motion, and to whom they should be made; it determines also the cases which must be proceeded with by citation. All such applications, whether they be made to the Judge or to the Registrar, and whether they be made by summons, motion or citation, are classed either in the contentious or the non-contentious class of business. Of course, in Saskatchewan all applications are made to the Judge, who has all the powers and jurisdiction of the English Judge and Registrar; but whether they should be made by motion, summons or citation, is a question which is not always of easy solution. In *Maurat estate*,[1] one of two co-executors had applied for probate. In a case like this, in England, the other co-executor may be cited and, if he fails to appear, his rights in respect of the executorship wholly cease; see sec. 16 of the English Probate Act of 1858, which was not incorporated into our statute. Our Surrogate rules provide for several kinds of citations, none of which covers a case like this one. *Maurat estate* (*supra*), decided that sec. 36 of our Act applied and that the English practice of 1870 should be followed, with the result that the co-executor could be cited in the same manner and to the same effect as in England; and that even though sec. 36 did not apply, the Court was at liberty to direct that the English procedure be adopted and it did so direct. Another point was also covered by that decision. In England, the Registrar to whom an application has been made may consider that there are difficulties in the matter which ought to be referred to the Court, and the directions of the Court in such cases are obtained on motion by the

[1] (1927) 3 W.W.R. 18.

applicant. The decision was to the effect that, under similar circumstances, in case of doubt, or of difficulties, the procedure by way of motion was the proper one to be followed here. This last point was also considered in *Hebert estate*,[2] where an application for probate had been made and there was a doubt as to whether certain obliterations in a will were to prevail; the Court directed that a motion be served upon the interested parties. These two decisions are based upon what was said above about the English practice of 1870 in non-contentious matters, the King's Bench practice to be followed in analogous contentious cases, and, when there is no analogy, the directions to be obtained from the Judge, subject, of course, to the Surrogate rules when they are susceptible of bringing any assistance. And it is not to be forgotten that, although the rules say nothing about it, we will naturally look into the practice followed in Ontario, and search the precedents and study the decisions of the Courts of that province on any point relating to those of our rules which have been borrowed from that province; and we will also have recourse to the precedents and authorities in force in the jurisdictions from which Ontario has drawn the rules which it has lent us. Litigants of our Surrogate Courts wishing to search for authorities and precedents have a wide field open to their activities. Referring to that subject His Honour Judge Widdifield said in the preface to his Surrogate Court Practice and Procedure:

> It is to be regretted that, in preparing the new Surrogate Court rules, the Board of County Court Judges did not frame a complete code of practice and procedure, instead of leaving the puzzled practitioner to wander through the mazes of Tristram & Coote.

If these remarks describe correctly the situation in Ontario they apply equally well to Saskatchewan, which has borrowed most of its Surrogate rules from Ontario; the lender could not lend more than he had himself.

Contentious Business.

Contentious proceedings may relate to: (a) Probate in solemn form, (b) the determination of which of two or more claimants is entitled to administration; (c) the revocation of probate or of administration.

(a) The executor, or the person entitled to administration with the will annexed, may desire to prove the will in solemn form. As

[2] (1927) 3 W.W.R. 24.

stated by *Mortimer*,[3] should probate in common form be taken, such probate may be called in at any time thereafter at the instance of any person adversely affected by it The executor or administrator with the will annexed will be then compelled to prove the will in solemn form and he may not then have an easy task before him. The witnesses to the will and to the testamentary capacity of the testator may be all dead. If the solemn form proceedings result in the revocation of the will, the executor or administrator with the will annexed will have to account for legacies paid under the will, his only protection being his right of recourse against the recipients of such payments. But if a will has been proved in solemn form, no person who has been a party or privy to the proceedings can afterwards put the executor again to the proof of it,[4] except in case of fraud or when a later will has been found. Rule 28 directs the manner of proceeding: All persons having an interest in upholding or attacking the validity of the will—and these include all persons who take under the will, or who would take if a previous will should be established, or who would share in the estate in case of an intestacy—are to be served with a citation calling upon them to enter an appearance and warning them that in default they will be bound by the result of the proceedings taken in their absence. Such citation is made by an order to be granted *ex parte* by the Judge upon an affidavit showing all the facts on which the application is grounded and disclosing the names and addresses of all the persons who have an interest as aforesaid. The obtaining of the said order makes the proceeding a contentious one. It seems that the appearance must state the reasons of the party for invalidating the will, e.g., that it was not duly executed, or that the signature has been forged, or that the execution was procured by fraud or undue influence, or that the testator had no testamentary capacity at the time, etc.; or the appearing party may insert in his appearance a notice to the effect that he merely insists upon the will being proved in solemn form of law and only intends to cross-examine the witnesses produced in support of the will (Rule 37). The party who obtained the citation will then apply to the Judge for directions. The order of directions may provide for production of documents, examination for discovery, the examination of witnesses in or out of the Province (Secs. 28 and 29 of the Act), the appointment of an administrator

[3] (1911) p. 577.
[4] *Wytcherley* v. *Andrews* (1871) 40 L.J.P. 56.

pendente lite (Sec. 55 of the Act). It may settle the issue, e.g., in the following manner: A affirms and B denies that the will was duly executed by C, or: A affirms and B denies that the making of the will was procured by the fraud and undue influence of B. It may direct the date and place of trial, and whether the case shall be tried with or without a jury.

Applications for probate in solemn form may also take place when the executor, or administrator with the will annexed, on lodging papers for a grant in common form, finds that an interested party has entered a caveat disclosing his interest and asking for probate in solemn form. The clerk will send a warning to the caveator, requesting him to enter an appearance and to set forth his interest, failing which the Court will proceed to do such acts, matters and things as shall be needful and necessary to be done in and about the premises. After the appearance has been entered the executor or administrator with the will annexed may issue the citation referred to in Rule 28 and apply for directions under Rule 27, whereupon the case will proceed in the manner above outlined. If the said executor or administrator refuses to proceed, the other interested parties may propound the will.

(b) When there is a contest as to who should have the administration, the following proceedings generally take place: The applicant lodges his application but finds that a caveat has been entered. The caveator is warned and enters an appearance. The applicant then proceeds to obtain an order for directions, as above stated. Questions of legitimacy or of relationship to the deceased are determined in these proceedings, which are known in the English practice as administration actions or interest suits. It may be noted here that the Surrogate Court's determination on such questions, as well as on any question necessary to be tried for the purpose of ascertaining who shall have the administration, or whether or not an alleged documentary paper should be probated, estops the parties or the persons claiming through them from afterwards re-opening the question in any other Court.[5]

(c) The proceedings for the revocation of grants relate to the validity of the will, or to the interest of the person appointed administrator.

A person may seek to have the probate revoked in order to obtain either the probate of an earlier will or a grant of adminis-

[5] *Spencer* v. *Spencer* 40 L.J.P. 45; *In re Noble Estate* (1927) 1 W.W.R. 938.

tration on intestacy. He issues a citation (Rule 33) calling upon the grantee to bring the grant into the Clerk's office. He will also issue a citation (Rule 28) calling upon all persons having an interest in upholding or attacking the validity of the will to enter an appearance, and warning them that in default they will be bound by the result of the proceedings. The executor may enter an appearance, after which the applicant will apply for an order for directions. The Court may pronounce for the validity of the will, in which case it will decree probate thereof in solemn form of law. If it pronounces for its invalidity, it will revoke the orginal grant and decree probate in solemn form of law of any other will that has been satisfactorily established, or order administration as on intestacy. See *Re Estate Hill*,[6] where a Court of Probate set aside a will probated in common form 24 years previously, the appeal Court refusing, however, to be bound by the lower Court's finding, which was based on the testimony of two interested parties.

The revocation of letters of administration may be asked by persons claiming an interest under an alleged will, or who contend that the grant has been made to a party insufficiently interested in the estate. In the first case, the contest is as to the validity of the will propounded; in the other, the contest is, in most cases at least, as to the relationship of the administrator to the estate, a question of legitimacy or pedigree being thereby involved. The same proceedings are to be followed as in the case of revocation of probate: citation to bring in the grant, citation of all interested parties, application for directions, etc.

One can easily realize the importance of the matters which may be tried by the Surrogate Courts. In the first place, there is no limit to their jurisdiction as to the amount; they may decide with or without a jury, e.g., in the case of an intestate having left millions of dollars, that A. is his sole child and heir at law, and that B., who claims to be also a son of the deceased, is illegitimate. They may decide, with or without a jury, that a will under the provisions of which fortunes are given to legatees, is not entitled to probate, either because, e.g., the testator was insane or because he has been induced by fraud or undue influence to execute it; and it goes without saying that all those decisions of the Surrogate Courts, unless reversed on appeal, will bind any other Court.

[6] 34 N.S. Rep. 494.

ARE THE SASKATCHEWAN SURROGATE COURTS SUPERIOR COURTS?

This brings me to the question: Are the Surrogate Courts of Saskatchewan Courts of superior jurisdiction?

I have already pointed out that the Judge of the Court of Probate of England had "rank and precedence with the Puisne Judges of her Majesty's Superior Courts of common law at Westminster"; that the powers and jurisdiction of that Court were allotted to the Supreme Court of the North-west Territories, whose successor, the King's Bench, exercises them concurrently with the Surrogate Courts; that the latter are vested with the same jurisdiction as the King's Bench and the Probate Division in probate matters. It should follow that if the English Court of Probate was a Superior Court our Surrogate Courts must necessarily be so.

DIVORCE COURT AND ADMIRALTY COURT WERE SUPERIOR.

If a new Court was now created and given the power of exercising in divorce and matrimonial causes the jurisdiction which is possessed by the King's Bench in such matters, that new Court would no doubt be a superior one. It would be a superior Court just as much as the one which was created by the Divorce Act of 1857. This last mentioned Court was considered a superior one. In *Foster* v. *Foster*,[7] Cockburn, C.J., said:

> I am very happy to think we are not called upon to decide so intricate and difficult a question. And so, also, as to whether in this case the exercise of this jurisdiction by the Court for Divorce and Matrimonial Causes (assuming that these parties are beyond its jurisdiction) is matter on which this Court would interfere by way of prohibition or not. Whether that Court, as I am strongly disposed to think it is, being a Court of co-ordinate jurisdiction, although the subject-matter of jurisdiction differs from that of the other superior Courts, is one to which a prohibition ought properly to be issued from this Court, is another question, upon which it is unnecessary, I am glad to think, to pronounce any opinion.

And Blackburn, J., said at p. 316:

> It is not necessary to decide whether or not, if the Court for Divorce and Matrimonial Causes were to exceed its jurisdiction, it is a Court to which we could issue a prohibition. I am rather inclined to think, notwithstanding the high dignity of the different members of that Court, that it would be subject to our jurisdiction to restrain it, if it exceeded its jurisdiction.

[7] (1863) 32 L.J.Q.B. 312 at p. 314.

But the fact that the Divorce Court can be restrained by prohibition does not take away from it its character of Superior Court. In *James* v. *The London & S.W. Railway*,[8] Martin, B., said:

The last point made for the company was that under the present constitution of the Court of Admiralty under the Admiralty Court Act, 1861, this writ of prohibition does not lie at all, and that the effect of that Act was to put the now existing Court of Admiralty on the same footing in all respects as one of the Superior Courts. Now there are four superior Courts in this country, one the Court of Chancery, and the others, the three Courts of Common Law at Westminster Hall, and I apprehend it is competent to none of those Courts to direct a writ of prohibition to any of the others, and that the law vests in those Superior Courts the power of determining whether they have jurisdiction or not, subject of course to a writ of error, or any other legal mode of questioning the decision to which they may come. But with respect to all the other Courts in this country, I apprehend that they are all inferior to the four superior Courts I have mentioned; and as regards the Court of Admiralty prohibitions have issued for centuries in respect of proceedings in the Court of Admiralty from all the superior Courts; and from the form in which the Admiralty Court Act of 1861 is framed I am satisfied that it was not intended to take away that right of prohibition.

Cleasby, J., said at p. 95:

Well, the Court of Admiralty then had a limited jurisdiction. Nothing that has taken place since has prevented it from being a Court of limited jurisdiction. For the purpose of providing judges for the Judicial Committee of the Privy Council, it may be found classed by interpretation clauses in statutes with the superior Courts, or it might be generally called a superior Court, but that does not prevent it from being a superior Court having a limited jurisdiction. The jurisdiction has been enormously enlarged by the Act referred to; but that does not shew that it is not still a Court with a limited jurisdiction. On the contrary, all these specific enlargements assume it still to be a Court with limited jurisdiction.

The same case came later in the Exchequer Chamber.[9] The following is an extract from the judgment of each Judge.

Willes, J., at p. 187:

Unless that be made out, the Court of Admiralty, assuming to itself to take away that remedy, as it has assumed to do in the present case, is acting beyond its jurisdiction, and being a Court of limited jurisdiction, it is subject to prohibition if it exceeds that jurisdiction. There are other Courts in this country which are called "superior," but which are limited in their jurisdiction, and are all subject (just as inferior Courts are) to be restrained by prohibition.

[8] (1872) 41 L.J. Ex. 82.
[9] (1872) 41 L.J. Ex. 186.

Blackburn, J., at p. 190:

Notwithstanding various enactments which have increased the power and jurisdiction of the Court of Admiralty and which may have made it a Superior Court and a Court of Record, its jurisdiction is still limited, and I think therefore that the old common law power of prohibiting it if it exceeds its jurisdiction, has not been taken away.

Keating, J., at p. 191:

Now where the Legislature gives an increase of jurisdiction to a Court of limited jurisdiction—and the Admiralty Court is confessedly a Court of limited jurisdiction even if it be, as it probably is, a "superior" court—the conditions on which such increase of jurisdiction is given must be distinctly fulfilled before the new jurisdiction can be exercised.

No doubt the Saskatchewan Surrogate Courts may also be restrained by prohibition. In *Beamish* v. *Kaulbach*[10] the Supreme Court of Canada held that the Court of Probate of Lunenburg, in Nova Scotia, was not a superior Court within the meaning of section 17 of the Supreme and Exchequer Court Act. That legislation has since been amended. The Chief Justice said: "The proceedings before that Court are entirely different from those of a common law Court, and are subject to a writ of prohibition from the Supreme Court of Nova Scotia."

Probate Courts of Nova Scotia and New Brunswick are Superior.

That a Court, although limited in its jurisdiction may be a Superior one is amply demonstrated by the B.N.A. Act, sec. 96 of which enacts that 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. These Courts of Probate being thus excepted out of a list of Courts which consists of Superior, District and County Courts, it is evident that they belong, naturally and in the ordinary course of things, to one of these three classes of Courts. Our Court of Appeal, in *Rimmer* v. *Hannon*,[11] and the Appellate Division of the Supreme Court of Alberta, in *In Re Small Debt Recovery Act*,[12] have interpreted that section and they both found that the two said Probate Courts belonged neither to the "District" nor to the "County" class, and that they were "Superior". In the first case

[10] (1879) 3 S.C.R. 704.
[11] (1921) 3 W.W.R. 1.
[12] (1917) 3 W.W.R. 698 at p. 702.

Lamont, J., referring to the Probate Courts of Nova Scotia and New Brunswick, said at page 6: "That these Courts were considered Superior Courts I do not doubt." I will quote the following extract from the judgment of Harvey, C.J., in the second case:

For the purpose of reaching a proper conclusion on this I am not so sure that the Canadian and not the English conditions should be looked at for guidance. As I have already shown the provision excepting the Probate Courts did not appear in resolutions emanating from the Quebec conference or until the last draft of the Act which was passed by the Imperial Parliament and drafted by the Imperial law officers. The Court of Probate in England had then recently been established by 20-21 Vic. ch. 77 (1859), taking over jurisdiction from the ecclesiastical Courts. A reference to that Act and to *The Act establishing The Court for Divorce and Matrimonial Causes* passed in the same year, 20-21 Vic. ch. 85, shows clearly that the English Court of Probate was deemed a Superior Court of the same importance as the old Superior Courts of law and the Court of Chancery, and a few years later upon the passing of *The Judicature Act* it became one of the divisions of the High Court. Within the knowledge then of the law officers and the members of the Imperial Parliament a Court of Probate was a Superior Court, and it seems not unreasonable to conclude that it is so considered within the meaning of sec. 96, but even a reference to the Nova Scotia Act does not satisfy me that the Nova Scotia Courts of Probate would be improperly described as Superior Courts. The recital of the English Act shows that the Court was established to exercise "jurisdiction in relation to the grant and revocation of probate of wills and letters of administration," and the Probate Courts of Nova Scotia, and probably of New Brunswick, though I have not had access to the statutes of that province in force at that time, exercised a similar jurisdiction.

Haultain, C.J.S., having concurred with Lamont, J., in *Rimmer* v. *Hannon* (*supra*) it may be said that we have the opinion of such high authorities as the Chief Justice of Saskatchewan, of the Chief Justice of Alberta and of one member of our Court of Appeal, now a member of the Supreme Court of Canada, in favour of the proposition that the Probate Courts of Nova Scotia and New Brunswick are, or were in 1867, superior Courts.

But are the Saskatchewan and Ontario Surrogate Courts Superior?

In *Rimmer* v. *Hannon* (*supra*) our Court of Appeal decided that the power to appoint the Saskatchewan Surrogate Court Judges belongs to the province. Lamont, J., said that the Probate Courts of Nova Scotia and New Brunswick were superior Courts the Judges of which were directed by said sec. 96 to be appointed by the

Lieutenant-Governors. He also said that the Ontario Surrogate Courts were neither District nor County Courts and that they were inferior Courts. Referring to them he said at p. 8:

> A perusal of the Act (C.S.U.C. 1859, ch. 16) satisfies me that they were not Superior Courts. That they were considered to be inferior to the Courts of Probate in Nova Scotia and New Brunswick is, I think, established by the fact that they had not the jurisdiction of those Courts in the matters above referred to as being ordinarily exercised by a Judge of a Superior Court.

He concluded that the Ontario Surrogate Courts, being inferior Courts, the appointment of its Judges was left, upon a correct interpretation of the Act, to the Lieutenant-Governor. And he added at p. 9:

> The Surrogate Courts of Saskatchewan are very similar in character, rank, and jurisdiction to the Surrogate Courts in Upper Canada at the date of the Union, and like those Courts bear no resemblance to the Superior, District, or County Courts referred to in sec. 96.

MacDonald, J., *ad hoc*, said at pp. 18, 19 and 20:

> The Surrogate Courts of Saskatchewan are essentially of the same kind and character as the Courts of Probate in Nova Scotia and New Brunswick, so that if the latter must be deemed to be Superior Courts so must the former. . . The provision that the Governor-General shall appoint the Judges of the Superior, District and County Courts in each province has been interpreted to mean that the Governor-General shall appoint the Judges of the Courts of the same character as the Courts by those names existing at Confederation, so the exception should be interpreted as extending to all Courts of the same character as the Courts of Probate then existing in Nova Scotia and New Brunswick.

It follows from what MacDonald, J., said that the Ontario Surrogate Courts were just as superior as the Nova Scotia and New Brunswick Probate Courts, and that, as in the case of the last mentioned Courts, the appointment of their Judges is to be made by the Lieutenant-Governor.

Gravelbourg, Sask. A. GRAVEL.

(To be Continued)