THE SASKATCHEWAN SURROGATE COURTS.

III.

The Circuit Court of Quebec.

Before beginning to consider the bearing of the B.N.A. Act upon the Surrogate Courts of Ontario with a view to ascertain whether or not it classed them, by implication or otherwise, among the inferior Courts, I wish to say something about the Cricuit Court of the Province of Quebec. That Court, like the Ontario Surrogate Courts, was ignored by the B.N.A. Act, that is to say it was not mentioned in the enumeration shown in sec. 96. Lamont, J., said in *Rimmer* v. *Hannon*[1] that it was decided in 1867 to give to the Dominion the right to appoint the Judges for the Courts highest in dignity, rank and jurisdiction, and that the Courts answering that description were the Superior, District and County Courts, and the Probate Courts. But these were not at the time the only Courts entitled to be classed among the highest in dignity, rank and jurisdiction. The Circuit Court certainly belonged to that class, although it was not a Superior, District, County or a Probate Court. Mr. Lefroy, in 37 D.L.R. 186 quotes some extracts from the laws in force at the time on the subject including the Lower Canada Statutes relating to the Circuit Court, and he concludes by saying: "But the fact that "District" was an alternative name to "Circuit" helps to explain the use of the word "District" in s. 96." MacDonald, J. *ad hoc* in *Rimmer* v. *Hannon* (*supra*), seems to have accepted that statement. He said: "In Lower Canada there were Circuit Courts, presided over by Judges of the Superior Court and it appears that these were sometimes called District Courts."[2] Perhaps a few words added by one who practised law at one time in Quebec will contribute to throw a little more light on that subject.

We have in Saskatchewan a District Court and a Surrogate Court for each Judicial District, as well as a King's Bench which covers the whole province. Quebec had, in 1867, a Superior Court and also a Circuit Court, and the jurisdiction of each was general and covered the whole province. Each one of these two Courts held its sit-

[1] 6 C.B. Rev. 448; (1921) 3 W.W.R. 1.
[2] See Annotation in 37 D.L.R., on page 186.

tings at the judicial centre of each Judicial District. These Judicial Districts always comprised more than one county each, and as the law authorised the Governor to fix one or more places in each county, where the Circuit Court sittings could be held, the result was that the Circuit Court, besides sitting at the same place as the Superior Court, e.g., in the Town of Arthabaska, judicial centre of the district of that name, sat also at Inverness, chief-place of the County of Megantic, being one of the counties comprised in the District of Arthabaska, and also at Drummondville, chief-place of the County of Drummond, being another one of the counties comprised in the Judicial District of Arthabaska. When the Circuit Court sat at Arthabaska, it was designated as the Circuit Court in and for the District of Arthabaska; when it sat at Inverness, it was designated as the Circuit Court in and for the County of Megantic. It might also have been held in, e.g., Leeds, in the County of Megantic (if the Governor had issued a Proclamation to that effect), and then it would have been designated as the Circuit Court in and for the County of Megantic at Leeds. The territory thus covered by the Circuit Court, consisting either of a whole district, or only of one of the counties of such district, was known as the "Circuit" of such Courts:[3] The word "County" has since been replaced by the words "Electoral District," and the said paragraph 2 of sec. 5, which has become sec. 65 of C. 145, R.S.Q. 1925, reads now as follows: "The word "Circuit" in this division, or in any Act relating to the administration of justice, shall mean the territorial division of a judicial District, or of an Electoral District, in and for which the Circuit Court at any place is held." And this definition of the word "Circuit," including, as it did in 1867, the district or county in which the Circuit Court was held, applied as well to the Superior Court, as may be seen by perusing article 41 of the Code of Civil Procedure of Lower Canada. That Code came into effect on June 28th, 1867, that is to say two days before Confederation was brought into existence. The said Sec. 41, which is part of the preliminary provisions relating to the procedure before the Superior Court, reads as follows: "When the real action has for its object an immoveable or immoveables, situated partly in one district or circuit, and partly in another, the suit may be brought in either." From all this it results, in my opinion, that if "District" was used as an alternative to "Circuit," these words had reference only to each one of the respective territorial divisions or districts into which the province

[3] See Par. 2, S. 5, C. 79, C.S.L.C. 1861.

was divided for the purpose of the administration of justice by the Superior Court and the Circuit Court.

The following is a summary of the principal Courts in existence in the four provinces in 1867:

Upper Canada—Superior, District, County, Surrogate.

Lower Canada—Superior, Circuit.

New Brunswick—Superior, Probate, County (from and after June 17, 1867).

Nova Scotia—Superior, Probate.

I might have omitted from this list the Probate Courts of Nova Scotia and New Brunswick, because the highest Courts of two of the prairie provinces have already declared that these two Probate Courts are included in the "Superior" category. Sec. 96 of the B.N.A. Act, which deals only with the appointment of Judges of the Courts highest in dignity and importance, makes no mention of the Surrogate Court Judges or of the Circuit Court Judges. What is the reason of that omission?

In the case of the Circuit Court, the reason is not that, when referring to the territorial divisions in which it exercised its jurisdiction, the words "District" and "Circuit" were used indifferently in the statutes in force in 1867. The same words were used in respect to the Superior Court. The Circuit Court has never been called a District Court, there never was a District Court in Quebec, and the only relation that the Circuit Court, or, for that matter, the Superior Court, ever had to the word "District" is the fact that both of them were held in the different "Districts" or "Circuits" of the province.

Such omission would appear, at first sight, all the more surprising on acount of the fact that Sir George E. Cartier was Attorney-General at the time that the B.N.A. came into force. He had been Premier of Canada and he was Attorney-General during the last few years immediately preceding Confederation. Sir George was a jurist of great renown, probably the greatest of his day. He knew well the Circuit Court, which was established in his own City of Montreal in 1843, by 7 Vic. C. 16, when he was a young practising advocate. Why did he not see to it that the Circuit Court was included in said sec. 96 of the B.N.A. Act, with which he had, by reason of his political standing and of his official functions, a great deal to do, possibly more than anybody else?

At the time of the passing of that Act, the Circuit Court had been in existence for twenty-four years, and no Circuit Court Judges had

ever been appointed. "The Court was held throughout Lower Canada, . . in each of the Districts and Circuits, . . by one of the Judges of the Superior Courts:"[4] Nobody thought in 1867 of the eventuality of appointing Circuit Court Judges. The province had not had any for twenty-four years, and it remained without any for twenty-six years more. It was only in 1893 that the Circuit Court was provided with Judges. There was, consequently, no reason whatever why the framers of the B.N.A. Act should have mentioned the Circuit Court in the list of Courts whose Judges were to be appointed by the Dominion. The Circuit Court had then its Judges, who were the Judges of the Superior Court, and the Act duly provided for the appointment of the Superior Court Judges by the Dominion.

Turning now to the Surrogate Courts of Ontario, we find that Upper Canada had in 1867, with regard to these Courts, a legislation similar to the Lower Canada law respecting the Judges of its Circuit Court

The Upper Canada Statute[5] reads as follows: "The senior Judge of the county Court in each County shall be ex officio Judge of the Surrogate Court for the County . . . ."

The Lower Canada Statutes[6] said: "A Court of record to be called the Circuit Court and having jurisdiction throughout Lower Canada shall continue to be holden every year in each of the District and Circuits of Lower Canada, by one of the Judges of the Superior Court."

The framers of the B.N.A. Act had no more reason to provide for the appointment of the Judges of the Ontario Surrogate Courts than for the appointment of the Quebec Circuit Court Judges. They were faced, in both cases, with provincial legislation which fully covered the ground. Quebec had entrusted the administration of its Circuit Court to the Superior Court Judges, who were provided for by Sec. 96 of the Act; and Ontario had entrusted the administration of its Surrogate Courts to the County Court Judges, who were also provided for by the said Section.

Some twenty-six years afterwards, in 1893, Quebec decided that the administration of its Circuit Court in and for one of its Judicial Districts, namely the District of Montreal, be taken away from the Superior Court Judges and given to three Circuit Court Judges.

[4] S. 1, C. 79, C.S.L.C. 1861.
[5] S. 4, C. 16, C.S.U.C. 1859.
[6] S. 1, C. 79, C.S.L.C. 1861.

The Ottawa Government appointed the three Judges in question in that year, and provided for their salaries. That number has since been increased to four.

Forty-three years after Confederation, in 1910, Ontario decided to repeal its own law which gave the administration of its Surrogate Courts to the County Court Judges. It passed a law providing for the appointment of its Surrogate Court Judges by the Lieutenant-Governor-in-Council.

There is no doubt that in both cases the right procedure was followed; nobody has, to my knowledge, ever challenged the right of the Federal Government to appoint the Circuit Court Judges, neither the right of the Ontario Government to appoint the Surrogate Court Judges.

I think that it may be safely said that in order to ascertain whether the Judge of a particular Court is to be appointed by the Governor-General or by the Lieutenant-Governor, we must compare that Court with the Superior, District and County Courts in existence at the time of the Union, and that the comparison must bear on the character of the Court and the extent and nature of its jurisdiction both absolutely and relatively to the other Courts of the province (Lamont, J., in *Rimmer* v. *Hannon, supra*); and if it is found that such Court corresponds either to a Superior, a District or a County Court of pre-Confederation days, its Judges shall be appointed by the Governor. In the case of the Circuit Court, it was easy enough to find its prototype either in the County or the District Courts, although its similarity with either of them was not adequate, and in spite of the fact that, in some respects, its jurisdiction was inferior to that of the District and County Courts. The B.N.A. Act provided for the appointment by the Dominion of the Judges of these last mentioned Courts; consequently no doubt could arise as to who should appoint the Judges of the Circuit Court. The Ontario Legislature found likewise the prototype of its Surrogate Courts in the Probate Court mentioned in Sec. 96, although the similarity was not adequate, and in spite of the fact that the jurisdiction of its Surrogate Courts might have been less extensive than that of the said Probate Courts. The said two Probate Courts were the only ones that the B.N.A. Act could deal with, and it decided to leave the appointment of its Judges to the Lieutenant-Governors. Consequently no doubt can arise, in my mind at least, as to who should appoint the Ontario Surrogate Judges; they are to be ap-

pointed in the same manner as in Nova Scotia or in New Brunswick, that is to say, by the Lieutenant-Governor.

As above stated, the only Probate Courts whose Judges had to be provided for by the framers of the B.N.A. Act were those of Nova Scotia and New Brunswick. They had no occasion at all of devoting their attention to the Upper Canada Surrogate Courts. The importance of these last mentioned Courts, the extent of their jurisdiction and the question as to whether they had a status equal to the status of the two above mentioned Probate Courts was not, and could not be considered by Parliament at the time. It would have been perfectly idle for the framers of the Act to raise such a question on that occasion, just as it would have been idle for them to consider and study the importance of the Circuit Court, or its standing in relation to the other Courts. They were not to provide for things which were already provided for. Consequently it cannot be said that the B.N.A. Act classed the Surrogate Courts of Ontario among the inferior Courts by abstaining from mentioning them, together with the Probate Courts of Nova Scotia and New Brunswick, as Superior Courts whose Judges were to be appointed by the Lieutenant-Governors.

The question has some importance, because it might be raised again in Canada. Quebec never had any Probate or Surrogate Court. Should it decide to create one, who would appoint the Judges? If Mr. Justice Lamont's opinion must prevail, the Quebec Surrogate Courts Act which I am now imagining would have to be scrutinized closely. If it was a copy of the Nova Scotia or of the New Brunswick Act, the Court created by it would be a superior one and Ottawa would have to appoint and pay its Judges. If the imaginary Act in question was found to be more like the Ontario Act, or followed the latter Act closely enough, the new Court would be an inferior one and Quebec would have to appoint and pay its Judges. It would just depend how Quebec felt about it: if it were anxious to throw upon the Federal Government the obligation of paying the salaries of the Judges, it would draw the Bill along the lines of the Nova Scotia or of the New Brunswick Act; and if it wanted to appoint and pay the Judges itself, it would introduce in the Bill the features of the Ontario Act which, it is claimed, make the Surrogate Courts of that Province inferior to those of Nova Scotia and New Brunswick. And still, no matter how ingenious the legislator might be, and no matter what name he gave to the

new Court, he would have to confer upon it the jurisdiction which is possessed in probate matters by the Ontario, the Nova Scotia and the New Brunswick Courts, that is to say, he would have to confer upon the new Court jurisdiction in "the granting or revoking of probate of wills and of letters of administration, and in matters and causes testamentary, with power to issue process and hold recognizance and to hear and determine all questions relating thereto." In other words he would have to give to the new Court such powers as are absolutely necessary to make it a Probate or Surrogate Court.

And, after all, the Court of Probate which was created in England in 1857 had no more powers and no greater jurisdiction than those I have just mentioned; and they were considered sufficient to make that Court a superior one.

The framers of the B.N.A. Act wanted the Superior Court judges to be appointed by the federal Government, but they excepted out of that rule the Probate Courts of Nova Scotia and New Brunswick. They said, in effect, that although these Courts were superior, the appointment of their Judges would be left to the Provincial Governments. These Probate Courts were the only ones that the Act could deal with, and they were made an exception to the general rule applying to the superior Courts. As was said by Mr. Justice MacDonald in *Rimmer* v. *Hannon* (*supra*), the exception should be interpreted as extending to all Courts of the same character as the Courts of Probate then in existence in Nova Scotia and New Brunswick; and consequently the Surrogate Courts of Ontario, which existed then, as well as those, e.g., of Saskatchewan and of Manitoba, which were created later, being all of the same character as the Probate Courts of Nova Scotia and New Brunswick, fall within the exception, and the appointment of their Judges is a matter which belongs to the Provincial Governments.

Gravelbourg, Sask. A. GRAVEL.

(*To be Continued.*)