1965

*Feb. 1, 2
Apr. 6

THE ATTORNEY GENERAL OF BRITISH COLUMBIA ..... APPELLANT;

AND

LLOYD G. McKENZIE, Q.C. ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law—Validity of provincial legislation—Legislation conferring divorce jurisdiction on local judges of Supreme Court—Whether ultra vires—B.N.A. Act, 1867, ss. 91, 92, 96, 101—Supreme Court Act Amendment Act 1964, 1964 (B.C.), c. 56—Constitutional Questions Determination Act, R.S.B.C. 1960, c. 72—Supreme Court Act, R.S.C. 1952, c. 259, s. 37.

Pursuant to the *Constitutional Questions Determination Act,* R.S.B.C. 1960, c. 72, the Lieutenant Governor in Council of British Columbia referred to the Court of Appeal the question of determining the validity of part of s. 3 of the *Supreme Court Act Amendment Act 1964,* 1964 (B.C.), c. 56, which purports to confer jurisdiction in divorce and matrimonial causes upon County Court Judges sitting as local judges of the Supreme Court. By a unanimous judgment, the Court of Appeal held that the impugned legislation was *ultra vires*. The Attorney General for British Columbia appealed to this Court pursuant to s. 37 of the *Supreme Court Act,* R.S.C. 1952, c. 259.

Held: The appeal should be allowed.

Per Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Ritchie, Hall and Spence JJ.: The Dominion parliament has not seen fit to pass any legislation pursuant to its power under s. 101 of the *B.N.A. Act* providing for the establishment of Courts for the administration of the law of marriage and divorce in British Columbia. It was therefore within the legislative competence of the legislature of that province to pass laws relating to the constitution, maintenance and organization of such Courts. By virtue of s. 91(26) of the *B.N.A. Act* the provincial legislature is precluded from making substantive changes in the law of divorce as it existed in British Columbia at Confederation, but the impugned legislation does not 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 previously, and the effect of the new legislation is limited to reorganizing the administration of justice in that Court by allocating jurisdiction to Courts presided over by local judges of the Supreme Court. It cannot be said that this constitutes provincial legislation purporting to appoint judges of a Superior Court. It can only be characterized as a valid exercise of provincial power under s. 92(14) of the *B.N.A. Act.* The present legislation is not concerned with conferring jurisdiction "upon persons", but with defining the jurisdiction of the Courts. The provisions of s. 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 appointed by the Governor General. This is not a case in which the province has sought to regulate the exercise of the Dominion authority in relation

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie, Hall and Spence JJ.

to judicial appointments, it is rather a case in which the legislature has sought to regulate the administration of justice within a province by prescribing the jurisdiction to be exercised by provincial Courts presided over by federally appointed judges. There is no conflict between the impugned legislation and ss. 96 to 101 of the *B.N.A. Act*.

Per Judson J.: All County or District Judges are by the terms of their appointment *ex officio* local judges of the Superior Court in the province in which they are appointed. In British Columbia in that capacity they have long exercised functions assigned to them by provincial legislation, but never as trial judges with complete control over the trial. The present legislation gives them this control in divorce actions but in their capacity as local judges. It is still the Supreme Court that is functioning. Furthermore the province of British Columbia is competent to empower the County Courts to exercise this jurisdiction and 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.

Droit constitutionnel—Validité d'un statut provincial—Statut conférant aux juges locaux de la Cour suprême juridiction en matières de divorce—Statut est-il ultra vires—Acte de l'Amérique du Nord britannique, 1867, arts. 91, 92, 96, 101—Supreme Court Act Amendment Act 1964, 1964 (B.C.), c. 56—Constitutional Questions Determination Act, R.S.B.C. 1960, c. 72—Loi sur la Cour suprême, S.R.C. 1952, c. 259, s. 37.

Conformément à la loi intitulée *Constitutional Questions Determination Act*, R.S.B.C. 1960, c. 72, le lieutenant-gouverneur en conseil de la Colombie-Britannique a référé à la Cour d'Appel la question de déterminer la validité de la partie de l'art. 3 de la loi, intitulée *Supreme Court Act Amendment Act 1964*, 1964 (B.C.), c. 56, dont le but est de conférer la juridiction en matières de divorce aux juges de la Cour de Comté siégeant comme juges locaux de la Cour suprême. Par un jugement unanime, la Cour d'Appel jugea que le statut attaqué était *ultra vires*. Le procureur général de la Colombie-Britannique en appela devant cette Cour, en vertu de l'art. 37 de la *Loi sur la Cour suprême*, S.R.C. 1952, c. 259.

Arrêt: L'appel doit être maintenu.

Le Juge en Chef Taschereau et les Juges Cartwright, Fauteux, Abbott, Martland, Ritchie, Hall et Spence: Le parlement fédéral n'a pas jugé à propos d'adopter une législation en vertu de son pouvoir sous l'art. 101 de l'*Acte de l'Amérique du Nord britannique* pour pourvoir à la création de Cours pour l'administration de la loi du mariage et du divorce en Colombie-Britannique. La législature de cette province avait donc la compétence législative d'adopter des lois concernant la création, le maintien et l'organisation de telles Cours. En vertu de l'art. 91(26) le l'*Acte de l'Amérique du Nord britannique* la législature provinciale ne peut pas faire des changements substantiels dans la loi sur le divorce telle qu'elle existait en Colombie-Britannique lors de la Confédération, mais la législation attaquée ne crée aucun droit substantiel ou ne fait aucun changement dans la loi ou la juridiction sur ce sujet. Le droit d'accorder un divorce en Colombie-Britannique demeure investi dans la Cour suprême tel qu'auparavant, et l'effet de la nouvelle législation est limité à la réorganisation de l'administration de la justice dans cette Cour en conférant la juridiction aux Cours présidées par les juges locaux de la Cour suprême. On ne peut pas dire que cela constitue une législation provinciale ayant pour but de nommer des

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juges à une Cour supérieure. On peut caractériser cette législation seulement comme étant un exercice valide du pouvoir provincial sous l'art. 92(14) de l'*Acte de l'Amérique du Nord britannique*. La présente législation ne vise pas à conférer la juridiction «à des personnes» mais à définir la juridiction des Cours. Les dispositions de l'art. 92(14) donnent le pouvoir à la législature provinciale, lorsqu'elle réorganise les Cours de la province, de conférer la juridiction en matières de divorce à une Cour présidée par un juge nommé par le Gouverneur Général. Il ne s'agit pas ici d'un cas où la province tente de réglementer l'exercice de l'autorité fédérale concernant les nominations judiciaires, mais c'est plutôt un cas où la législature a tenté de réglementer l'administration de la justice dans la province en prescrivant la juridiction à être exercée par les Cours provinciales présidées par des juges nommés par le fédéral. Il n'y a aucun conflit entre la législation attaquée et les arts. 96 à 101 de l'*Acte de l'Amérique du Nord britannique*.

Le Juge Judson: Tous les juges de comté ou de district sont de par les termes de leur nomination *ex officio* des juges locaux de la Cour supérieure dans la province où ils sont nommés. En Colombie-Britannique, en cette capacité, ils ont depuis longtemps exercé les fonctions que la législation provinciale leur a attribuées, mais jamais comme juges de première instance avec contrôle complet du procès. La présente législation leur donne ce contrôle en matières de divorce mais en leur capacité de juges locaux. C'est toujours la Cour suprême qui agit. De plus, la province de la Colombie-Britannique est compétente pour donner le pouvoir aux Cours de comté d'exercer cette juridiction, et aucune limite constitutionnelle ne se soulèverait sous l'art. 96 de l'*Acte de l'Amérique du Nord britannique* si la province décidait de façonner sa législation de cette manière.

APPEL d'un jugement de la Cour d'appel de la Colombie-Britannique[1], declarant que partie de l'art. 3 de la loi intitulée *Supreme Court Act Amendment Act 1964* était *ultra vires*. Appel maintenu.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], holding that part of s. 3 of the *Supreme Court Act Amendment Act 1964* was *ultra vires*. Appeal allowed.

W. G. Burke-Robertson, Q.C., and *M. H. Smith*, for the appellant.

L. G. McKenzie, Q.C. in person.

D. S. Maxwell, Q.C., and *N. A. Chalmers*, for the Attorney General for Canada.

Gérald LeDain, Q.C., for the Attorney General for Quebec.

[1] (1965), 50 W.W.R. 193, 48 D.L.R. (2d) 447.

F. Callaghan, for the Attorney General for Ontario.

The judgment of Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Ritchie, Hall and Spence JJ. was delivered by

RITCHIE J.:—This is an appeal brought in accordance with the provisions of s. 37 of the *Supreme Court Act,* R.S.C. 1952, c. 259, from a unanimous opinion of the Court of Appeal for British Columbia[1] answering in the negative the following question referred to it under the provisions of the *Constitutional Questions Determination Act,* R.S.B.C. 1960, c. 72:

> Is that part of section 3 of the Supreme Court Act Amendment Act 1964, being Chapter 56 of the Statutes of British Columbia 1964, which provides for the amendment of section 18 of the Supreme Court Act by inserting the words 'the Divorce and Matrimonial Causes Act as amended by the Divorce Jurisdiction Act and by the Marriage and Divorce Act of Canada' as clause (d1) of subsection (2) thereof intra vires the Legislature of the Province?

Pursuant to notice of the constitutional question involved having been given by order of the Chief Justice pursuant to Rule 18 of the Rules of this Court, the Attorney General of Canada and the Attorneys General of the Provinces of Ontario and Quebec appeared on the hearing of this appeal.

The relevant portions of the *Supreme Court Act* of British Columbia as amended by c. 56 of the Statutes of British Columbia 1964, read as follows:

> 18. (1) Judges of the several County Courts are Judges of the Court for the purposes 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.
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> (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
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> (a) the *Administration Act,* or by virtue of any Statute or of any law in force in the Province in respect of matters or causes relating to the grant or revocation of probate of wills or letters of administration;

[1] (1965), 50 W.W.R. 193, 48 D.L.R. (2d) 447.

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(b) the *Bills of Sale Act*;
(b1) the *Adoption Act*;
(c) the *Companies Act*;
(d) the *Creditors' Relief Act*;
(d1) the *Divorce and Matrimonial Causes Act* as amended by the *Divorce Jurisdiction Act* and by the *Marriage and Divorce Act* of Canada;
(e) the *Equal Guardianship of Infants Act*;
(f) the *Infants Act*;
(g) the *Land Registry Act*;
(h) the *Quieting Titles Act*;
(i) the *Trustee Act*;
(j) the *Water Act.*

The constitutional validity of clause (d1) of the amended subsection is challenged on the grounds that it is legislation in relation to "marriage and divorce", a field which is assigned to the exclusive legislative authority of the Parliament of Canada by s. 91(26) of the *British North America Act,* and that it purports to authorize judicial appointments which by the terms of s. 96 of that Act are required to be made by the Governor-General.

The Court of Appeal phrased these questions in the following terms:

(1) Whether the Province may legislate in respect of Divorce and Matrimonial Causes.
(2) Whether such legislation is an appointment within the power of the Governor-General in Council under Section 96 of the B.N.A. Act.

The well known provisions of s. 96 read as follows:

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.

Mr. Justice Tysoe, with whose conclusions the other members of the Court of Appeal agreed, held the impugned legislation to be *ultra vires* on the second of the above grounds and accordingly found it unnecessary to express a final opinion with respect to the contention that the amendment constituted legislation in relation to "marriage and divorce". Mr. Justice Sheppard however, having discussed the historical origins of the divorce jurisdiction of the Supreme Court of British Columbia, proceeded to hold:

. . . that the Legislature of British Columbia under Section 92(14) of the British North America Act has legislative jurisdiction to constitute a Court having original jurisdiction in divorce, and in creating the organization of the Court, to designate the offices within the Court and their jurisdiction in divorce equally as in other matters; *Watts v. Watts,* 1908 A.C.

573; *Walker v. Walker,* 1919 A.C. 947; *Board v. Board,* 1919 A.C. 956. That would enable the legislature to create the office of Local Judge and to define the jurisdiction thereof, subject always to any Dominion legislation under Section 101 of the British North America Act by reason of divorce coming within Section 91 ss. 26.

The case of *Watts v. Watts*[1] clearly recognized the jurisdiction of the Supreme Court of British Columbia in matters of divorce as having been acquired by virtue of the pre-Confederation adoption in that Province of the *Divorce and Matrimonial Causes Act* passed in England in 1857. In the course of the opinion delivered by Lord Collins on behalf of the Privy Council in that case, express approval is given to the judgment of Martin, J. In *Sheppard v. Sheppard*[2], where the following passage occurs:

> Moreover, while on the one hand it is true that the Legislature of a Province has no power to legislate in divorce matters so far as expending or contracting the jurisdiction in that respect possessed by its Courts before the Union, yet on the other hand it is equally true that the Court itself has inherent power to make rules regulating its procedure, and that power the Provincial Legislature can take from it in divorce matters as it has in all other matters in this Court, and therefore may, in this sense, legislate by rules of court or otherwise, respecting the regulation of the procedure by which the unalterable Ante-Union jurisdiction may be exercised. Under section 92(14) of the British North America Act the Provincial Legislatures have the exclusive power to constitute, maintain, and organize Courts for the purpose of exercising all jurisdictions whether acquired before or after the Union—*Regina v. Bush* (1888), 15 Ont. 398; *In re Small Debts Act* (1896), 5 B.C. 246. This view is indeed in effect that which is expressed by Clement, J., in his Canadian Constitution (1904), p. 235, note:
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> > It is submitted that, given a law permitting divorce, the administration of that law would *prima facie* fall to Provincial Courts, constituted under Provincial legislation—subject always, of course, to the power of the Dominion Parliament to constitute additional Courts, under s. 101, and to regulate procedure in divorce cases, if so disposed.

The Dominion Parliament has not seen fit to pass any legislation pursuant to its power under s. 101 of the *British North America Act* providing for the establishment of courts for the administration of the law of "marriage and divorce" in British Columbia and I am accordingly in agreement with Mr. Justice Sheppard that it is within the legislative competence of the Legislature of that Province to pass laws relating to the constitution, maintenance and organization of such courts.

[1] [1908] A.C. 573.

[2] (1908), 13 B.C.R. 486 at 519.

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The Provincial Legislature is by virtue of the provisions of s. 91(26) of the *British North America 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* (as amended by federal legislation) to courts presided over by Local Judges of the Supreme Court appointed by the Governor-General, and unless it can be said that this constitutes provincial legislation purporting to appoint judges of a superior court, it appears to me that it can only be characterized as a valid exercise of provincial power under s. 92(14) which reads as follows:

> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, . . .
>
> 14. 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.

The reasoning which led Tysoe J.A. to the conclusion that the legislation in question constitutes an attempt by the Province to exercise the power of appointing superior court judges which is vested in the Governor-General under s. 96 of the *British North America Act,* is summarized in the following excerpt from his reasons for judgment:

> The effect of the legislation in question is to confer upon County Court Judges, acting as Local Judges of the Supreme Court, power to fully and finally adjudicate upon the rights of the parties in Supreme Court actions for divorce and judicial separation as fully and effectually as Supreme Court Judges can do. This jurisdiction given to the County Court Judges is to be exercised in the Supreme Court and their judgments will be judgments of the Supreme Court. In my opinion this is a clear case of constituting Judges of the County Court Judges of the Supreme Court. What else are they, notwithstanding their designation as Local Judges, if they can and do exercise the jurisdiction, powers and functions and all their actions and judgments are those of Supreme Court Judges. It is true that the jurisdiction is limited to one branch of law; but it is unlimited within that sphere, and is subject only, with respect to their final judgments, to appeals to the Court in the same way as final judgments of any ordinary and

properly appointed judges of the Supreme Court. In my opinion this limitation does not affect the position. It is also my opinion that the *Provincial Legislature has no more power to confer such a jurisdiction upon persons who have been appointed by the Dominion to the County Courts and as Local Judges of the Supreme Court with the powers set out in their Letters Patent, than it has to confer it upon provincially appointed Masters, Magistrates or other persons.*

The italics are my own.

With the greatest respect, it appears to me that the present legislation is not concerned with conferring jurisdiction *"upon persons"* but with defining the jurisdiction of courts. The distinction between a provincial legislature conferring jurisdiction upon courts presided over by provincially appointed officials on the one hand and upon courts to which the Governor-General has appointed judges on the other hand, is that in the former case the provincially appointed official is excluded by reason of the origin of his appointment from exercising jurisdiction broadly conforming to the type exercised by superior, district or county courts, (see *In re The Adoption Act*[1], *In re Labour Relations Board of Saskatchewan v. John East Iron Works*[2] and *Attorney General for Ontario and Display Services Company Limited v. Victoria Medical Building Limited*[3]), whereas it is within the exclusive power of the provincial legislature to define the jurisdiction of provincial courts presided over by federally appointed judges, and as Strong J. observed in *In re County Courts of British Columbia*[4]:

> . . . 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.

See also *A. A. Dupon v. Inglis*[5], per Rand J. at 542.

Since 1891 (Statutes of British Columbia 1891, c. 8) the provincial legislation has provided for "Local Judges of the Supreme Court of British Columbia" to preside over courts transacting business in causes and actions in the Supreme Court of British Columbia to such extent "as they are by statute or rules of court in that behalf from time to time empowered to do . . . . " and although these judges

[1] [1938] S.C.R. 398, 71 C.C.C. 110, 3 D.L.R. 497.
[2] [1949] A.C. 134, [1948] 4 D.L.R. 673, [1948] 2 W.W.R. 1055.
[3] [1960] S.C.R. 32, 21 D.L.R. (2d) 97.
[4] (1892), 21 S.C.R. 446 at 453.
[5] [1958] S.C.R. 535, 14 D.L.R. (2d) 417.

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are judges of the County Courts they are specifically appointed as Local Judges under a patent issued by the Governor-General in Council which reads as follows:

> KNOW YOU that, reposing trust and confidence in your loyalty, integrity, and ability, we did, on the ..... day of ....., in the year of Our Lord One thousand nine hundred and ....., and in the ..... year of Our Reign, constitute and appoint you the said ..... to be *A LOCAL JUDGE OF THE SUPREME COURT OF BRITISH COLUMBIA*
>
> TO HAVE, hold, exercise and enjoy the said office of a Local Judge of the Supreme Court of British Columbia, unto you the said ..... with all and every the powers, rights, authority, privileges, profits, emoluments and advantages unto the said office of right and by Law appertaining during your good behaviour and your tenure of office as a Judge of the County Court of ....., in the Province of British Columbia.

The form of the Minute of the Privy Council authorizing such appointment reads as follows:

> The Committee of the Privy Council, on the recommendation of the Minister of Justice, advise that ..... of the City of .....,.. in the Province of British Columbia, Barrister at Law, be appointed a Judge of the County Court of ..... in the said Province, effective February 1st, 1965.
>
> The Committee further advise that the said ..... be appointed a Local Judge of the Supreme Court of British Columbia during his tenure of office as a Judge of the said County Court.

There can thus be no doubt that "Local Judges of the Supreme Court of British Columbia" are appointed by the Governor-General in Council, but it is contended that under the impugned legislation Judges of the County Court in their capacity as "Local Judges of the Supreme Court" are empowered to exercise jurisdiction formerly reserved to Judges of the Superior Court, to whom, unlike the Judges of the County Courts, security of tenure is guaranteed in accordance with s. 99 of the *British North America Act* which 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.

The complaint is that the legislation has the effect of authorizing persons to preside over Courts exercising the jurisdiction of superior courts who have not been appointed in accordance with this section. In the present case, however, the patents issued to Local Judges by the Governor-General expressly appoint them to that office "during good

behaviour" although the term of the appointment is limited to the period during which the appointee remains a Judge of the County Court. In my opinion the provisions of s. 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.

It is contended also that the impugned legislation is in excess of the powers of the provincial legislature in that it restricts the persons eligible to be "Local Judges of the Supreme Court", with power to exercise the jurisdiction of a Superior Court Judge, to "Judges of the several County Courts" and thus curtails the unlimited right of selection of judges of the Superior Court which is vested in the Governor-General in Council under s. 96 of the *British North America Act*. The latter proposition is forcefully stated by Davey J.A. in the last paragraph of his reasons for judgment in the Court of Appeal where he says:

> 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 section 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 section 96 intends.

In support of this contention reliance is placed on the decision of the Privy Council in *Attorney General for Ontario v. Attorney General for Canada*[1], dismissing an appeal from the decision of the Appellate Division of the Supreme Court of Ontario which is reported as *Re Judicature Act*[2]. By the legislation there in question, the Lieutenant-Governor in Council was directed to assign the judges of the Supreme Court who were to constitute the Appellate Division of that Court and it was provided that one of their number was to be designated by the Lieutenant-Governor in Council as President of that division and to be called Chief Justice of Ontario and that the judges not so assigned were to be judges of the High Court Division, one of whom was to be designated by the Lieutenant-Governor in Council as Chief Justice of that division. This legislation

[1] [1925] A.C. 750, 1 W.W.R. 1131, 2 D.L.R. 753.
[2] (1924), 56 O.L.R. 1, 4 D.L.R. 529.

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was found to be *ultra vires* on the ground that it constituted a colourable attempt to vest in the Lieutenant-Governor in Council the powers reserved to the Governor-General in Council by s. 96, and in a very short judgment in the Privy Council Lord Cave said, at page 753:

> What is the effect of these provisions? It can hardly be doubted that the result of them is to authorize the Lieutenant-Governor of the province to assign—that is to say, to appoint—certain judges of the High Court to be judges of the Appellate Division of the Supreme Court, and also to designate—that is to say, to appoint—certain judges to hold the offices of Chief Justice of Ontario and Chief Justice of the High Court Division. If that is the real effect of the statute, as it appears to be, there can be no doubt that the effect of the statute, if valid, would be to transfer the right to appointment of the two Chief Justices and the judges of Appeal from the Governor-General of Canada to the Lieutenant-Governor of Ontario in Council; and if so, it must follow that the statute is to that extent inconsistent with s. 96 of the Act of 1867 and beyond the powers of the Legislature of Ontario.

In my view there is a fundamental difference between the question dealt with in that case and the one which is raised by the present appeal; it is the difference 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. This is not, in my opinion, a case in which the province has sought to regulate the exercise of the dominion authority in relation to judicial appointments by prescribing the class of persons from whom the appointments to judicial office shall be selected, it is rather a case in which the legislature has sought to regulate the administration of justice within a province by prescribing the jurisdiction to be exercised by provincial courts presided over by federally appointed judges.

I see no conflict between the legislation here in question and ss. 96 to 101 of the *British North America Act* and I would accordingly allow this appeal and direct that the question referred to the Court of Appeal of British Columbia be answered in the affirmative.

JUDSON J.:—British Columbia legislation has conferred upon local judges of the Supreme Court of British Columbia jurisdiction in divorce concurrent with that of the Supreme Court of British Columbia. Since the questions raised by Clement J., in the first instance in 1907, were settled in the

Privy Council in *Watts & A.G.B.C. v. Watts*[1], there has been no doubt that the Supreme Court of British Columbia has this jurisdiction. The question here for determination is whether the province under s. 92(14) can confer concurrent jurisdiction on local judges of the Supreme Court. It is apparent and the reasons delivered in the British Columbia Court of Appeal recognize this, that the only possible constitutional limitation arises from s. 96 of the *British North America Act*.

All the judges in British Columbia[2] have held that there does exist such a limitation and that the legislation is invalid. Their reason is that the legislation offends s. 96 of the *British North America Act* because it makes a local judge of the Supreme Court, who is in reality a County Court Judge, into a Judge of the Supreme Court of British Columbia. I do not think that it does. The case is widely different from Ontario legislation considered in the Reference in 1924, which attempted to limit the Governor General's power under s. 96 to appointing judges generally to the Supreme Court of Ontario and purported to reserve to the province the power to assign those judges to the High Court of Justice for trial work and to the Appellate Division and to appoint the Chief Justices. It is also widely different from *Display Services*[3], where provincial legislation attempted to confer upon a judicial officer not appointed under s. 96 the jurisdiction of a judge in Mechanics Lien actions.

The Attorney General for British Columbia and the Attorney General for Canada both support the legislation but on different grounds. The Attorney General for British Columbia says that the province can redistribute this item of jurisdiction within s. 96 courts generally and that this power is all the more plain where the recipient of the jurisdiction is a local judge of the Supreme Court. The Attorney General for Canada says that because of the Dominion power over divorce and because jurisdiction is now in the Supreme Court of British Columbia, it is the fact that the county judge is a local judge of the Supreme Court by Dominion appointment that saves the legislation. The

1 [1908] A.C. 573.
2 (1965), 50 W.W.R. 193, 48 D.L.R. (2d) 447.
3 [1960] S.C.R. 32, 21 D.L.R. (2d) 97.

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divorce will still be granted in the Supreme Court of British Columbia with the local judge presiding. There is really no problem here. All county or district judges are by the terms of their appointment *ex officio* local judges of the Superior Court in the province in which they are appointed. In British Columbia in that capacity they have long exercised functions assigned to them by provincial legislation, but never as trial judges with complete control over the trial. The present legislation does give them this control in divorce actions but in their capacity as local judges. It is still the Supreme Court that is functioning.

I would go further and hold, contrary to the submission of the Attorney General of Canada, 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 *British North America Act*, if the province were to choose to frame its legislation in this way.

I would allow the appeal.

Appeal allowed.

Solicitor for the appellant: M. H. Smith, Victoria.

Solicitor for the respondent: Lloyd G. McKenzie, Victoria.

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