Reversed Scott v Atty. Gen'l. 1923- 4 D.L.R. 647

IN THE MATTER OF CERTAIN QUESTIONS SUBMITTED BY HIS EXCELLENCY THE GOVERNOR GENERAL FOR THE HEARING AND CONSIDERATION OF THE SUPREME COURT OF CANADA, IN REGARD TO THE POSITION OF CHIEF JUSTICE OF ALBERTA AND THE FFFECT OF CERTAIN LETTERS PATENT NOMINATING THE HONOURABLE HORACE HARVEY, CHIEF JUSTICE OF THE TRIAL DIVISION OF THE SUPREME COURT OF ALBERTA, AND THE HONOURABLE DAVID LYNCH SCOTT, CHIEF JUSTICE AND PRESIDENT OF THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

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*Mar. 14, 15.
*May 2.

REFERENCE BY THE GOVERNOR GENERAL IN COUNCIL.

Statutes—"Judicature Act" and its amendments—Construction—Letters Patent as to Chief Justiceship—Validity—B. N. A. Act, (1867), *ss.* 92, 96, 99, 100, 101—*"The Alberta Act,"* (*D.*) 1905, 4 & 5 *Edw. VII*, *c.* 3—*"The Supreme Court Act,"* (*Alta.*) 1907, 7 *Edw. VII.*, *c.* 3, *ss.* 5, 30—*"The Judicature Act,"* (*Alta.*) 1919, 9 *Geo. V.*, *c.* 3, *ss.* 1, 2, 3, 5, 6, 7, 9, 10, 28, 59.—(*Alta.*) 1913, 4 *Geo. V.*, *c.* 9, *s.* 38; 4 *Geo. V.*, *2nd sess.*, *c.* 2, *s.* 11—(*Alta.*) 1920, 10 *Geo. V.*, *c.* 3, *s.* 2; *c.* 4, *s.* 43.

The Appellate Division of the Supreme Court of Alberta, as established by the "Judicature Act" of 1919, was not abolished as the result of the new section 6 of the Act enacted in 1920, which section did not create a new judicial office of Chief Justice of Alberta. Consequently, in the opinion of this court, the Honourable Horace Harvey, who had been appointed Chief Justice of the Supreme Court of Alberta in 1910, is still "by law entitled to exercise and perform the jurisdiction, office and functions of the Chief Justice and President of the Appellate Division of the Supreme Court of Alberta" instead of the Honourable D. L. Scott who had been appointed as such subsequently to the said amendment of 1920. Davies C. J. and Idington J. *contra.*

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*PRESENT:—Sir Louis Davies C. J., and Idington, Duff, Anglin, Brodeur and Mignault JJ.

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REFERENCE by the Governor General in Council of questions respecting the validity of letters patent appointing a Chief Justice of the Appellate Division of the Supreme Court of Alberta and a Chief Justice of the Trial Division of that court, for hearing and consideration pursuant to section 60 of the "Supreme Court Act."

The questions so submitted are as follows:—

A Report of the Committee of the Privy Council, approved by His Excellency the Governor General on the 15th February, 1922.

The Committee of the Privy Council have had before them a report, dated 6th February, 1922, from the Minister of Justice, submitting herewith certified copy of the letters patent of 12th October, 1910, whereby the Honourable Horace Harvey was, as therein expressed, constituted and appointed to be The Chief Justice of the Supreme Court of Alberta, with the style or title of The Chief Justice of Alberta; also certified copy of the letters patent of 15th September, 1921, whereby the said Horace Harvey was, as therein expressed, constituted and appointed to be The Chief Justice of the Trial Division of the Supreme Court of Alberta, and *ex-officio* a judge of the Appellate Division of the said court; also certified copy of letters patent of 15th September, 1921, whereby the Honourable David Lynch Scott was, as therein expressed, constituted and appointed to be the Chief Justice and President of the Appellate Division of the Supreme Court of Alberta as constituted under the "Judicature Act" of Alberta, chap. 3, 9 George V., as amended, and to be styled the Chief Justice of Alberta, and to be *ex-officio* a judge of the trial division of the said court.

The following questions have arisen upon which, in the opinion of the Minister, it is advisable that Your Excellency in Council should be advised by the Supreme Court of Canada, viz.:

1. Are the aforesaid letters patent of 15th September, 1921, nominating the said David Lynch Scott, effective to constitute and appoint him to be the Chief Justice and President of the Appellate Division of the Supreme Court of Alberta as constituted under the "Judicature Act" of Alberta, chap. 3, 9 George V., as amended, and to be styled the Chief Justice of Alberta, and to be *ex-officio* a judge of the Trial Division of the said court?

2. If the last mentioned letters patent be not effective for all the purposes therein expressed, in what particular or particulars, or to what extent, are they ineffective?

3. Are the said letters patent of 15th September, 1921, nominating the said Horace Harvey, effective to constitute and appoint him to be the Chief Justice of the Trial Division of the Supreme Court of Alberta, and *ex-officio* a judge of the Appellate Division of the said court?

4. If the last mentioned letters patent be not effective for all the purposes therein expressed, in what particular or particulars, or to what extent, are they ineffective?

5. Is the said Horace Harvey by virtue of the aforesaid letters patent of 12th October, 1910, or otherwise, constituted and appointed to be, or does he by law hold the said office of, or is he by law entitled to exercise and perform the jurisdiction, office and functions of the Chief Justice and President of the Appellate Division of the Supreme

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Court of Alberta, as constituted under the "Judicature Act" of Alberta, Chapter 3, 9 George V., as amended, and what judicial office or offices does he hold other than as provided by his said letters patent of 15th September, 1921?

The Minister therefore, recommends that the aforesaid questions be referred by Your Excellency in Council to the Supreme Court of Canada for hearing and consideration pursuant to the authority of Section 60 of the "Supreme Court Act."

The Committee concur in the foregoing recommendation and submit the same for approval.

(Signed) G. G. KEZAR,
Asst. Clerk of the Privy Council.

The answers of the Supreme Court of Canada to these questions are printed at the end of this report.

E. L. Newcombe K.C. for the Attorney-General of Canada.

Eug. Lafleur K.C. for the Honourable Horace Harvey.

THE CHIEF JUSTICE.—The questions submitted to us are five in number and ask us to advise whether, in our opinion, the letters patent issued to the Honourable David Lynch Scott of 15th September, 1921, as the Chief Justice and President of the Appellate Division of the Supreme Court of Alberta as constituted under the "Judicature Act" of Alberta, chapter 3, 9 Geo. V, as amended, are effective to so constitute him Chief Justice and President, and whether the letters patent of same date appointing the Honourable Horace Harvey Chief Justice of the Trial Division of said court are effective so as to constitute and appoint him as such Chief Justice.

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The Chief Justice.

From the copy of the report of the Committee of the Privy Council, approved by His Excellency the Governor General, submitted to us, it appears that the Honourable Horace Harvey was by letters patent of the 12th October, 1910, appointed Chief Justice of the Supreme Court of Alberta with the style and title as such Chief Justice and by letters patent of 15th September, 1921, the said Horace Harvey was constutited and appointed to be the Chief Justice of the Trial Division of such Supreme Court and *ex-officio* a judge of the Appellate Division of said court, whereas by letters patent of the same date the Honourable David Lynch Scott was appointed Chief Justice and President of the Appellate Division as constituted under the said "Judicature Act" as amended and to be styled the Chief Justice of Alberta and to be *ex-officio* a judge of the trial division.

As the Honourable Horace Harvey had never resigned his office as Chief Justice of Alberta to which he had been appointed in 1910 the submission to us was that by virtue of the amendments made to the Supreme Court Act of the province from time to time his commission as Chief Justice of the old appellate division dated in 1907 had practically come to an end by the creation of a new appellate division with new judicial officials.

The question immediately arose not whether he could be re-appointed as Chief Justice of the new Appellate Division for that, of course, no one questions, but whether he must necessarily receive a new commission appointing him as such Chief Justice or whether His Excellency's power on that regard was untrammelled and he could appoint any other eligible person from the bench or bar.

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To determine the question we had, of course, to consider all the statutes of Alberta bearing upon the creation and constitution of the Supreme Court of Alberta and its branches and divisions.

The Act of 9 Geo. V, chap. 3, called the "Judicature Act, 1919," came into force by proclamation on the 15th day of September, 1920, on which date the letters patent or commissions in question were issued and in my judgment it is upon the proper construction of the several sections of this Act as amended by the statute of 1920, passed before the Act of 1919 was brought into force, that the question submitted to us must be answered.

I may premise that the difficulties of reaching a firm and clear conclusion upon these questions are very great owing to the slipshod and inartistic manner in which the amendments to the Act of 1919 were framed and passed. However inartistically and loosely framed these amendments may be, there is no doubt in my mind that they indicate a clear and radical change in the intention of the legislature with respect to the Appellate Division in several important respects from the intention apparent from the sections as passed in 1919. First it was not to be a "continuance" of the then existing Appellate Division. Every word in the section of the Act as passed in 1919 and being amended indicating that, was struck out and secondly it was not necessarily to be presided over by the then Chief Justice of Alberta but by any eligible person of the bench or bar who his Excellency might appoint.

The 6th section of the Act of 1919 called "The Judicature Act of 1919" as originally passed read as follows:

The Appellate Division shall continue to be presided over by the Chief Justice of the Court who shall continue to be styled as the Chief Justice of Alberta and shall consist of the said Chief Justice and four others of the Court to be assigned to it by His Excellency the Governor General in Council and to be called Justices of Appeal and three judges shall constitute a quorum.

The result of the amendment made in section 6 by the Act of 1920 made the section to read as follows:—

The Appellate Division shall be presided over by a Chief Justice, who shall be Chief Justice of the Court and who shall be styled the Chief Justice of Alberta and shall consist of the said Chief Justice and four others of the Court to be assigned to it by His Excellency the Governor General in Council and to be called Justices of Appeal, and three judges shall constitute a quorum for hearing of appeals from any district court, but the Appellate Division when hearing such appeals may be composed of five judges. The Appellate Division shall be composed of five judges when hearing appeals from the trial division of the Supreme Court of Alberta, and in no case shall an appeal be heard by the Appellate Division of the Supreme Court of Alberta when composed of four or an even number of judges.

And on the day when the Act of 1919 was proclaimed as coming into force the 6th section of the Act read as I have above set out.

The result of that amendment was that instead of the old Appellate Division being continued and presided over by the then Chief Justice of Alberta as was expressly provided for in the Act of 1919 as originally passed, an Appellate Division of the Supreme Court was created which was to be presided over by a Chief Justice to be appointed by His Excellency the Governor General and to consist of that Chief Justice so appointed and four other judges of the court to be assigned to it by His Excellency the Governor General.

The Act in other words before being amended provided for the continuance of the then existing Appellate Division and that the then Chief Justice should continue to be its presiding officer while the amendment deliberately struck out the words providing for

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the continuance of the Appellate Division and of the continuance in office as its Chief Justice of the then existing Chief Justice and created an Appellate Division with a Chief Justice to be appointed by the Governor General who might be chosen and taken from those eligible either from the existing bench or bar. By thus expressly striking out the words that the Appellate Division should be "continued" and the further words providing that the existing Chief Justice should be the Chief Justice of the reconstituted Appellate Division leaving the appointment of the new Chief Justice untrammelled with His Excellency, it seems to me that the intention of the legislature was clearly not to continue the old Appellate Division but to so construct it as to create a new Appellate Division leaving the presiding officer to be any one eligible chosen by the Governor General. Further the amendment provided for an appeal to the Appellate Division from the newly constituted Trial Division and that when hearing such appeals the Appellate Division should be composed of five judges. The new and additional jurisdiction thus given to the reconstructed Appellate Division, the elimination from the section being amended of all words making the new Appellate Division a continuance of the old division and also of the words making the then Chief Justice of the court the Chief Justice of the new Appellate Division thus leaving the appointment of the new Chief Justice in His Excellency's hands untrammelled and the declaration that the Chief Justice to be appointed and four other judges of the court to be assigned to it by His Excellency the Governor General and to be called Justices of Appeals should constitute the Appellate Division, thus abolishing the old plan of the judges in a body selecting yearly these

four judges combine to satisfy me that the Appellate Division so established was a new division with new judicial offices and some additional functions. It is strongly argued that such a construction is at variance with sections 3 and 5 which read as follows:—

3.—There shall continue to be in and for the province a superior court of civil and criminal jurisdiction known as "The Supreme Court of Alberta.

* * *

5.—The Court shall continue to consist of two branches or divisions which shall be designated respectively "The Appellate Division of the Supreme Court of Alberta," and "The Trial Division of the Supreme Court of Alberta."

I respectfully submit there is no real or necessary inconsistency between these two sections and the amended section 6. Indeed it may be said they rather support the argument as to the intention of the legislature not to leave it open to the slightest doubt that the "Supreme Court of Alberta" was continued but that it should thereafter consist of two branches or divisions respectively designated as the Appellate Division and the Trial Division, and with the respective jurisdictions and appointees assigned to each, and emphasizing such intention of creating a new division by striking out the word "continue" in two places of the section and by further expressly striking out the words of the section amended which provided for the former Chief Justice continuing as President of the Appellate Division.

Having reached this conclusion I would answer the first question and the third question in the affirmative and question 5 in the negative. Questions 2 and 4 do not require any answer in view of my answers to questions 1, 3 and 5.

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IDINGTON J.—The Province of Alberta was established by 4 and 5 Ed. VII., ch. 3, assented to 20th July, 1905, and known as "The Alberta Act," which came into force on the 1st day of September, 1905.

Prior thereto it had formed part of the North West Territories and fell within the jurisdiction of the Supreme Court of the said Territories.

The Legislature of Alberta was, by said Act, given power for all purposes affecting or extending said province to abolish said court. That power does not seem to have been exercised until the Supreme Court was constituted by the legislature of that province acting within its powers under said "Alberta Act," and the "British North America Act," section 92, item 14 thereof, by the enactment of 7 Edw. VII., to be cited as "The Supreme Court Act."

Section 5 of said Act declared that the said court

> shall consist of a Chief Justice who shall be styled the Chief Justice of Alberta and four puisne Judges who shall be called the justices of the court.

The power of appointment of said Chief Justice and puisne judges rested, as it always has done in like cases, under sec. 96 of said "British North America Act," with the Governor-General, and appointments were duly made pursuant thereto of the Chief Justice and puisne judges as specified by the said "Supreme Court Act."

The appellate work of the court was referred to as *en banc* according to ancient form of speech, and it would seem to have been left to the judges to arrange amongst themselves who should sit *en banc* and who attend to *nisi prius* work, observing, however, the term times for *en banc* sittings fixed in regard to time and place by the Lieutenant Governor in Council, as required by section 30 of the said "Supreme Court Act."

That condition of things (save as to an amendment in 1908 increasing the number of puisne judges to five instead of four) existed when, on the resignation of the then Chief Justice, the late Honourable A. L. Sifton, the then Honourable Horace Harvey, a puisne judge of said court, was appointed to succeed him in 1910 as Chief Justice.

In 1913 tentative amendments were made and part thereof repealed and parts left to be brought into force by proclamation and the net result was that the power was given the Lieutenant Governor in Council at the second session of 1913 to proclaim an increase in the number of puisne judges from five to six, seven or eight, and, in January 1914, by proclamation the desired increase to eight was brought into effect.

In March following, another proclamation brought into effect subsection 2 of sec. 38 of ch. 9 of the Statutes of Alberta, 1913 (first session) being an amendment to sec. 30 of the "Supreme Court Act."

That amendment was as follows:

(2) by repealing sec. 30 and substituting therefor the following: 30. The court *en banc* shall be known as the Appellate Division of the Supreme Court and shall sit at such times and places as the judges of the court shall determine and three judges shall constitute a quorum.

(2) The judges of the Supreme Court shall, during the month of December, and at such other times as may be convenient, select four of their number to constitute the Appellate Division for the next ensuing calendar year, but every other judge of the said court shall be *ex officio* a member of the Appellate Division.

(3) The terms "court *en banc*" or "court sitting *en banc*," and "Appellate Division" wherever used in this or any other Act or in any rules made thereunder, shall be deemed to be interchangeable and to have the same meaning.

The enabling the judges to fix their own term times, instead of being dependent as previously on the directions of the Lieutenant Governor in Council, and

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to distribute their work for the coming year, one can easily understand, but the mere changing of the name of the division would seem absolutely unimportant unless to keep up with the fashions of modern times.

But for the stress laid upon it by counsel in argument herein I should not have thought it worth mentioning.

If memory serves me correctly, he was under the impression that the rest of the court was at the same time designated the "Trial Division" which was not the case until the Act of 1919, presently to be referred to.

No change in the jurisdiction nor change in the organization of the court seems to have been pointed to as in contemplation at that stage in the history of the legislation we are concerned with.

The word "court" used in that connection is, by the interpretation clause of the Act the "Supreme Court."

Such being the condition of things there was enacted in 1919 an Act styled, by sec. 1 thereof, "The Judicature Act" which in its growth gives rise to our present troubles.

It does not profess to be a consolidation of Acts relative to the Supreme Court, nor does it begin by recognizing the existence of that court but, on the contrary, after giving the name of the Act as just stated, and in sec. 2 an interpretation clause, by sec. 3 enacts as follows:

> There shall continue to be in and for the province a superior court of civil and criminal jurisdiction known as "The Supreme Court of Alberta."

It is to be observed that this enactment is under the caption of "Constitution of court" and clearly refrains from continuing the Supreme Court then existent, and instead of doing so declares there shall continue to be a Supreme Court of civil and criminal jurisdiction.

That circumstance, in connection with much else to be presently referred to, suggests a clear intention not to continue the then existing court.

It is the intrepretation and construction of this "Judicature Act," and amendments thereto, before it was brought into effect by proclamation as provided by the Act itself, as to which we are now interrogated.

The questions raised thereby are whether or not the legislature had created a new court or courts, to which the Dominion Government was entitled to appoint judges, or created new judicial offices which the said Government was entitled to fill.

The 6th section of the "Judicature Act" above referred to as originally enacted, reads as follows:

> 6. The Appellate Division shall continue to be presided over by the Chief Justice of the Court, who shall continue to be styled the Chief Justice of Alberta, and shall consist of the said Chief Justice and four other judges of the court to be assigned to it by His Excellency the Governor in Council and to be called Justices of Appeal and three judges shall constitute a quorum.

That, which clearly contemplated the continuation of the then Chief Justice as such and his filling the new office, was amended before the proclamation was issued bringing the said "Judicature Act" into effect, by ch. 3, sec. 2, of the Statutes of Alberta, 1920, as follows:

> Sec. 6 is amended as follows:
>
> (*a*) by striking out the words "continue to" where the same occur in lines 1, 2 and 3 thereof, and by striking out the expression "of the court" where the same occurs in line two thereof; and by striking out the first 'the" in the second line thereof, and substituting in lieu thereof the article "a."
>
> (*b*) by striking out the words "three judges shall constitute a quorum" where the same occur in the seventh line thereof, and substituting the following in lieu thereof:—

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Three judges shall constitute a quorum for the hearing of appeals from any district court, but the Appellate Division, when hearing such appeals, may be composed of five judges. The Appellate Division shall be composed of five judges when hearing appeals from the Trial Division of the Supreme Court of Alberta and in no case shall an appeal be heard by the Appellate Division of the Supreme Court of Alberta when composed of four or an even number of judges.

That in turn was amended the same year, 1920, before the proclamation bringing the said "Judicature Act" into effect was issued, as follows:—

(1) By adding after the article "a" in the 6th line of subsection (*a*) of section 2, the following: "and by adding thereto after the words "Chief Justice" in the second line thereof, the expression "who shall be Chief Justices of the Court and."

Thus the said section was made to read at the date of said proclamation as follows:

The Appellate Division shall be presided over by a Chief Justice, who shall be Chief Justice of the court and who shall be styled the Chief Justice of Alberta, and shall consist of the said Chief Justice and four other judges of the court to be assigned to it by His Excellency the Governor General in Council and to be called Justices of Appeal, and three judges shall constitute a quorum for the hearing of appeals from any district court, but the Appellate Division, when hearing such appeals, may be composed of five judges. The Appellate Division shall be composed of five judges when hearing appeals from the Trial Division of the Supreme Court of Alberta, and in no case shall an appeal be heard by the Appellate Division of the Supreme Court of Alberta when composed of four or an even number of judges.

The said "Judicature Act" thus, and otherwise, amended was duly declared by proclamation, on the 15th of August, 1921, to come into force and effect on, from and after the 15th of September, 1921.

The other amendments, though substantial, have no important bearing on what we are concerned with herein.

The 59th section of the "Judicature Act," enacted as follows:

59. The "Judicature Ordinance," being ch. 21 of the Consolidated Ordinances, 1898, and the "Supreme Court Act," being ch. 3 of the Acts of 1907, and all amendments of the said Ordinance and Act, are hereby repealed.

I submit that by said repealing section of the said Act, all the legislation effective prior to the 15th September, relevant to the Supreme Court of Alberta, was rendered nul, and in effect the said court was abolished as the legislature had power to do if it saw fit.

The only use such legislation thus drastically repealed could thereafter serve was as a possible historical means of helping to interpret the actual meaning of the "Judicature Act," so brought into effect.

The clear meaning of the language used in said section 6 of the "Judicature Act," as finally amended, as I read it, was to constitute the Appellate Division of the Supreme Court of Alberta a new court of appeal requiring the appointment of a Chief Justice thereof and that when he was appointed he would be styled the Chief Justice of Alberta.

The party chosen for such position might be he who had been under the "Supreme Court Act" styled Chief Justice of Alberta, or any other person qualified by law to accept such a position. On such appointment the party so appointed would thereby become but not otherwise entitled to be styled such Chief Justice.

It seems to me in face of the several legislative attempts to make, by the amendment above quoted clear the purpose of the legislature, idle to contend that such was not the intention of the legislature, whatever may be urged as to the exact extent of the effect of the repealing section 59, which I quote above.

The Dominion Government evidently acted upon one or other of these interpretations, and proceeded upon the assumption that the new Court of Appeal and the new Trial Division, each required the appointment of a Chief Justice and as to the Court of Appeal,

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new puisne judges, and appointed accordingly Mr. Justice Scott to be Chief Justice of the Appellate Division and Chief Justice Harvey to be Chief Justice of the Trial Division, and reappointed some of those previously named to serve as puisne judges of the Trial Division.

It is stated that each accepted the respective position thus assigned to him, except the Honourable Mr. Justice Harvey who has declined so far as to refrain from taking the required oath of office, yet has continued to act as a judge.

His status on which he relies for his present contention was expressed thus by sec. 5 of the "Supreme Court Act."

> The court shall consist of a Chief Justice who shall be styled "The Chief Justice of Alberta," etc.

The oath of office prescribed by sec. 7 of said Act which he presumably took, reads as follows:

> I, * * * solemnly and sincerely promise and swear that I will duly and faithfully, and to the best of my skill and knowledge, exercise the powers and trusts reposed in me as Chief Justice (or one of the puisne judges) of the Supreme Court. So help me God.

That oath, it is to be observed, makes no mention of the style now so much relied upon and, I respectfully submit, having been swept away by the repealing section above quoted before the present divisional courts could come into existence, is a rather slender thread to rely upon.

Five months later we are asked the questions I will presently refer to.

Counsel for Chief Justice Harvey in his factum remarks in dealing with the changes of sec. 6, upon the want of modification of sections 3, 4, 5, 7 and 9, of the statute of 1919.

Sec. 3 I have already dealt with by pointing out that the legislature seems to have purposely abstained from continuing the then existing Supreme Court and, I may add, did so in light of the very different mode of treatment given by prior legislation relative to the Supreme Court of the North West Territories, when superseded by the creation of the Supreme Court of Alberta.

For many reasons apart from the situation we are confronted with it seems to me that example demanded some provisions which have not been made.

Section 4 is simply another illustration of same spirit. Both show a determination to ignore the possibly continued existence of the old Supreme Court of Alberta, and detract from the force sought in such suggestion.

Section 5 continues two branches or divisions of the court constituting one the Appellate Division and the other the Trial Division.

As a matter of fact, there always existed two classes of duties to be performed by the judges of the Supreme Court, but not until this Act of 1919 was there any such description given legislatively of a Trial Division.

It is brought into existence as a distinct entity by that Act, and the word "continue" is simply one of the many absurdities to be found in this legislation.

There was nothing in fact continued, but an existent duty was given over to a new court, called, in section 7, for the first time "Trial Division."

I fail to see how that helps in any way unless to uphold the action of the Dominion Government of which counsel complains.

Section 9, when read in light of the amendments made to sec. 6 before it was brought into force and the plain language thereof especially when we consider sec. 59 had obliterated all styles resting upon prior legislation, clearly is consistent also with said action.

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It is contended, however, that said section 6 as it stands amended, when brought into effect, constituted him who had been heretofore styled "Chief Justice of Alberta," the actual Chief Justice of the new Appellate Division, and hence to continue to be styled the "Chief Justice of Alberta."

In other words, despite the several amendments to the contrary so clearly designed to remove any possibility of such being held to have been the intention of the legislature, we are asked to say that such amendments must be treated as null. One of the alleged reasons for such contention is that he had been theretofore styled the Chief Justice of Alberta.

He had been so styled, but only by virtue of the "Supreme Court Act" so directing; but that Act and all else bearing upon such a question was repealed the moment that the "Judicature Act" came into force on the 15th September, 1921.

From the earliest hour of that date, according to Alberta time, he ceased to be entitled any longer to be so styled.

The Act must be read as of the date when it came into force unless there is in it some clear intention to the contrary, which is not the case.

Again it is submitted by counsel for the Minister of Justice and I think quite correctly, that any attempt by the legislature to dictate to His Excellency who should be appointed to hold the new judicial office, would have been *ultra vires*.

Indeed I should not be surprised to learn that the discovery thereof was the reason for the numerous changes made in said section 6, for as it stood originally it was clearly open to that objection.

And as to the question of styling the head of the new court, or if you will, him called to fill the new judicial office created, the Chief Justice of the province, that is entirely within the power of the legislature.

I was at first blush disposed to look upon that as emanating from the Royal Prerogative exercised on behalf of the Dominion, but on considering the matter fully I find nothing to found such a pretension upon, for section 96 of the B.N.A. Act limits the power of His Excellency the Governor General to merely nominating him who is to fill the office as created by the legislature.

All that legislation can do relevant to the creation or constitution or recreation or reorganization or abolition of the court, rests with the legislature except the nomination of the person to fill the office which alone rests with the Governor General of the Dominion as advised by his ministers.

What has been done in that regard cannot now be undone by anything we may say herein for in answering such interrogatories, we and all concerned, I most respectfully submit, must never forget a single sentence contained in the judgment of the Judicial Committee of the Privy Council in the case of *Attorney-General for Ontario* v. *The Attorney-General for Canada* (1), wherein that court said:

> But the answers are only advisory and will have no more effect than the opinion of the law officers.

I have no doubt that the Alberta Legislature aimed at having, as Ontario long had had, and other provinces later, a new Court of Appeal separated from that dealing with the other work of its Supreme Court.

(1) [1912] A.C. 571 at p. 589.

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As now constituted the judges of either division are qualified *ex officio* to sit in the other, but, I assume, only to be made available in case of possible necessity.

I submit these suggestions as probably explaining what was aimed at and hence helping to illuminate the language used.

I may be permitted here to say that I prefer the method adopted in British Columbia, and betimes in Ontario, to that adopted by the Alberta legislature, to produce substantially the same result. In the first named of these the legislature whilst creating a court of appeal and, of course, styling the head thereof "Chief Justice" of the new court, preserve the title of Chief Justice of the province to him who then filled it and, on his vacating the place, to be passed on to the head of the appellate court.

Yet I must look at the case presented purely as a matter of law free from all such sentiment, and try to realize what those concerned were in truth about.

It cannot, I submit, be contended for a moment that the legislature could not have created a new appellate court and eliminated from the jurisdiction of the Chief Justice, and all other judges of the old Supreme Court, all the appellate powers it had theretofore exercised, and then leave him and them no other powers than those of trial judges.

That in effect is all the legislature, I imagine, really desired to bring about.

By the united efforts of the respective executives of the Dominion and of Alberta acting in harmony, that is all that has transpired.

The same result as I have pointed out could have been reached by pursuing another and possibly better method, at all events by some one of the several methods I have mentioned as adopted in other provinces.

It is not my desire to criticize herein, but to try to realize from the past history of our country and its several provinces the probably justifiable object the legislature had in view, and then give to a rather peculiar growth of six years in way of legislation the exact measure of vitality it was intended to have.

Approached in such a mood and attitude as such considerations are likely to produce, the contention set up by able counsel seems to me rather an undue strain upon the English language.

Clearly there were to be two courts where only one existed before, and two Chief Justices to be appointed.

It was then thrown upon the Dominion Executive to select him it chose for each respectively.

We have no facts stated relative to how this duty was to be discharged, though we may suspect or indeed infer from the remarkable coincidence of events which took place, that it was well understood between the two Executives concerned that the old Chief Justice and such of his puisne judges as the Dominion Executive chose to fill the positions they respectively were chosen to fill, should be effected by such a manner as would substantially protect them and the due administration of justice at the same time.

Clearly it so happens that some men are by nature and attainments better fitted for appellate courts than trial courts, and *vice versa.*

The salaries allotted the new Chief Justices were, we are told, in each case to be the same.

It may be pointed out that this is not the first instance on record of a legislature having taken upon itself to change the status of judicial officers, for I find that in pre-confederation days, though the old "Court of Error and Appeal Act," chapter 13 of the Consolidated Statutes of Upper Canada, by section

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5 thereof, had declared that the Chief Justice of the Queen's Bench, for the time being, and the judge entitled to precedence over all other judges should preside, yet by 24 Vic., ch. 36, sec. 1 that was repealed.

Much stress seemed to be put by counsel for Chief Justice Harvey upon the fact that uncertainty as to the tenure of the position of Chief Justice of Alberta may be attended with serious consequences, inasmuch as important powers are conferred upon the Chief Justice of that court, the exercise of which by an incompetent judge might lead to serious consequences, and he cites the example of the "Bankruptcy Act" assigning the power to the Chief Justice to make the appointments to certain officers in certain contingencies.

I should have thought that the doctrine of *de facto* applied to any officer would relieve any person so embarrassed and should be surprised if any one thought of applying to any one else than Chief Justice Scott.

But if that is not enough, clearly the true remedy must be that applied in the cases of *Buckley* v. *Edwards* (1), and *McCawley* v. *The King* (2), instead of the adoption of the opinion of this court as mere law officers of the Crown as intimated in the case cited above, which surely cannot be held especially if divided as entitled to override the opinions of the law officers of the Crown who presumably must have held in line with what I have concluded was the correct course.

For the foregoing reasons I would answer the first question in the affirmative. Hence the second needs no answer. I would also answer the third question in the affirmative, and the fourth I would answer by

(1) [1892] A.C. 387.

(2) [1920] A.C. 691.

saying that his being *ex officio* a judge of the Appellate Division of the said court only qualifies him to act in the place or stead of some member of the court not being able to take the place to which he or his successor may have been assigned.

The fifth question I would answer in the negative and that he holds only the office provided by his said letters patent of 15th September, 1921.

DUFF J.—The fundamental question raised by the present reference is this: Had the amendments of 1919 (9 Geo. V., ch. 3) and 1920 (ch. 3, s. 2 and c. 4, s. 43) the effect of abolishing the office of Chief Justice of the Supreme Court of the Supreme Court of Alberta, an office created by the Supreme Court Act of 1907? If the office still exists then The Honourable Mr. Harvey is still the incumbent of it and he is also the President of the Appellate Division because the intention of the statutes mentioned is indubitably that the two offices shall be held by one and the same person.

The statutes of 1920 by their terms were to come into force on proclamation and they were passed as amendments of the statute of 1919 which was also to come into force on proclamation. The proclamation by which they became operative is dated 11th August, 1921. I shall speak of these statutes by reference to their respective dates.

Now the statutes of 1913 (4 Geo. V, ch. 9) and 1919 (as originally framed) although they made some changes in relation to the functioning of the Supreme Court left quite unaffected most important matters of substance. 1st, the Supreme Court itself was not abolished—the legislation did not create a new Supreme Court bearing the old name; secs. 2 and 3 of the statute of 1919 which were left untouched by the Act

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of 1920 demonstrate this; 2nd, in the division of the court into two branches effected by these Acts (of 1913 and 1919) the legislation does not appear to have proceeded by the way of the creation of new judicial offices save in respect of two matters which are not relevant to the present discussion—the provisions made for a Chief Justice of the Trial Division and an additional judge of the Supreme Court.

An examination of the pertinent sections seems to give this result. Section 30 of the Act of 1913 which first authorized the designation "Appellate Division" provides simply that such shall be the designation by which the "Court *en banc*" shall be known; and by sub-section 3 of that section it is declared in terms that the phrases "Court *en banc*" and "Appellate Division" shall have the same meaning in that very statute of 1913 as well as elsewhere. By the Act of 1919 an important provision is introduced touching the selection of judges for duty in the "Appellate Division" and the weight and significance of this circumstance must of course be considered; but the phraseology of secs. 2, 3, 5, 10 and 28 shews that the legislature in using the designation Appellate Division was still applying it to the Supreme Court of Alberta sitting *en banc*.

By section 5, for example, it is enacted that "the Court" that is to say, the existing Supreme Court of Alberta, which when sitting *en banc* is, by force of the Act of 1913, known as the "Appellate Division,"

shall continue to consist of two branches or divisions.

In section 6 the form of words used is

the Appellate Division shall continue to be presided over by the Chief Justice of Alberta,

a turn of phrase implying an intention to preserve the identity of the Appellate Division; section 10 provides that all the judges of the Supreme Court shall *ex officio* be members, with equal jurisdiction, power and authority, of both divisions; and finally, by section 28 it is declared again that the terms "Court *en banc*" and "Appellate Division" wherever

> used in any Act or Ordinance * * * shall be deemed to have the same meaning.

These features of the statute afford good reasons for thinking that the legislature was not in 1913 or in 1919 erecting a new court under the existing style of the "Appellate Division;" and that in providing for the assignment of judges of the Supreme Court to duty in that Division the statute does not contemplate the establishment of new judicial offices.

As inconsistent with this view of the statute it is pointed out that the four judges who, under section 6 of the Act of 1919, together with the Chief Justice normally constitute the Appellate Division, are to be

> assigned to it by His Excellency the Governor General in Council

and this provision is relied upon as giving support to the contention that the office of judge of that court is a new judicial office created by this statute. I may say at once, that—after examining the *indicia* afforded by this legislation for determining the true character of this section (I am speaking now of the section as passed in 1919) whether, that is to say, in the context in which it is found it ought to be read as prescribing the duties or providing machinery for prescribing the duties appertaining to judicial offices already existing (or created by enactment *aliunde*) or on the other hand as establishing a new judicial tribunal or a new judicial office—I think on the whole those *indicia*

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point rather directly to the conclusion that the office of the section is limited to making provision for the administration and exercise of the judicial duties and powers of the existing court, and the judges of that court. One consideration weighs very powerfully with me; and it is that arising from the circumstance that while the judges other than the Chief Justice constituting the Appellate Division are to be named by the Governor in Council, these judges are to be chosen—that I think is the meaning of the section—from among persons who are already judges of the Supreme Court of Alberta. If the office of judge of that court were a new judicial office the appointment by force of section 100 of the B.N.A. Act would rest with the Governor in Council and I am unaware of any authority possessed by a province to regulate the exercise of the Dominion authority in relation to judicial appointments by prescribing the class of persons from whom the appointees to judicial office shall be selected. The provision moreover for assignment by the Governor in Council would be pointless unless it be, as apparently it is, intended as an invitation by the legislature to the Governor in Council to act on its behalf in performing that duty.

The Act of 1919, that is to say the Act which received the Royal assent in the year 1919 as ch. 3 was by its terms, as already mentioned, not to come into force until after proclamation; and before proclamation two statutes were passed (in the year 1920) amending sections 2 and 6 of this Act of 1919. The effect of this amendment of section 6 was that for the section so numbered as it stood in the statute as originally passed in the year 1919, the following was substituted:—

The Appellate Division shall be presided over by a Chief Justice, who shall be Chief Justice of the court and who shall be styled the Chief Justice of Alberta, and shall consist of the said Chief Justice and four other judges of the court to be assigned to it by His Excellency the Governor General in Council and to be called Justices of Appeal, and three judges shall constitute a quorum for the hearing of appeals from any district court, but the Appellate Division, when hearing such appeals, may be composed of five judges. The Appellate Division shall be composed of five judges when hearing appeals from the Trial Division of the Supreme Court of Alberta, and in no case shall an appeal be heard by the Appellate Division of the Supreme Court of Alberta when composed of four or an even number of judges.

The language of this section undoubtedly lends some colour to the contention that the legislature had in view the creation of a new office of Chief Justice of the Appellate Division, the incumbent of which should be *ex officio* the Chief Justice of the Supreme Court in substitution for the old office of Chief Justice of the Supreme Court, the incumbent of which under the statute of 1919 as originally passed would have been the *ex officio* President of the Appellate Division. But it must be remembered that sections 3, 5, 9, 10 and 28 of the Act as amended in 1920 stand as they originally stood in the Act of 1919 as conditionally passed in that year; that the Appellate Division is still, after the amendments of 1920, the Supreme Court of Alberta sitting *en banc*; that it is the Chief Justice of the Supreme Court who, by section 9, takes rank and precedence over all the judges of any court in the province and not the Chief Justice of the Appellate Division; and that in the Act even as it now stands there is no office formally designated in terms as that of the Chief Justice of the Appellate Division. And although section 6 in the form it assumes under the amendments of 1920 is capable of a construction according to which the then existing office of Chief Justice of the Supreme Court would cease to exist,

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that is not the necessary meaning of the words used. And the other construction, that which regards the whole section in so far forth as pertains to the office of Chief Justice (as well as in other respects) as an enactment designed to make provision for the distribution and assignment of judicial duties among existing judicial offices or judicial offices elsewhere provided for seems to accord better with the general tenour of the statute of which it is a part.

The answers which I think should be returned to the questions submitted are these:—

To question No. 1:—No.

To question No. 2:—Wholly inoperative.

To question No. 3:—No.

To question No. 4:—Wholly inoperative.

To question No. 5:—He is Chief Justice of the Supreme Court of Alberta and as such is entitled by law to perform and exercise the jurisdiction, office and functions of Chief Justice and President of the Appellate Division.

ANGLIN J.—Seldom has the embarassment which may be occasioned by requiring this court to answer any question that the executive department of the Government may see fit to propound for its consideration and opinion been so forcibly brought to our attention as in the reference now before us. The court is called upon to express its opinion as to the status of two gentlemen on behalf of each of whom it is asserted that he holds the highest judicial office of the province of Alberta under letters patent from His Excellency, the Governor-General. Unfortunately only one of them has been represented before us by counsel, the other, although duly notified, having, as was his right, declined to appear.

Nor is our embarrassment materially lessened because our

answers are only advisory and will have no more effect than the opinions of the law officers.

But the right of the Governor in Council to refer questions to this court touching any matter in regard to which he may see fit to do so, and our duty to consider and answer questions so referred ("Supreme Court Act," s. 60) are conclusively settled. *Attorney-General for Ontario* v. *Attorney-General for Canada* (1). A suggestion made by their Lordships of the Judicial Committee that the court may point out in its answer considerations which render difficult the discharge of the duty imposed upon it or that the answer itself is of little value, or may make representations to the Governor-in-Council looking to the withdrawal of the reference in whole or in part (p. 589) would seem, with respect, to have little practical value.

The facts out of which the questions referred in the present case have arisen are fully stated in the opinion of my brother Mignault. I shall not repeat them. The answers to these questions I think depend upon whether the Alberta "Judicature Act" of 1919 (9 Geo. V, c. 3), as amended in 1920 (c. 3, s. 2 and c. 4, s. 43), should be regarded as having created a new Supreme Court for that province, or, at least, an entire new set of judicial officers, or should be deemed to have continued the existing Supreme Court and judicial officers, merely adding to the number of the latter and creating an additional Chief Justiceship. The constitutional validity of the statute has not been challenged. The question argued at bar was one of construction—what was the intention of the legislature as expressed in the several enactments?

(1) [1912] A.C. 571.

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In view of the tenure of judicial office (s. 99 of the B.N.A. Act) I should be disposed to hold that the Alberta "Judicature Act" of 1919 as amended, had either the effect of abolishing the existing Supreme Court of Alberta and creating in its stead a new court under the same name, or of doing away with the existing judicial offices and substituting therefor new judgeships of the same class, only if it does not reasonably admit of another construction.

Far from that being the case, however, it seems to me that another construction is not merely quite possible but is much more probably that intended by the legislature.

I regard it as not arguable that, as enacted in 1919, the Alberta "Judicature Act" did aught else than continue the existing Supreme Court with its existing judicial officers, by s. 6 assigning to one of them—the Chief Justice of Alberta—by his title of office, the duty of presiding over the Appellate Division of the Supreme Court and entrusting to the Governor General in Council the selection of four of the puisne judges who should, with the Chief Justice of Alberta, ordinarily constitute the membership of that division of the court. As amended in 1920 this may not so clearly be the purpose and effect of s. 6. Indeed, Mr. Newcombe strongly pressed that these amendments predicate an intention to create five appellate judgeships as new positions to be filled by the Governor General in Council. It may be a little difficult to assign another purpose to the amendments. But no mere implication can suffice to overcome the explicit term of s. 3 that

> there shall continue to be * * * a superior court of civil and criminal jurisdiction known as "The Supreme Court of Alberta,"

and of s. 5 that

the court (i.e. the existing court continued by s. 3) shall continue to consist of two branches or divisions which shall be designated respectively the "Appellate Division of the Supreme Court of Alberta" and "The Trial Division of the Supreme Court of Alberta."

Sec. 6 as amended must be read and construed with sections 3 and 5, which remain as they were enacted in 1919. These provisions, in my opinion, make it quite impossible to contend successfully either that a new Supreme Court was established or that new divisions of that court were constituted. The existing court and the existing divisions are expressly "continued"—one of them retaining the name given to it at its birth in 1914, "The Appellate Division" (4 Geo. V., ch. 9, sec. 38; 4 Geo. V., 2nd sess., c. 2, s. 11; Alberta Gazette Vol. X, pp. 164-5), and the other, likewise born in 1914 and existing since that date, as is evidenced by s. 5 of the Act of 1919, being by that section christened for the first time "The Trial Division."

It is, I think, equally impossible to maintain that all the existing judicial positions in the Supreme Court were abolished and eleven new Supreme Court Judgeships created. If that had been the case, all the judges theretofore in office might have been superseded and a judiciary consisting of an entirely new personnel appointed by the Governor General in Council. Is it conceivable that the legislature intended to create a situation admitting of such a possibility? Again, although the judges theretofore in office should be reappointed, the former Chief Justice of Alberta might have been appointed a puisne judge and two of his former puisnes, or it may be the two additional judges provided for by the Act of 1919, appointed to the two Chief Justiceships. If a new court was con-

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stituted, or wholly new judicial positions were created by the legislation of 1919, as amended in 1920, it was undoubtedly the right of the Governor General in Council to select whom he would (subject, it may be, to prescribed requirements of qualification) to fill those positions. It was not competent for the provincial legislature to place any restriction upon the freedom of choice.

I am of the opinion that the existing Supreme Court, the existing two divisions of that court and the existing judicial positions were continued by the Alberta "Judicature Act," 1919-1920, and that the only new offices thereby created to which the Governor in Council was authorized to make appointments were the Chief Justiceship of the Trial Division and an additional puisne judgeship of the Supreme Court. Placing on s. 6, as amended, a construction in harmony with secs. 3 and 5 and within the competence of a provincial legislature, I read it as assigning to the Chief Justice of Alberta for the time being the duty of presiding over the Appellate Division, and to four of the nine puisne judges provided for, to be nominated by the Governor General in Council, the duty of sitting as ordinary members of that Division. To the Chief Justiceship of the Trial Division and to one of the nine puisne judgeships, as new positions the appointment lay exclusively with the Governor General in Council, subject, however, to this restriction, that the same person could not fill the two Chief Justiceships for which the "Judicature Act" provides.

It follows that the position of Chief Justice of the Supreme Court of Alberta, with the style and title of the Chief Justice of Alberta, to which the Hon. Horace Harvey was appointed by letters patent of the 12th October, 1910, still exists and continues to be filled

by that gentleman, he having neither resigned nor been removed from office by competent authority. While holding that office he was not eligible for appointment as Chief Justice of the Trial Division.

I would for these reasons respectfully return the following answers to the questions referred by His Excellency in Council:

(1) No; (2) Wholly; (3) No; (4) Wholly; (5) (a) Yes; (b) Chief Justice of the Supreme Court of Alberta with the style and title of the Chief Justice of Alberta.

BRODEUR J.—Five questions have been submitted to us by the Governor in Council under the provisions of sec. 60 of the "Supreme Court Act."

We are called upon to give our opinion on the effect of the letters patent of the 12th October, 1910, nominating The Honourable Horace Harvey Chief Justice of the Supreme Court of Alberta and on the effect of the letters patent of 15th September, 1921, nominating the same Mr. Justice Harvey, Chief Justice of the Trial Division of the Supreme Court of Alberta, and the Hon. D. L. Scott, Chief Justice and President of the Appellate Division of the same Supreme Court.

The effect and validity of these different letters patent depends very largely upon the construction of the statutes concerning the Supreme Court of Alberta and upon the respective powers of the federal and provincial authorities concerning the constitution, maintenance and organization of provincial courts and the appointment of judges of these courts.

The legislature of Alberta created in 1907 (7 Edw. VII ch. 3) "The Supreme Court of Alberta" which consisted of a Chief Justice and of a certain number of puisne judges, and determined that the Chief Justice (s. 6) who

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should be designated as Chief Justice of Alberta, should have rank of precedence over all other judges of any court in the province and should preside when the court sitting *en banc* (sec. 31) would hear appeals from any decision of any judge of the Supreme Court.

In 1910, Mr. Justice Harvey was appointed by the federal government to fill the position of Chief Justice of the Supreme Court of Alberta.

In 1913, the legislature of the province enacted that the court *en banc* should be known as the Appellate Division of the Supreme Court. In 1919, a "Judicature Act" was passed declaring (sec. 3) that

> there *shall continue* to be in and for the province a superior court of civil and criminal jurisdiction known as the Supreme Court of Alberta,

and that the court *should continue* to consist of two branches or divisions which shall be designated as the Appellate Division and the Trial Division (sec. 5).

It was declared in sec. 6 of that "Judicature Act" that the Appellate Division *should continue* to be presided over by the Chief Justice of the court and by four other judges who should be assigned to it by the Governor General in Council.

This section six was amended twice in 1920 and reads now as follows:

> The Appellate Division shall be presided over by a Chief Justice, who shall be Chief Justice of the court and who shall be styled the Chief Justice of Alberta, and shall consist of the said Chief Justice and four other judges of the court to be assigned to it by His Excellency the Governor-General in Council and to be called Justices of Appeal, and three judges shall constitute a quorum for the hearing of appeals from any district court, but the Appellate Division, when hearing such appeals, may be composed of five judges. The Appellate Division shall be composed of five judges when hearing appeals from the Trial Division of the Supreme Court of Alberta, and in no case shall an appeal be heard by the Appellate Division of the Supreme Court of Alberta when composed of four or an even number of judges.

We have no information before us to the reasons why section 6 was amended in 1920, but I presume by what has been contended by Mr. Newcombe at the argument that the federal government found in this original section 6 an encroachment upon its right to appoint the judges of the provincial courts.

I fail to see, however, how section 6 as originally enacted could be considered as *ultra vires*.

By the B.N.A. Act (sec. 92, s.s. 14) the constitution and organization of the courts are within the domain of the provincial legislature. The legislature of Alberta had then the power to create a Supreme Court and to determine that it could be presided over by a Chief Justice whose powers and rank in its branches and divisions could be fixed by the provincial authorities.

On the other hand, it was for the federal authorities to determine whom they would select for the position of Chief Justice of the Supreme Court. In the exercise of its power, the federal government had in 1910 appointed Mr. Justice Harvey as the Chief Justice of this court and according to the B.N.A. Act, Mr. Justice Harvey would hold such office and could not be removed therefrom except on address of the Senate and House of Commons or unless the provincial legislature would abolish the court or the office.

It is no wonder then that in 1919, when the provincial legislature intended to call with specific names the trial and appellate divisions which practically existed before, it declared that the Appellate Division which was naturally more important than the other, should continue to have as its presiding officer the Chief Justice of the Supreme Court.

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The right to regulate and provide for the whole machinery for the proper administration of civil justice in its widest sense is with the provincial legislatures subject to the appointing power of the federal government and subject to the reserved power for the federal Parliament to create certain additional courts (sec. 101). The powers and authority of these judges is to be determined by the province; and once a person was appointed Chief Justice of a court he could not be removed except on the recommendation of the Senate and the House of Commons. On the other hand, this Chief Justice could see his powers and authority curtailed by the provincial legislature and even the court of which he is a member, or his title or both could be abolished by the province. At the same time, the province could extend his powers and authority in connection with the administration the same as the provincial legislature could impose additional authority or powers on the other judges.

The legislature of Alberta, in my opinion, had the power to state that the Chief Justice of the Supreme Court appointed by the federal authorities could continue to preside over the more important of the divisions of this court.

Section 6 of the Act of 1919 as originally drawn was then *intra vires*.

But the legislature found it advisable to amend sec. 6 and to declare that the Appellate Division would be presided over

> by a Chief Justice who shall be Chief Justice of the court and who shall be styled the Chief Justice of Alberta.

It is contended that this amendment gave the authority to the Governor in Council to select any person to act as Chief Justice of the Appellate Division.

This contention has undoubtedly a great deal of force. The legislature has shown its disposition not to interfere with the power of appointment. At the same time we have to construe in the light of this amendment the other sections of the Act and particularly sections 3 and 7.

Section 3 states that the Supreme Court has not been abolished and continues to exist. The main purpose of the Act is to provide for two specific divisions, viz., the Appellate Division and the Trial Division of the Supreme Court and that there will be at the head of each division a Chief Justice. It gives, however, to the one who is to preside over the Appellate Division the additional title of Chief Justice of Alberta and gives him by sec. 7 rank and precedence over all other judges, even the Chief Justice of the Trial Division.

The Supreme Court of Alberta being continued, the Governor in Council having in the discharge of its power of appointment nominated in 1910 the Honourable Mr. Harvey as Chief Justice of this court and Chief Justice of Alberta, it seems to me that the new legislation concerning the Chief Justice could not be construed as providing for a new office. It is the old office of Chief Justice of Alberta which is continued and maintained, though the legislature has assigned to this Chief Justice the duty to preside over the Appellate Division.

The legislature never intended to abolish the old office of the Chief Justice. The statute could not be construed as maintaining the old position of Chief Justice and as creating a similar position. The idea of having two Chief Justices of Alberta with the same power and authority has certainly not entered into the mind and intention of the legislature. The old position stands and has not been superseded by the one mentioned in section 6 of the Act of 1919.

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I therefore come to the conclusion that Mr. Justice Harvey being already the Chief Justice of Alberta, should have imposed upon him, under the new Act, the duty of presiding over the Appellate Division or should be confirmed in his right to preside over this Appellate Division.

I would answer the questions as follows:—

To the first question:—No.

To the second question:—The letters patent of the 15th September, 1921, nominating Honourable Mr. Scott Chief Justice of Alberta are wholly ineffective.

To the third question:—No.

To the fourth question:—The letters patent nominating Mr. Justice Harvey Chief Justice of the Trial Division are wholly ineffective.

To the fifth question:—The Honourable Horace Harvey holds the office of Chief Justice of the Supreme Court of Alberta with the style and title of Chief Justice of Alberta and is by law entitled to exercise the jurisdiction and perform the duties and functions of Chief Justice and President of the Appellate Division of the Supreme Court of Alberta.

MIGNAULT J.—The questions submitted by this reference are very important and, if I may say so, somewhat unusual. They call for an expression of opinion as to the status and authority of two eminent members of the judiciary in the province of Alberta. They also touch on some important constitutional problems which have seldom been discussed before the courts of this country. It seems impossible to satisfactorily deal with them unless they are prefaced by a very brief statement of what I may perhaps call the history of the case.

The Provinces of Alberta and Saskatchewan were created in 1905 out of what was known as the North West Territories. These territories had a court of superior jurisdiction called the Supreme Court of the North West Territories, which administered justice either by sitting *en banc* or by trial judges, and which the legislature of each province was empowered to abolish for all purposes affecting or extending to the province.

The legislature of Alberta, in 1907, passed an Act, 7 Edw. VII, c. 3, creating the Supreme Court of Alberta, consisting of a Chief Justice, styled the Chief Justice of Alberta, and four puisne judges. When sitting as an Appellate Court this court was called the Supreme Court *en banc*, its quorum was three judges and it was presided over by the Chief Justice, or in his absence by the senior judge. The Chief Justice had rank and precedence over all judges and the latter between themselves ranked according to seniority of appointment.

While this statute was in force the Hon. Horace Harvey, then a puisne judge of the Supreme Court of Alberta, was appointed Chief Justice of the Supreme Court of Alberta with the style or title of the Chief Justice of Alberta, his commission bearing date the 12th of October, 1910.

In 1913, by 4 Geo. V., c. 9, the "Supreme Court Act" above referred to was amended by changing the name of the court *en banc* to that of "The Appellate Division of the Supreme Court," and it was enacted that during the month of December, or at some other convenient time, the judges of the Supreme Court should select four of their number to constitute the Appellate Division for the next ensuing calendar year, but that every other judge of the said court should be *ex officio* a member of the Appellate Division.

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These two statutes were repealed by the "Judicature Act" 1919 (9 Geo. V, c. 3), which was to come in force upon a day to be named by proclamation of the Lieutenant Governor in Council. This proclamation was issued on the 11th day of August, 1921, and fixed the 15th of September, 1921, for the coming in force of the Act.

By the provisions of this statute it is declared that there shall continue to be in and for the province a Superior Court of civil and criminal jurisdiction known as "The Supreme Court of Alberta" (sec. 3) and that the court shall continue to consist of two branches or divisions which shall be designated respectively "The Appellate Division of the Supreme Court of Alberta" and "The Trial Division of the Supreme Court of Alberta" (sec. 5).

As enacted in 1919, sec. 6 was as follows:

> The Appellate Division shall continue to be presided over by the Chief Justice of the court, who shall continue to be styled the Chief Justice of Alberta, and shall consist of the said Chief Justice and four other judges of the court to be assigned to it by His Excellency the Governor General in Council and to be called Justices of Appeal and three judges shall constitute a quorum.

In 1920 (before the Act was proclaimed and had come in force), sec. 6 was twice amended, by c. 3 of the Statutes of that year, sec. 2, and by c. 4 of the same statutes, sec. 43. As thus amended—and the changes can easily be noticed by careful reading—sec. 6 is in the following terms:

> The Appellate Division shall be presided over by a Chief Justice, who shall be Chief Justice of the court and who shall be styled the Chief Justice of Alberta, and shall consist of the said Chief Justice and four other judges of the court to be assigned to it by His Excellency the Governor General in Council and to be called Justices of Appeal, and three judges shall constitute a quorum for the hearing of appeals from any district court. But the Appellate Division, when hearing such appeals, may be composed of five judges. The Appellate Division

shall be composed of five judges when hearing appeals from the trial Division of the Supreme Court of Alberta, and in no case shall an appeal be heard by the Appellate Division of the Supreme Court of Alberta when composed of four or an even number of judges.

By sec. 7 of the "Judicature Act, 1919," the Trial Division consists of a Chief Justice, styled the Chief Justice of the Trial Division of the Supreme Court of Alberta, and five other judges, called justices of the Supreme Court of Alberta.

The Chief Justice of the court has rank and precedence over all other judges of any court in the province; the Chief Justice of the Trial Division has rank and precedence next after the Chief Justice of the court; the other judges of the court rank among themselves according to seniority of appointment (sec. 9). Every judge is *ex officio* a judge of the division of which he is not a member (sec. 10).

Referring very briefly to these enactments, it will be noticed that although the term "Supreme Court *en banc*" was used from the origin of the court, and the term "Appellate Division" from 1913, the expression "Trial Division" was introduced only by the "Judicature Act" of 1919. Section 5 of the latter statute however appears to have recognized by the words "the court shall continue to consist of" that there had been hitherto two divisions of the Supreme Court. The second, or then unnamed Trial Division, was composed of the judges who did not sit in the Appellate Division, although no doubt any of the latter could hold trials if thought advisable.

The "Judicature Act," 1919, as amended in 1920, came in force, I have said, on the 15th September, 1921. It increased the number of judges and added a Chief Justice for the Trial Division. For the salaries of

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these judges, Parliament made provision by 10-11 Geo. V., c. 56, s. 14 a (1920) which came in force by proclamation of the Governor in Council also on the 15th September, 1921.

On the same day, the 15th September, 1921, the Governor General, by commission under the Great Seal of Canada, appointed the Honourable David Lynch Scott described as

> one of the judges of the Supreme Court of Alberta, as heretofore established,
>
> (to be)
>
> the Chief Justice and President of the Appellate Division of the Supreme Court of Alberta, as constituted under the "Judicature Act" of Alberta, Ch. 3, 9 Geo. V., as amended, and to be styled the Chief Justice of Alberta and to be *ex officio* a judge of the Trial Division of the said court.

Also, on the same day, the Governor General, by Commission under the Great Seal of Canada, appointed the Honourable Horace Harvey described as

> Chief Justice of the Supreme Court of Alberta as heretofore established (to be) the Chief Justice of the Trial Division of the Supreme Court of Alberta and *ex officio* a judge of the Appellate Division of the said court.

The reference states that the following questions have arisen upon which the advice of this court is desired by the Governor in Council: (see page 137).

Notice of the hearing under this reference was given by order of the court to the Hon. Horace Harvey and to the Hon. David Lynch Scott, as well to the Attorney-General of Alberta. The two latter were not present or represented at the hearing. The Honourable Horace Harvey appeared by Mr. Eugene Lafleur K.C., and the Attorney-General of Canada by Mr. E. L. Newcombe K.C., Deputy Minister of Justice.

The administration of justice in the province, including the constitution, maintenance and organization of the provincial courts, both of the civil and criminal jurisdiction, is by the British North America Act, (sec. 92, para. 14), assigned to the provinces. The appointment of judges of superior, district and county courts belongs to the Governor General, and their salaries are provided for by the Parliament of Canada (same Act secs. 96, 100). Judges hold office during good behaviour but are removable only by the Governor General on address of the Senate and House of Commons (B.N.A. Act, sec. 99).

Mr. Newcombe's contention was that the Alberta "Judicature Act, 1919," created, if not a new court, at least new judicial offices which could be filled only by appointments made by the Governor-General; that anything in the said Act purporting to vest these offices in any existing Chief Justice or judge would be *ultra vires* of the legislature of Alberta, and that consequently the commissions issued on the 15th September, 1921, were effective for the purposes therein stated.

Mr. Lafleur argued that no new court and no new judicial office, with the exception of the Chief Justiceship of the Trial Division and the additional judgeships, had been created by the "Judicature Act, 1919;" that the Hon. Horace Harvey, as Chief Justice of the Supreme Court of Alberta and Chief Justice of Alberta, could not be removed nor his offices taken away except by the method specified in the B.N.A. Act, sec. 99; that, as the Hon. Mr. Harvey still filled the said offices, no other person could be thereunto appointed, and consequently the commissions of the 15th September were inefficient to appoint the Hon. Mr. Scott to be Chief Justice and President of the

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Appellate Division of the Supreme Court of Alberta and Chief Justice of Alberta, and the Hon. Mr. Harvey to be Chief Justice of the Trial Division of the Supreme Court of Alberta, for obviously the two offices could not be filled by the same person.

Assuming, but not deciding, that the legislature could destroy an existing judicial office, so as to deprive thereof the person duly appointed thereto, it would require a very clear enactment to make me come to the conclusion that the judicial office had been destroyed and that the titulary thereof was no longer entitled to exercise the powers, authority and jurisdiction thereunto appertaining. Still less would I be disposed to find—in the reorganization and rearrangement by the legislature of an existing court, with provisions for the appointment by the proper authority of the Chief Justice and judges of the court, where the court had already, as it naturally would have had, a Chief Justice and judges,—the creation of new judicial offices or the destruction of the existing ones. It is only when the legislature by legislation such as that under consideration, increases the number of judges of an existing court, or when, in dividing the court into different branches, it provides for additional Chief Justices, that I would readily conclude that a new judicial office has been established. It follows that if the existing judicial offices are filled and have not been destroyed, no new appointments can be made thereto.

Bearing these considerations well in mind, I will take up the proper construction of the Alberta "Judicature Act, 1919," and I have no difficulty whatever in coming to the conclusion that the only new judicial offices created by this Act were the additional judgeships required to complete the number of judges provided for and the Chief Justiceship of the Trial Division.

In other respects, in my opinion, the existing Supreme Court of Alberta continued. This is shown by sec. 3 of the Act. Sec. 5 assumes that there were already two existing branches or divisions of the court and it gives a name to the Trial Division. Sec. 6, as first enacted in 1919, shows that that was clearly the intention of the legislature, for the language was

> the Appellate Division shall continue to be presided over by the Chief Justice of the court, who shall continue to be styled the Chief Justice of Alberta. * * *

But it is contended that the 1920 amendments show that this intention of the legislature was not persisted in. No doubt the present language of sec. 6 does not as emphatically express the intention not to create a new office of Chief Justice of the Supreme Court of Alberta, but even were I of opinion that the new language of the section is equivocal or consistent with either construction, I would not, for the reasons above stated, give the preference to a construction that would deprive the existing Chief Justice of the Supreme Court of his high office, and possibly leave the Governor in Council free not to reappoint him to any judicial office. Furthermore, the language of sections 3 and 5 was not changed in 1920, and I find in these sections the clearly expressed intention to continue the existing court with its existing Chief Justice and judges, the number of which, however, was increased.

It appears unnecessary to express any opinion upon the right of the legislature to make these enactments. I assume, for the purpose of answering the questions submitted, that it acted within its powers.

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Answering now these questions, I will reply to the first and third questions in the negative. I do not think, in view of this answer, that questions 2 and 4 call for a reply; it is clear that the letters patent in question are wholly ineffective for the purposes therein expressed. I would answer question 5 by saying that in my opinion the said Horace Harvey holds the office conferred on him by his Commission of 1910, which office is continued under the "Judicature Act" of Alberta, 1919, and entitles him to be the Chief Justice and President of the Appellate Division of the Supreme Court of Alberta.

At the sittings on the 2nd day of May, 1922, the Supreme Court of Canada answered the questions submitted as follows:

To the first question:—No.

To the second question:—Wholly.

To the third question:—No.

To the fourth question:—Wholly.

To the fifth question:—The Hon. Horace Harvey holds the office of Chief Justice of the Supreme Court of Alberta with the style and title of Chief Justice of Alberta and is by law entitled to exercise and perform the jurisdiction, office and functions of the Chief Justice and President of the Appellate Division of the Supreme Court of Alberta.

The Chief Justice and Idington J. answer questions 1 and 3 in the affirmative, that the Honourable David Lynch Scott is the Chief Justice and President of the Appellate Division of the Supreme Court of Alberta and that the Honourable Horace Harvey is the Chief Justice of the Trial Division of such

Supreme Court. The Chief Justice answers the fifth question in the negative and holds therefore that no answer is required to questions 2 and 4. Idington J. holds no answer to 2 necessary, but answers the fourth question by saying that the Honourable Horace Harvey being *ex officio* a judge of the Appellate Division of the Supreme Court only qualifies him to act in place or stead of some member of the court not being able to take the place to which he or his successor may have been assigned. To the 5th question Idington J. answers in the negative and that the Honourable Horace Harvey only holds the office provided by his patent of September, 1921.