IN THE SUPREME COURT.

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FACTUM

On behalf of the Province of British Columbia upon the questions raised in "the Thrasher case," referred to the Supreme Court of Canada by His Excellency the Governor-General in Council.

1st.—Is the Supreme Court of British Columbia a Provincial Court within the meaning of the 14th Sub-section, of Section 92, of the British North America Act?

The Supreme Court of British Columbia is such a Provincial Court. It will be well first, to trace the history of the Court. Previously to the Union (November, 1866) of the former separate Colonies of British Columbia and Vancouver Island, each Colony had its own Supreme Court; that is to say, in the Colony of British Columbia "The Supreme Court of Civil Justice of British Columbia;" in the Colony of Vancouver Island, "The Supreme Court of Civil Justice of the Colony of Vancouver Island." The Supreme Court of Civil Justice of British Columbia was first *constituted*, or (to use the language of section 5 of the "Supreme Courts Ordinance, 1869," No. 112, Revised Statutes, B. C.) *established*, by a Proclamation having the force of law, issued by James Douglas, the then Governor of the Colony of British Columbia, on the 8th June, 1859. (No. 28, Revised Statutes, B. C.)

No other Proclamation, Ordinance, or Statute of the separate Colony of British Columbia was issued or passed before or since 1859, dealing with the constitution of the Supreme Court of Civil Justice of British Columbia. The salaries of the Judge (Mr. Begbie) and of the officers of the Court, and the expenses of the administration of justice generally, were defrayed by the then separate Colony of British Columbia.

The other Court, viz.: "The Supreme Court of Civil Justice of the Colony of Vancouver Island," was constituted by an Imperial Order in Council (4th April, 1856) made under the authority of the Imperial Statute 12 & 13 Vic., chap. 48, and was, by section 2 of that statute, made subordinate as regards its constitution and jurisdiction, and to provisions for and concerning the administration of justice in the Island, to the local Legislature of Vancouver Island. That Legislature, in exercise of that power, passed "The Vancouver Island Civil Procedure Act, 1861," which brought into force the Common Law Procedure Acts of England, and the statutory enactments and orders regulating the proceedings of the English High Court of Chancery.

They also passed other similar enactments, *e. g.*, "The Summary Procedure on Bills of Exchange Act, 1861," "The Bankruptcy Act, 1862."

These different Acts, as the records in the now Supreme Court will shew, were acted upon by the Supreme Court of Civil Justice of the Colony of Vancouver Island.

The salary of the Chief Justice of Vancouver Island, and the expense of the administration of justice therein, were defrayed out of funds of the Colony of Vancouver Island.

In November, 1866, the two separate Colonies of British Columbia and Vancouver Island were united, pursuant to the Imperial Statute, 30 Vic., chap. 67, entitled the "British Columbia Act, 1866," proclaimed November, 1866. [*See No. 43, Appendix to Revised Statutes, B. C.*]

After such Union, the Legislature of British Columbia (*i. e.*, of the united Colonies) passed, in 1868, "The Courts Declaratory Ordinance, 1868" (No. 99 Revised Statutes of B. C.), Section 1 of which is as follows:—

"1. All the jurisdiction, powers, and authorities which, before the passing of 'The British Columbia Act, 1866,' were by law vested in and had and exercisable by the Supreme Court of Civil Justice of the Colony of Vancouver Island, and in and by the Chief Justice thereof, both in civil and criminal matters and proceedings, shall be deemed and taken to have continued so vested in, and to have been had and exercisable by, the said Court and the said Chief Justice thereof, as if the said Act had not been passed."

The same Legislature, in 1869, passed "The Supreme Courts Ordinance, 1869," (No. 112, Revised Statutes of B. C.). Sections 3, 4, 5, 6, and 11 of that Statute, are as follows:—

"3. All acts heretofore done and powers exercised by, or by order or under colour of, any Writ or Warrant of the present Judge of the Supreme Court of Civil Justice of British Columbia, in any part of the present Colony of British Columbia, shall be and be deemed to have been lawful and lawfully done and exercised, to all intents and purposes whatsoever, and shall be recognized as such in all Courts of the Colony; and no objection thereto shall be taken or allowed, or suit, action, or proceedings sustained by reason that any such act has been heretofore done, Order so made, Warrant, Writ, or Summons so issued or executed, out of the jurisdiction of the said Supreme Court of British Columbia.

"4. The Supreme Court established under the name of 'The Supreme Court of Civil Justice of the Colony of Vancouver Island,' shall, from and after the coming into operation of this Ordinance, be called 'The Supreme Court of Vancouver Island,' and the present Chief Justice thereof shall be called and known by the name and style of 'The Chief Justice of Vancouver Island.'

"5. The Supreme Court established under the name of 'The Supreme Court of Civil Justice of British Columbia,' shall, from and after the coming into operation of this Ordinance, be called 'The Supreme Court of the Mainland of British Columbia,' and the present Judge thereof shall be called and known by the name and style of 'The Chief Justice of the Mainland of British Columbia.'

"6. Except as hereinafter mentioned, the jurisdiction, civil and criminal, of the said Supreme Courts shall be the same, and all the powers and authorities heretofore by law vested in and exercisable by the Judges thereof respectively, in all civil and criminal matters and proceedings whatsoever, shall be the same and shall continue so vested in and exercisable by them respectively, as if the titles of the said Supreme Courts and of the Judges thereof had not been changed, and as if the Imperial Statute of the 29th and 30th Victoria, chapter 67, intituled 'The British Columbia Act, 1866,' had not passed; that is to say: the jurisdiction of the Supreme Court of the Mainland of British Columbia shall extend only over the former Colony of British Columbia and its Dependencies, and the jurisdiction of the Supreme Court of Vancouver Island shall extend only over the former Colony of Vancouver Island and its Dependencies previous to Union.

"11. Upon a vacancy being created by the death, resignation, or otherwise, of either of the present two Chief Justices, the said Supreme Courts of the Mainland of British Columbia and of Vancouver Island, shall be merged into one Supreme Court, to be called 'The Supreme Court of British Columbia,' and the surviving or remaining Chief Justice shall preside over the said Courts, and shall be called 'The Chief Justice of British Columbia,' and a Puisne Judge of the said Court shall thereupon be appointed by Her Majesty, Her heirs or successors, by Warrant under Her or their Sign Manual and Signet, and receive

the annual salary of one thousand pounds; and all the jurisdiction, powers, and authorities of the two present existing Supreme Courts, and of the Judges thereof, shall be vested in, and shall be had, exercised, and enjoyed by the said Supreme Court of British Columbia, and the Judges thereof."

The Chief Justice of Vancouver Island having resigned, the Legislature passed "The Courts Merger Ordinance, 1870;" the first section of which enacts as follows:—

"1. The merger of the Supreme Court of the Mainland of British Columbia, and of the Supreme Court of Vancouver Island, into the Supreme Court of British Columbia, under 'The Supreme Courts Ordinance, 1869,' shall be deemed and taken for all purposes whatsoever to have taken place as from the twenty-ninth day of March, A. D. 1870, and shall be so recognized in judicature, and thereout, in all proceedings, matters, and things by all persons and for all purposes whatsoever."

The contention of the Province, therefore, is that the Supreme Court of British Columbia as it now exists, was constituted by "The Supreme Courts Ordinance, 1869," and "The Courts Merger Ordinance, 1870." Up to the time of the Union of British Columbia with Canada (July, 1871), the salaries of the Judges of the Court, and all other expenses attendant upon the administration of justice, were paid out of Colonial funds; and since the Union all the expenses attendant upon the maintenance of the Court and the administration of justice by it, *e. g.*, the payment of Registrars; the maintenance of the Court House; supplies of books, stationery, fuel, lights, &c.; payment of Sheriffs and Jurors, have, with the exception of the Judges' salaries, been defrayed by the Province. Under the Terms of Union (sec. 5), and sec. 100 of the British North America Act, Canada is bound to assume and defray the salaries of the Judges. This obligation does not alter the character of the Court. It only relieves the Province from the payment of the salaries of the Judges. It was a Colonial Court constituted, maintained, and organized by the Colony; and upon and since Confederation, was and is a Court in respect of which the Province could legislate concerning its constitution, maintenance, and organization. The Imperial Statute, 28 and 29 Vic., by section 5, gave power to the Colony to establish Courts of Judicature, and to abolish and re-constitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein. This is a power which, by section 129 of the British North America Act, has been preserved to the Province. From this point of view the Supreme Court is clearly a Court of the Province, subject, as regards its constitution and procedure, to Provincial legislation. But beyond this, it is a Provincial Court within the meaning of sub-section 14, of section 92, of the British North America Act. If it is not a Provincial Court within that section, what is it? Clearly not an Imperial Court. It has not been constituted, organized, nor is it maintained by Great Britain. Before Confederation, it is true the Chief Justice and Mr. Justice Crease received their Commissions from England, but the Court was constituted and maintained by the then Colony. The Judges, Gray, McCreight, Robertson, and Walkem, J. J., who have been appointed since Confederation, have received their Commissions from the Governor-General, and all the Judges are paid by Canada. Nor is the Court a Court of Canada within the meaning of the 101st section of the British North America Act; for it is neither a Dominion Court of Appeal, nor is it an additional Court established by the Parliament of Canada for the better administration of the laws of Canada. If it be neither an Imperial or Dominion Court, it can only be a Provincial Court within the meaning of the sub-section 14; especially so, as under section 96, the Judges are appointed for each Province by the Governor-General, and, under section 100, are paid by the Dominion as Judges of Provincial Courts.

It is idle to make a difference between the meaning of the words "Colonial" and "Provincial." Subject to the provisions of the British North America Act, what before Confederation was Colonial, has, upon and since Confederation, become Provincial; what was a Colony has become a Province; what was a Colonial Court has become a Provincial Court; and what were Colonial rights have become Provincial rights. The words "Colonies" and "Provinces" are used as convertible terms—section 146, British North America Act, section 10 of the British Columbia Terms of Union. If the contention be correct that the Supreme Court be not a Provincial Court, it is hard to see by what authority its constitution or procedure could be affected. The Dominion Parliament could not touch its constitution or procedure, for it does not come under section 101 of the British North America Act; and not being a Provincial Court, the Province could not deal with it; nor could the Dominion impose upon it the duties, the consideration of the exercise of which gave rise to the case Valin *v.* Langlois. *(Vol. 3, Canada Supreme Court Reports, p. 1.)*

Our Supreme Court is also a Court of criminal jurisdiction, and in this respect it is clear the Dominion Parliament could not constitute or alter the constitution of such Court (sub-section 27 of section 91.) To the Province is reserved this right (sub-section 14 of section 92.)

If the contention be correct, that the Supreme Court is not a Provincial Court, then it follows that there is no power, Dominion or Provincial, which could legislate in respect of its constitution or procedure. Such a Court would be *imperium in imperio*, a state of things not existing before Confederation, and never contemplated by the British North America Act.

Valin *v.* Langlois, cited above, is, it is submitted, conclusive authority that the Court is a Provincial Court, within the meaning of sub-section 14. The whole case, from both sides, proceeded upon the foundation of the Superior Courts of the different Provinces being such Provincial Courts; the simple question being whether, to the ordinary duties of the Judges, the Dominion could superadd judicial duties required by Dominion legislation. The Chief Justice, at p. 19, says: "Transferring "this new and this peculiar jurisdiction vested in the House of Com- "mons to the * * Superior Courts, in other words, substitu- "ting those Courts in place of the House of Commons, in relation to those "matters with which the Local Legislatures have nothing to do, can in "no way, that I can perceive, militate against or derogate from the "right of Local Legislatures to make laws in relation to all subjects or "matters exclusively reserved to them. * * * These "Courts are surely bound to execute all laws in force in the Dominion, "whether they are enacted by the Parliament of the Dominion or by "the Local Legislatures respectively. * * * They are "the Courts which were the established Courts of the respective "Provinces before Confederation existed, at Confederation, and were "continued, with all laws in force, as if the union had not been made, "by the 129th section of the British North America Act, and subject "therein, as expressly provided, to be repealed, abolished, or altered "by the Parliament of Canada, or by the Legislatures of the respective "Provinces, according to the authority of the Parliament or of that "Legislature under this Act. They are the Queen's Courts, bound to "take cognizance of and execute all laws, whether enacted by the "Dominion Parliament or the Local Legislatures. Provided always, "such laws are within the scope of their respective legislative powers."

Mr. Justice Fournier speaks of these Courts as "Provincial tribunals," p. 49; "Provincial Courts," pp. 50, 55, 59.

Mr. Justice Henry, at p. 64, says: "Legislation by the Dominion "Parliament on such subjects is legitimate and binding, and the "Provincial Courts are bound to determine the 'civil rights of parties'

"in the Province solely by it." And, at p. 66, "The right of the Parlia-
"ment [of Canada] to deal with the general subject of the trial of con-
"tested elections is admitted, but it is objected that, in so dealing with
"it as to give Provincial Courts power to try them, and in framing the
"procedure, it has trenched on the prerogatives of the Local Legisla-
"latures."

The Supreme Court of British Columbia is treated by the Parliament of Canada as one of such Provincial Courts (sub-section 6 of section 3 of the Dominion "Controverted Elections Act, 1874."

At p. 68, Mr. Justice Henry again uses the words "Provincial Courts," and, at p. 69, he says: "If there is no incompatibility in the Provincial
"Courts in the one case, and none has been found or suggested, I am at
"a loss to discover why there should be in any other. The Local
"Legislatures, even had they the power, have intervened no prohibitory
"legislation. The Courts entertain and adjudicate on all matters pre-
"sented to them, under the common law and local statutes, and until it
"is shown, whilst so doing, the additional duty of trying contested
"elections is incompatible with their other duties and obligations, I have
"no difficulty in arriving at the conclusion that they are equally
"authorized, as well as bound, by the provisions of the Dominion Acts
"which are in this case objected to as *ultra vires.*"

Mr. Justice Taschereau also treats the Superior Courts of the Provinces as Provincial Courts, pp. 71, 72, 73, 74, 76, and 81.

Valin *v.* Langlois is affirmed on appeal (L.R., 5, Appeal Cases, 115.)

2nd. Has the Legislature of the Province exclusive legislative authority over the procedure in all civil matters in the Supreme Court? If not, to what extent has it such authority?

The Legislature has such exclusive legislative authority. It is one of the exclusive powers given by sub-section 14 of section 92 of the British North America Act. It may be said that Valin *v.* Langlois conflicts with this view to the extent only that the Dominion Government has the right to legislate as regards procedure necessary to carry out Dominion legislation, and to utilize the services of the Judges in carrying out measures within the scope of the Dominion Parliament. Be this as it may, the Province, at all events, has the exclusive right to legislate upon procedure in respect of those matters concerning which the Province has power to legislate, *e. g.*, Property and civil rights in the Province, and the administration of justice in the Province, Valin *v.* Langlois *(ubi supra.)* The right of the Province to utilize the services of the Judges is paramount to that of the Dominion, for the legal business of the Province might be so extensive as to afford no time to the Judges to perform the duties imposed upon them by the Dominion, and the Dominion can always create Courts for the administration of the laws of Canada (sec. 101 of B. N. A. Act.)

The Legislature of British Columbia, in 1869, passed the "Civil Procedure Ordinance, 1869," (No. 121 Revised Statutes B. C.) Under that Ordinance, the practice of the Supreme Court of British Columbia has, up to a recent date, been that of the Common Law Procedure Acts and of the English Court of Chancery, as specified in the Ordinance.

On the 16th day of October, 1880, the Lieutenant-Governor, by Order in Council, under section 17 of the "Judicature Act, 1879 (No. 12, Statutes B.C. 1879), promulgated *in extenso* a set of Rules known as the "Supreme Court Rules, 1880." The Judges have, in the Thrasher case, declared such Rules to be beyond the power of our Legislature to make, and also that in any event the Legislature could not delegate to the Lieutenant-Governor in Council power to make such Rules.

An Order of the Supreme Court was afterwards made in the following terms:—

"SUPREME COURT OF BRITISH COLUMBIA.

"GENERAL ORDER.

"Whereas by the 'Supreme Court Ordinance, 1869,' Section 13, the Chief Justice of British Columbia is authorized and empowered, from time to time, to make all such Orders, Rules, and Regulations as he shall think fit for the proper administration of justice in the Supreme Court of British Columbia;

"And whereas by the 'Courts Merger Act, 1870,' Section 1, it was declared that the said Supreme Court of British Columbia should be deemed to have come into existence on the 29th March, 1870, and it was by Section 4 declared that nothing therein contained should affect any of the provisions of the said recited Ordinance of 1869;

"And whereas the Judges of Superior Courts have as of right and as part of their judicial authority power to make rules of practice and procedure in such Courts, subject to the provisions of Statutes made by a competent Legislature;

"And whereas it is considered that the Supreme Court of British Columbia and the Judges thereof are, by divers sections of the British North America Act, 1867—viz., in particular Sections 96, 99, 100, 129, and 130—placed under the authority of the Parliament of Canada;

"And whereas the Parliament of Canada has not made any law affecting the power of the Chief Justice or of the Judges of the said Supreme Court to make such Rules of Court as in the said first recited Ordinance are mentioned;

"Now, therefore, I, Matthew Baillie Begbie, Chief Justice of the said Court, do, by virtue of the power expressed and contained in the said first recited Ordinance,—and we, the said Matthew B. Begbie, and also H. P. P. Crease, J. H. Gray, and J. F. McCreight, Justices of the said Court,—do, by virtue of every power and authority us in this behalf in anywise enabling and so far as we lawfully can or may, and not further or otherwise, order as follows, viz.:—

"Until further order herein, the body or code of rules known as the 'Supreme Court Rules, 1880,' as the same are referred to and more particularly described in the Order of His Honor the Lieutenant-Governor in Council of the 16th day of October, 1880, and published in the *British Columbia Gazette*, No. 42 of vol. xx, on the said 16th October, 1880, and so far as the same do not contradict nor are repugnant to any Statute made and passed by a competent Legislature, shall be the rules of practice and procedure to be observed in all suits, applications, and proceedings had or taken, or attempted to be had or taken, with respect to any matters within the cognizance of the Supreme Court.

"MATT. B. BEGBIE, *C. J.*
"HENRY P. PELLEW CREASE, *J.*
"J. H. GRAY, *J.*
"J. F. MCCREIGHT, *J.*

"Victoria, 11th February, 1882."

The Rules received Legislative confirmation by virtue of Section 32 of the "Local Administration of Justice Act, 1881" (No. 1, Stat. B. C. 1881).

The contention of the Province, that it has full power to make laws relative to procedure, is further borne out by Regina *v.* Hodge, 7 Ontario Appeals, page 246, especially at page 255, which so far as Judge-made rules are concerned goes to show the Judges must derive their authority from the Legislature. Cushing *v.* Dupuy, L. R., 5 App. Ca., 409, and Peek *v.* Shields, 6 Ont. App. Repts., 639, are also authorities in favour of the Province.

3rd.—If that Legislature can make Rules to govern the procedure of that Court, can it delegate this power to the Lieutenant-Governor in Council?

The case of Regina *v.* Hodge *(ubi supra)* is conclusive authority that

the Legislature can so delegate this power. Regina *v.* Burah (L.R., 3, App. cases, 889) is also an authority in favour of the Province.

4th.—Is the "Judicial District Act, 1879," (British Columbia) within the powers of the Legislature of the Province? If so does it apply to Judges appointed before that Act came into force?

It is conceded that the British North America Act contemplates two distinct judicial systems in the Provinces, viz.: a Superior Court system, and an inferior Court system. As against this Act, it has been urged that it confounds the two systems when read with the "Better Administration of Justice Act, 1878," which provides for the Supreme Court Judges holding the County Courts, and would make but one Court for the whole Province sitting at different places at the one time, and with but one seal situate in the one place. It has been further urged as an objection against the Act, that the Judges, being by their Commissions Judges of the Supreme Court, are bound to reside in proximity to the seal, by means only of which it is contended the mandate of the Court can be made efficacious. Also, that the distribution throughout the Province of the Judges, would, in effect, destroy the appellate character of the Court, and would prevent the Dominion Government utilizing the full Bench, as required by Dominion legislation. It is submitted, in answer to these objections, that the Act is *intra vires* the Provincial Legislature, as it provides for the administration of justice in the Province. It is somewhat similar to the Quebec Acts, which regulate the Superior or District Court system of that Province. The Supreme Court may be held at any place. Section 1 of the "Puisne Judge Appointment Act, 1872," under which Mr. Justice Gray was appointed, provides that the Court might be held before any one or more of the Judges. The Province contends that it has the right to say where and when the Supreme Court shall be held; and, having indicated places and times, the Dominion Government, under section 7 of the "Local Administration of Justice Act, 1881," has the right to assign the Judges to the several districts. The Judges are Officers of the Crown, and bound to obey the directions in this respect of the Governor-General, when given at the request of the Province. There is no vested right in any of the Judges to reside at any particular place. The "Better Administration of Justice Act, 1878," provides that three of the Judges shall reside on the Mainland; the Judges appointed thereunder are governed by its provisions. Orders in Council, under section 7 of the "Local Administration of Justice Act, 1881," are probably to be found in the proper offices of the Dominion Government at Ottawa. The Province, therefore, contends that the "Judicial District Act, 1879," is within the power of the Provincial Legislature, and applies to Judges appointed both before and since the Act came into operation, and, in any event, to the Judges appointed since the Act.

5th.—Are the following Acts passed by the Legislature of British Columbia, namely:—

The "Better Administration of Justice Act, 1878 (42 Vic., c. 20, 1878);

42 Vic., c. 12 (1879). "An Act to amend the practice and procedure of the Supreme Court of British Columbia, and for other purposes relating to the Administration of Justice Act;"

44 Vic., c. 1. "An Act to carry out the objects of the 'Better Administration of Justice Act, 1878,' and the 'Judicial District Act, 1879;'"

so far as they relate to procedure in the Supreme Court of British Columbia, within the legislative authority of the Legislature of the Province?

They are. The reasons given under questions 2 and 3 sufficiently answer this question. It is quite likely that section 28 of the "Local Administration of Justice Act, 1881," will be repealed on the score of expediency.

ALEX. E. B. DAVIE,
Attorney-General, B. C.

Victoria, 31st March, 1883.