1959
*Jun. 15, 16
Nov. 30

THE ATTORNEY-GENERAL FOR ONTARIO AND DISPLAY SERVICE COMPANY LIMITED .... APPELLANTS;

AND

VICTORIA MEDICAL BUILDING LIMITED, THE ROYAL BANK OF CANADA, J. IRVING OELBAUM AND TOCA INVESTMENT ESTABLISHMENT .....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Constitutional law—Mechanics' liens—Trial of mechanics' lien actions by Master in County of York—Whether s. 31(1) of the Mechanics' Lien Act, R.S.O. 1950, c. 227, as amended by 1953, c. 61, s. 21, giving such*

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*powers to Master, ultra vires—Whether violation of s. 96 of the B.N.A. Act—Whether legislation in relation to procedure in civil matters under s. 92(14) of B.N.A. Act—The Judicature Act, R.S.O. 1950, c. 190, ss. 67, 68—Review of the history of the Mechanics' Lien Act.*

Section 31(1) of the *Mechanics' Lien Act*, which confers upon the Master or Assistant Master in the County of York, Ontario, jurisdiction to try mechanics' lien actions, is *ultra vires*.

*Per* Kerwin C.J.: Applying the test set forth in *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.*, [1949] A.C. 134, the jurisdiction conferred upon the Master by the impugned legislation broadly conforms to the type of jurisdiction exercised by the Superior, District or County Courts at Confederation. Section 31(1), in attempting to confer jurisdiction upon the Master in all cases no matter what the amount claimed might be, is beyond the jurisdiction of the Legislature of the Province. There is no similarity to references directed under ss. 67 and 68 of the *Judicature Act* of Ontario. Here the Master issues a final judgment subject only to appeal to the Court of Appeal. This is not a matter of procedure within s. 92(14) of the *B.N.A. Act*, and the position is not bettered because of s. 31(2) of the *Mechanics' Lien Act*.

*Per* Locke, Cartwright, Abbott, Martland and Judson JJ.: Even though this is a case where the Province has increased the jurisdiction of a provincially appointed judicial officer, by redistributing the work within a s. 96 Court and assigning new work to this officer, nevertheless the legislation is *ultra vires*. It is in conflict with the appointing power under s. 96 of the *B.N.A. Act* for two reasons, namely, the nature of the jurisdiction conferred upon the Master and the fact that he is given power of final adjudication in these matters, subject to the usual right of appeal to the Court of Appeal as from a single judge.

The nature of the jurisdiction, which is clearly defined by s. 31(1) of the Act, is a very wide departure from the work usually assigned to the Master. The legislation makes him a judge in this particular type of action. All his functions are exercised in an original way and constitute a new type of jurisdiction for the Master which in many aspects is not merely analogous to that exercised by a s. 96 judge but is, in fact, that very jurisdiction, limited only to one particular field of litigation. There is usually no inherent jurisdiction in the office of the Master. Everything the Master does must be authorized. This does not mean, however, that the Legislature can assign any and all work to him. Section 96 operates as a limiting factor.

As to the mode of exercise of the jurisdiction, the Master, being the only trial officer in the County of York, gives a final adjudication, subject to an appeal to the Court of Appeal. He is not acting as a referee under ss. 67, and 68 of the *Judicature Act*. A distinction was correctly drawn below between the position of the Master exercising delegated jurisdiction as a referee and his position when he exercises original jurisdiction under s. 31(1). Anything that he does on a reference depends for its validity on the judge's original order. On the other hand, under the impugned legislation, the Master issues a judgment which is subject to a direct appeal to the Court of Appeal. This assignment of the power of final adjudication goes beyond procedure and amounts to an appointment of a judge under s. 96 of the *B.N.A. Act*.

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The legislation is not saved by s. 31(2) of the Act, since the jurisdiction of the judge can only be sought if one or other of the litigants chooses to apply for it and is assumed only in the judge's discretion. *Per* Locke, Martland and Ritchie JJ.: There is no analogy between the limited and controlled jurisdiction of the Master on a reference and the original jurisdiction under the authority which the Act purports to confer, and which is not subordinate to but in substitution for the jurisdiction of a judge of one of the Courts within the intendment of s. 96 of the *B.N.A. Act*. That jurisdiction is not a mere change in the procedure of provincial Courts.

APPEAL from a judgment of the Court of Appeal for Ontario[1], quashing a judgment of the Master in a mechanics' lien action for want of jurisdiction. Appeal dismissed.

*D. B. Black*, for the appellant Display Service Co. Ltd.

*D. S. Maxwell* and *L. A. Chalmers*, for the Attorney General of Canada.

*A. Kelso Roberts, Q.C., C. R. Magone, Q.C.*, and *Miss C. M. Wysocki*, for the Attorney-General for Ontario.

THE CHIEF JUSTICE:—This is an appeal in a mechanics' lien action against a decision of the Court of Appeal for Ontario[1] which had allowed an appeal by the Royal Bank of Canada from a judgment of the Master of the Supreme Court of Ontario at Toronto and had quashed that judgment. The Court of Appeal proceeded on the ground that the Master had no jurisdiction to pronounce judgment because s. 31(1) of *The Mechanics' Lien Act*, R.S.O. 1950, c. 227, as amended in 1953 by s. 21 of c. 61, was *ultra vires* the Legislature of the Province of Ontario. An appeal to this Court was launched by the plaintiff lienholder, Display Service Co. Limited, but the Attorney-General for Ontario was added as a party and he also appealed. One of the defendants who was a first mortgagee has foreclosed and, as a result, neither it, nor any other defendant, took part in the appeal. The Attorney General of Canada was permitted to intervene and counsel on his behalf filed a factum and supported the judgment of the Court of Appeal. The Attorneys-General of the other Provinces were notified but did not apply for leave to intervene.

[1] [1958] O.R. 759, O.W.N. 93, 16 D.L.R. (2d) 1.

The judgment of the Master declared that the plaintiff was entitled to a lien for a large sum of money under *The Mechanics' Lien Act* upon the land owned and occupied by Victoria Medical Building, Limited. Before any evidence was taken counsel for that company had consented to judgment for the amount claimed. The company was required to pay the money into Court on or before a fixed date, in default of which the land was to be sold and the purchase money applied as set forth in the judgment. The land being in the County of York the Master tried the action pursuant to subs. (1) of s. 31 of the Act, as amended in 1953. That subsection, and subs. (2) as amended in the same year which will be referred to later, read as follows:

(1) The action shall be tried in the county or district in which the land or part thereof is situate before a judge of the county or district court, provided that where the land is situate wholly in the County of York the action shall be tried before a Master of the Supreme Court or an Assistant Master.

(2) Notwithstanding subsection 1, upon the application of any party to an action, made according to the practice of the Supreme Court, and upon notice the court may direct that the action be tried before a judge of the Supreme Court at the regular sittings of the court for the trial of actions in the county or district in which the land or part thereof is situate.

The Court of Appeal considered that s. 96 of the *British North America Act,* 1867, applied and that the Legislature was attempting to confer upon a provincial appointee, the Master of the Supreme Court of Ontario, powers that appertained only to judges of the Superior, District or County Courts. The Attorney-General for Ontario contended that at the date of Confederation the Master was a judicial officer exercising a jurisdiction like that conferred upon him by *The Mechanics' Lien Act* and that an extension of his jurisdiction beyond that possessed by him at Confederation does not necessarily violate s. 96. He also contended that the Legislature was merely dealing with the constitution, maintenance and organization of provincial Courts including procedure in civil matters within Head 14 of s. 92 of the *British North America Act.* The relevant provisions of that Act are the following:

92. In each Province the Legislature may exclusively make Laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say,—

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14. The administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts.

* * *

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

100. The salaries, allowances, and pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in cases where the judges thereof are for the time being paid by salary, shall be fixed and provided by the Parliament of Canada.

129. Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of civil and criminal jurisdiction, and all legal commissions, powers, and authorities, and all officers, judicial, administrative, and ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the authority of the Parliament or of that Legislature under this Act.

At the time of Confederation in 1867 a lien of a contractor on the land on which he had constructed a building or of one who had furnished material incorporated in a building or of a wage earner who had worked on such building was unknown to the common law, whereunder the right of a person to retain property upon which he had performed labour applied merely to personal property. It was only in 1873, by 36 Vict., c. 27, that the Ontario Legislature enacted "An Act to establish Liens in favour of Mechanics, Machinists and others". These liens and the rights of the holders thereof were widened in scope by subsequent legislation but by the terms of the first enactment, where the amount of the claim was within the jurisdiction of the county or division courts respectively, proceedings to recover the same according to the usual procedure of the said court by judgment and execution might be taken in the proper division Court or the county Court of the county in which the land charged was situate. The judge of the said Courts might proceed in a summary manner by summons and order, might take accounts and make the necessary enquiries, and in default of payment might direct the sale

of the estate and interest charged at such time as the same could be sold under execution. In other cases the lien might be realized in the Court of Chancery according to the usual procedure to that Court.

Undoubtedly the decision of the Court of Appeal for Ontario in *French v. McKendrick*[1], relied upon by the appellant and the Attorney-General for Ontario, was approved by this Court in *Reference Re Adoption Act, etc.*[2], but at p. 417, Sir Lyman Duff speaking for the Court pointed out the true meaning of that decision, viz, that Division Courts, Courts established before Confederation, exercising jurisdiction in contract and in tort within defined limits as to amount and value, presided over, by the statute constituting them, by a County Court judge or by a member of the Bar named as deputy by one of the judges, were not Courts within the scope of s. 96 of the *British North America Act* and that, therefore, the enactment authorizing the appointment of a deputy judge from the Bar by a county judge was competent as well as legislation enlarging the pecuniary limits of jurisdiction. In *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.*[3], the Judicial Committee of the Privy Council, at p. 152, noted that a passage from the judgment of the Board by Lord Blanesburgh in *O. Martineau v. City of Montreal*[4] had been made the basis for the proposition that it is incompetent for provincial Legislatures to legislate for the appointment of any officer of any provincial Court exercising other than ministerial functions. They agreed with the view expressed by Sir Lyman Duff in the *Adoption Act* case that that was a wholly unwarranted view of *Martineau's* case which was directed neither to Courts of summary jurisdiction of any kind nor to tribunals established for the exercise of jurisdiction of a kind unknown in 1867.

Furthermore it was pointed out in the *Labour Relations* case that it was sufficient for the purpose of the decision of the *Reference Re Adoption Act* for Sir Lyman Duff to pose this question:—"Does the jurisdiction conferred upon

[1] (1930), 66 O.L.R. 306, [1931] 1 D.L.R. 696.
[2] [1938] S.C.R. 398, 9 D.L.R. 497, 71 C.C.C. 110.
[3] [1949] A.C. 134, [1948] 4 D.L.R. 673.
[4] [1932] A.C. 113, 1 D.L.R. 353, 52 Que. K.B. 542.

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magistrates under these statutes broadly conform to a type of jurisdiction generally exercisable by courts of summary jurisdiction rather than the jurisdiction exercised by courts within the purview of s. 96?" In the *Labour Relations Board* case Their Lordships pointed out that if the same alternative had been presented to them they might well answer it in like manner, but they preferred to put the question in another way which might be more helpful in the decisions of similar issues, namely:—"Does the jurisdiction conferred by the Act on the appellant Board broadly conform to the type of jurisdiction exercised by the Superior, District or County Courts?"

In the early days of *The Mechanics' Lien Act* in Ontario questions were raised as to whether a lien attached upon an engine house and turn-table of a railway company and it was argued that a lienholder was in a better position than an execution creditor and that the true analogy was with a vendor's lien. In *King v. Alford*[1], Chancellor Boyd following *Breeze v. Midland R.W. Co.*[2], stated that a vendor's lien arises out of the very nature of the transaction and is inapplicable to a lien created by the statute. While he pointed out that the Act itself rather indicates an analogy with proceedings by way of execution, he did not lay stress upon the point but at p. 646 referred with approval to Pomeroy's Equity Jurisprudence ss. 1268-9, where it was stated that mechanics' liens "are enforced by ordinary equitable actions resulting in a decree for sale and distribution of the proceeds identical in all their features with suits for the foreclosure of mortgages by judicial action".

Notwithstanding the fact that mechanics' liens were unknown at the time of Confederation, my view is that Pomeroy correctly stated the nature of the action given by *The Mechanics' Lien Act* and that to apply the test set forth in the *Labour Relations Board* case the jurisdiction conferred upon the Master by subs. (1) of s. 31 of *The Mechanics' Lien Act* broadly conforms to the type of jurisdiction exercised by the Superior, District or County Courts at Confederation. This is not to say that, if it were so provided, a judge of a Division Court could not exercise the

[1] (1885), 9 O.R. 643. [2] (1879), 26 Gr. 225.

power to give judgment for the amount claimed and for the sale of the land so long as the amount involved was within the jurisdiction of the Division Court or that such powers might not be exercised by a member of the Bar named as deputy by one of the judges,—following *French v. McKendrick* as approved in the *Adoption Act* case. Here, however, the amount involved is large and beyond the jurisdiction of a Division Court. The attempt to confer jurisdiction upon the Master in all cases no matter what the amount claimed might be is beyond the jurisdiction of the Legislature of the province.

This is not similar to references directed under ss. 67 and 68 of *The Ontario Judicature Act*. There the Master acts as a referee pursuant to an order of a judge and he makes a report which is subject to variation by a judge. In the present case the Master issues a final judgment, which requires no confirmation, but remains in full force and effect unless set aside upon appeal to the Court of Appeal. This is not a mere matter of procedure within Head 14 of s. 92 of the *British North America Act* and the position is not bettered because of subs. (2) of s. 31 of *The Mechanics' Lien Act*. That subsection requires action by one of the litigants as well as the exercise of a discretion by a Supreme Court judge.

The appeal should therefore be dismissed but under the circumstances there should be no costs.

The judgment of Locke, Cartwright, Abbott, Martland and Judson JJ. was delivered by

JUDSON J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] which holds that s. 31(1) of *The Mechanics' Lien Act*, R.S.O. 1950, c. 227, is beyond the powers of the Ontario Legislature in so far as it requires County of York actions to be tried before a Master or an Assistant Master of the Supreme Court of Ontario. Section 31(1) reads:

> The action shall be tried in the county or district in which the land or part thereof is situate before a judge of the county or district court, provided that where the land is situate wholly in the County of York the action shall be tried before a Master of the Supreme Court or an Assistant Master.

[1] [1958] O.R. 759, O.W.N. 93, 16 D.L.R. (2d) 1.

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The point of attack on the legislation is that this grant of jurisdiction to the Master involves a violation of s. 96 of the *British North America Act*, which reads:

> The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

The issue is, therefore, a very narrow one, the appointing power expressed in s. 96 being raised as a barrier against an attempted provincial distribution of function within the Court itself. The function in question is obviously judicial in character and is being exercised by an officer of one of the Courts mentioned in s. 96. The ratio of the judgment under appeal may be briefly stated in these terms: The Master, who is a judicial officer of the provincial Supreme Court, cannot be given this judicial power by s. 31(1) of *The Mechanics' Lien Act* because he then has a jurisdiction which "broadly conforms to the type of jurisdiction" exercised by those judges named in s. 96 of the *British North America Act*. This is said to be so even though *The Mechanics' Lien Act* creates entirely new rights, unknown either at common law or in equity because it gives the Master, as the trial officer, unlimited authority over all those matters covered by the Act, many of which are normally to be found within the jurisdiction of a Superior Court judge. Lastly, the judgment denies any analogy which might save the legislation between the position of the Master exercising delegated jurisdiction under an order of reference made by a judge pursuant to *The Judicature Act* and his position in exercising original jurisdiction under s. 31(1) of *The Mechanics' Lien Act*.

The position taken by the Attorney-General for Ontario is that this assignment of function to the Master is legislation in relation to procedure in civil matters under s. 92(14) of the *British North America Act*; that at the date of Confederation the Master was a judicial officer exercising a like jurisdiction, and that an extension of this jurisdiction in this case does not violate s. 96 of the *British North America Act*.

*The Mechanics' Lien Act* was first enacted by the Legislature of Ontario in 1873 (36 Vict., c. 27). A statutory lien was given to mechanics, machinists, builders, contractors

and other persons doing work upon or furnishing material to be used in the construction of buildings. The Act conferred jurisdiction to enforce the lien upon the County or Division Courts where the amount of the claim was within the jurisdiction of these Courts. Beyond these limits, the jurisdiction was in the Court of Chancery. The Master's jurisdiction to try the action first appeared in 1890, 53 Vict., c. 37, in *An Act to Simplify the Procedure for Enforcing Mechanics' Liens*. This legislation also abolished the writ of summons in these actions. Proceedings were to be instituted by the mere filing of a statement of claim in the office of the master or official referee having jurisdiction in the county where the lands were situate. By *The Mechanics' Lien Act*, (1896), 69 Vict., c. 35, s. 31, provision was made for the trial of these actions by the Master in Ordinary, a local Master of the High Court, an Official Referee or a judge of the High Court. At this point, jurisdiction was withdrawn from the County and Division Courts and the High Court Judge and the Master were left with concurrent jurisdiction. The section in its present form goes back to 1916 when it was enacted by 6 Geo. V, c. 31, s. 1, which provided for the trial of County of York actions before the Master and outside actions before the County or District Court Judge. A new Act was passed in 1923 (13 and 14 Geo. V, c. 30) which preserved this position but added what is now s. 31(2) giving any party the right to apply for a trial before a Judge of the Supreme Court. Under this subsection the judge has no initiative. This rests with the litigants and the judge's order is a discretionary one and does not issue as a matter of course. I have referred to the history of the legislation because it shows the development of the policy of the Legislature now expressed in s. 47(1) of the Act to have these liens enforced at the least expense, with procedure as far as possible of a summary nature, and it is, I think, accurate to state that most of this litigation in the County of York has been, since 1916, dealt with by the Master or Assistant Master in accordance with the expressed policy of the Act.

This is not a case where the Province has appointed a new judicial officer to preside over a newly created court or tribunal but one where the Province has increased the

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jurisdiction of a judicial officer already appointed by the Province. There is no question here of the use of a device to create a new s. 96 court with a new s. 96 judge under another name. What is happening is that work is being redistributed within the s. 96 court itself and new work assigned to a provincially appointed judicial officer. In a sense it is not even an exclusive assignment when a judge of the court, on motion by one of the parties, has the power of removal under s. 31(2).

Nevertheless, it is my opinion that the judgment under appeal is well founded and that this legislation is in conflict with the appointing power under s. 96 of the *British North America Act,* and I reach this conclusion for two reasons—the nature of the jurisdiction which is conferred upon the Master and the fact that he is given the power of final adjudication in these matters, subject to the usual right of appeal to the Court of Appeal as from a single judge.

The nature of the jurisdiction is clearly defined by s. 32(1) of the Act:

> 32.(1) The Master, Assistant Master and the county or district judge, in addition to their ordinary powers, shall have all the jurisdiction, powers and authority of the Supreme Court to try and completely dispose of the action and questions arising therein, including power to set aside a fraudulent conveyance or fraudulent mortgage, or a mortgage which amounts to a preference within the meaning of the *Bankruptcy Act* (Canada), or of *The Assignments and Preferences Act,* and all questions of set-off and counterclaim arising under the building contract or out of the work or service done or materials furnished to the property in question.

This is a very wide departure from the work usually assigned to the Master. This legislation makes him a judge in this particular type of action, which is essentially one for the enforcement of a statutory charge on the interest in the land of the person who is defined as the owner. The constituent elements of the jurisdiction are fully analysed in the reasons of the Court of Appeal. In addition to the matters mentioned in s. 32(1) and the enforcement of the charge itself, they comprise unlimited monetary claims, the power to appoint an interim receiver of the rents and profits of the land or a trustee to manage and sell the property and the power to make a vesting order in the purchaser and an order for possession. All these functions are exercised in an original way and constitute a new type of jurisdiction

for the Master which in many aspects is not merely analogous to that exercised by a s. 96 judge but is, in fact, that very jurisdiction, limited only to one particular field of litigation. While it is true that the Master's jurisdiction is very varied in character, it is, I think, largely concerned with preliminary matters and proceedings in an action, necessary to enable the case to be heard, and with matters that are referred to that office under a judge's order. There is no inherent jurisdiction in the office as there is in the office of a Superior Court judge. I am content to adopt the judgment of Harvey C.J.A. in *Polson Iron Works v. Munns*[1], for its account of the historical origins of the office and the broad outlines of the jurisdiction, and it is sufficient to say that everything the Master does must be authorized by the *Rules of Practice, The Judicature Act* or some other statute. This does not mean, however, that the Legislature can assign any and all work to him. Section 96 operates as a limiting factor. If this were not so, there would be nothing to prevent the withdrawal of any judicial function from a s. 96 appointee and its assignment to the Master.

The mode of exercise of the jurisdiction in question is also significant in the determination of this dispute. The Master, under this legislation, is the only trial officer in the County of York. He gives a final adjudication, subject to an appeal to the Court of Appeal. He is not acting as a referee under ss. 67 and 68 of *The Judicature Act*. These sections read:

> 67. (1) Subject to the rules and to any right to have particular cases tried by a jury, a judge of the High Court may refer any question arising in an action for inquiry and report either to an official referee or to a special referee agreed upon by the parties.
>
> (2) Subsection 1 shall not, unless with the consent of the Crown, authorize the reference to an official referee of an action to which the Crown is a party or of any question of issue therein.
>
> 68. In an action,
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> (*a*) if all the parties interested who are not under disability consent, and where there are parties under disability the judge is of opinion that reference should be made and the other parties interested consent; or,
>
> (*b*) where a prolonged examination of documents or a scientific or local investigation is required which cannot, in the opinion of a court or a judge conveniently be made before a jury or conducted by the court directly; or,

[1] (1915), 24 D.L.R. 18.

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(c) where the question in dispute consists wholly or partly of matters of account,

a judge of the High Court may at any time refer the whole action or any question or issue of fact arising therein or question of account either to an official referee or to a special referee agreed upon by the parties.

These sections may be traced back to the *Common Law Procedure Act of Upper Canada,* 1856 (Can.), c. 43, and still further to the English *Common Law Procedure Act,* 1854, 17-18 Vict., c. 125, and are the necessary source of the judicial power to direct a reference concerning the matters dealt with in the sections, for there is nothing inherent in the office of a Superior Court Judge which would justify such a reference. The judgment under appeal correctly draws a distinction between the position of the Master exercising delegated jurisdiction as a referee under ss. 67 and 68 of *The Judicature Act* and his position when he exercises original jurisdiction under s. 31(1) of *The Mechanics' Lien Act.* Anything that he does on a reference depends for its validity on the judge's original order. His findings must be embodied not in a judgment but in a report which is subject to control of the judge on a motion for confirmation, variation or appeal; *Martin v. Cornhill Insurance Co. Ltd.*[1]. On the other hand under the impugned section the Master issues a judgment which is subject to a direct appeal to the Court of Appeal.

At first glance, it might be thought that the Legislature, which can authorize a judge to direct a reference in the circumstances mentioned in ss. 67 and 68 of *The Judicature Act,* could decide that in a particular case there should be no need of delegation but a direct assignment of function with a consequent simplification of civil procedure. But I am satisfied, as was the Court of Appeal, that the assignment of the power of final adjudication to the Master goes beyond procedure and amounts to an appointment of a judge under s. 96 of the *British North America Act.* The position of the Master as a referee acting under a judge's order and reporting back to the Court is fundamentally different from his position under the impugned legislation as an independent trier of fact and I think that the Court of Appeal was right in rejecting any analogy between the two positions.

[1] [1935] O.R. 239, 2 D.L.R. 682.

For the same reason, I agree with the Court of Appeal in its decision that s. 31(2) does not save this legislation. This section reads:

> 31. (2) Notwithstanding subsection 1, upon the application of any party to an action, made according to the practice of the Supreme Court, and upon notice the court may direct that the action be tried before a judge of the Supreme Court at the regular sittings of the court for the trial of actions in the county or district in which the land or part thereof is situate.

While the jurisdiction of the judge is not completely ousted by the Act, it can be sought only if one or other of the litigants chooses to apply for it and it is assumed only in the judge's discretion. This section leaves untouched the fundamental objection to the legislation that a grant of original jurisdiction to the Master in a case of this kind cannot stand in view of s. 96.

The problem, in the precise form in which it appears in this litigation, is not new. It was dealt with by the Alberta Court of Appeal in *Colonial Investment and Loan Co. v. Grady*[1], where a unanimous Court held that the Legislature could not direct that actions for the enforcement of mortgages and agreements of sale should be brought before the Master. This legislation gave the Master unlimited jurisdiction within the fields assigned to him and the power to pronounce a final judgment subject to the usual right of appeal direct to the Appellate Division. In *C. Huebert Ltd. v. Sharman*[2], the Manitoba Court of Appeal invalidated a section of *The Mechanics' Lien Act* which authorized the judge of the Court having jurisdiction in these matters (in this case the County Court) to refer the whole trial of the action to the referee in chambers of the Court of King's Bench. The ratio of the decision was the same as in the present case—the nature of the jurisdiction and its exercise by a provincially appointed officer of the Court, including the power of final adjudication.

I would dismiss the appeal but without costs. The only issue here was the constitutional one, the subject-matter of the litigation having disappeared as a result of a foreclosure action brought by a mortgagee who had priority over the lien.

[1] (1915), 24 D.L.R. 176, 8 A.L.R. 496.
[2] [1950] 2 D.L.R. 344, 58 Man. R. 1.

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Ritchie J.

The judgment of Locke, Martland and Ritchie JJ. was delivered by

RITCHIE J.:—I have had the benefit of reading the decisions of the Chief Justice and Mr. Justice Judson in this case, and as I agree with their reasons and conclusion it would be superfluous for me to retrace the ground which they have covered so fully.

I would like, however, to address myself briefly to the interesting and careful argument of the Attorney-General of Ontario to the effect that actions brought to enforce mechanics' liens, as they consist "wholly or in part of matters of mere account", are the type of "matters" which at and before Confederation could be and were referred by order of the Court or a judge to officers of the Court for final determination under the provisions of the *Common Law Procedure Act of Upper Canada,* 1856 (Can.), c. 43, s. 84 *et seq.* and that it therefore follows that the provisions of *The Mechanics' Lien Act,* R.S.O. 1950, c. 227, s. 31 *et seq.* do not create a new jurisdiction for masters and assistant masters but simply constitute a procedural change for the purpose of simplifying administration by doing away with the requirement of an order of the Court and conferring the necessary authority directly on masters and assistant masters to try and completely dispose of such actions where the land is situate wholly in the county of York which change is well within the legislative competence of the provincial Legislature by virtue of the provisions of ss. 129 and 92(14) of the *British North America Act.* Section 84 of the said *Common Law Procedure Act, supra,* reads as follows:

> If it be made to appear, at any time after the issuing of the writ to the satisfaction of the Court or a Judge, upon the application of either party, that the matters in dispute consist wholly or in part of matters of mere account, which cannot conveniently be tried in the ordinary way, it shall be lawful for such Court or Judge, upon such application, if they or he think fit, to decide such matter in a summary manner, or to order that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties, or to an officer of the Court, or in country causes to the Judge of any County Court, upon such terms as to costs and otherwise as such Court or Judge shall think reasonable; and the decision or order of such Court or Judge, or the award or certificate of such referee, shall be enforceable by the same process as the finding of a Jury upon the matter referred.

One of the main premises on which the foregoing proposition rests is that an "award" made by an officer of the Court pursuant to the said s. 84 was accorded a degree of finality which does not attach to a "report" made in accordance with s. 71 of the Ontario *Judicature Act* (hereinafter referred to as the *"Judicature Act"*), and it was strongly contended that the cases of *Brown v. Emerson*[1], *Cruikshank v. Floating Swimming Baths Company*[2] *and Lloyd v. Lewis*[3], served to bear out this contention.

That such an "award" was "final between the parties" unless moved against in the time provided by s. 89 of the *Common Law Procedure Act* is clear from the terms of that section, see *Cumming v. Low*[4], but it is not possible to assess the quality or effect of the "award" or "report" itself without having regard to the latter words of the said s. 84 which provide that "The award or certificate of such referee, shall be enforceable by the same process as the finding of a jury on the matter referred". See in this regard *White v. Beemer*[5], *per* Boyd C. at 532 and *Cook v. The Newcastle and Gateshead Water Company*[6].

If the effect of such an "award" was indeed equivalent to the finding of a jury and enforceable only by order of the Court, then it is at once apparent that a wide gulf is fixed between the jurisdiction of an officer of the Court acting on such a compulsory reference and that of a master or assistant master acting under s. 31 *et seq.* of *The Mechanics' Lien Act* and thereby endowed with all the powers of the Supreme Court (s. 32(1)).

There is, however, a more fundamental factor which lies at the very root of all the cases above referred to and that is that the jurisdiction of the master, referee, arbitrator or other officer to whom a matter has been referred either for award, report or decision in all instances finds its source in and is limited and controlled by an order granted in the discretion of a judge, and in my view this factor of itself invalidates the analogy between the jurisdiction of a master to whom a matter was referred under the *Common Law*

[1] (1856), 17 C.B. 361, 139 E.R. 1112.
[2] (1876), 1 C.P.D. 260.
[3] (1876), 2 Ex. D. 7.
[4] (1883), 2 O.R. 499.
[5] (1885), 10 P.R. (Ont.) 531.
[6] (1882), 10 Q.B.D. 332.

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*Procedure Act* or indeed under *The Judicature Act* and that of a master or assistant master acting under the authority which *The Mechanics' Lien Act* purports to confer.

Much of the work entrusted to masters and assistant masters by *The Mechanics' Lien Act* is no doubt the same as the type of work done by masters pursuant to order of the Court at and before Confederation, but "the type of work done" and "the type of jurisdiction exercised" are two very different things and the type of trial jurisdiction exercised by masters under both the *Common Law Procedure Act* and under ss. 67 and 68 of *The Judicature Act* before and since Confederation is a subordinate and delegated jurisdiction dependent for its existence in each case on the exercise of the discretion of a judge whereas the jurisdiction which *The Mechanics' Lien Act* purports to accord to masters and assistant masters is original jurisdiction directly conferred by legislation and is not subordinate to but in substitution for the jurisdiction of a judge of one of the courts within the intendment of s. 96 of the *British North America Act*.

There can be no doubt as to the right of the Province to effect changes in the procedure of provincial Courts, but authority to control the manner in which jurisdiction is to be exercised is not the same thing as the authority to appoint the judges entrusted with exercising it and provincial control of the administration of provincial Courts exceeds its limit when it is assumed that it includes the right so to change the means of enforcing jurisdiction as to change the type of jurisdiction itself from that of a subordinate judicial officer to that of a Court within the intendment of s. 96 while at the same time retaining the right to appoint such an officer.

*Appeal dismissed without costs.*

*Solicitors for the appellant, Display Service Co.: Black, Bruce & Black, Toronto.*

*Solicitor for the Attorney General of Canada: W. R. Jackett, Ottawa.*

*Solicitor for the Attorney-General for Ontario: C. R. Magone, Toronto.*

*Solicitors for the Royal Bank of Canada: McMillan, Binch, Stuart, Berry, Dunn, Corrigan & Howland, Toronto.*

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*PRESENT: Kerwin C.J. and Locke, Cartwright, Martland and Judson JJ.