1963

*Oct. 2, 3
Dec. 16

HERBERT BROOKS ..... APPELLANT;

AND

KAREL PAVLICK AND GLORIA PAVLICK ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law—Land titles—Application for first registration—Jurisdiction of Local Master of Titles—The Land Titles Act, R.S.O. 1960, c. 204—British North America Act, s. 96.

On an application for first registration under *The Land Titles Act,* the Local Master of Titles decided that the appellant should be registered as owner of the lands, as described in the application, and overruled the objection of the respondents to the said description which objection was based on a metes and bounds description in the conveyance to the appellant's predecessor in title. The respondents' appeal from the Local Master to the Supreme Court of Ontario was dismissed; a further appeal was allowed by the Court of Appeal. An appeal, by leave of this Court, was then brought by the appellant.

Held: The appeal should be allowed.

The Master of Title's jurisdiction was limited to the consideration and determination of what documents should be registered upon the title and therefore who should have the protection of the guaranteed title and the right to claim on the assurance fund. When he determined an application for first registration in favour of the applicant the effect of s. 52 of *The Land Titles Act* was to give to the first registered owner a fee simple, subject to rectification of the register by proceedings in the ordinary courts under s. 169. In discharging such duty the Master had to act judicially, but such judicial action was necessary to enable him to perform his primary administrative duty and in so acting judicially he did not deprive himself of jurisdiction.

The jurisdiction conferred upon the Master of Titles by *The Land Titles Act* to determine whether an application for first registration under the Act should be granted was not exercised by any officer whatsoever prior to Confederation as the scheme of registration of titles did not exist in Ontario before 1885 and any judicial determinations he made were merely necessarily incidental to the discharge of those duties which, therefore, were not analogous to those of a Superior, District, or County Court.

Accordingly, the order of the Local Master of Titles was one which he had jurisdiction to make and such jurisdiction was not granted by the provincial legislation in violation of s. 96 of the *British North America Act.*

The Court of Appeal not having considered the grounds for appeal other than that of jurisdiction of the Local Master of Titles, the case was returned for disposal upon the other grounds of appeal.

Re Mutual Investments Ltd. (1924), 56 O.L.R. 29; *Dupont v. Inglis,* [1958] S.C.R. 535, applied; *Attorney-General for Ontario v. Victoria Building Ltd.,* [1960] S.C.R. 32; *Heller v. Registrar, Vancouver Land Registra-*

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

tion District, [1963] S.C.R. 229, distinguished; *Re Winter,* [1962] O.R. 402, disapproved; *Re Lord and Ellis* (1914), 30 O.L.R. 582; *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.,* [1949] A.C. 134; *Re Ontario Teachers Federation & Duncan,* [1958] O.R. 691; *Farrell v. Workmen's Compensation Board,* [1962] S.C.R. 48, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from Morand J. who had dismissed an appeal from the Local Master of Titles. Appeal allowed.

C. L. Dubin, Q.C., for the appellant.

D. J. Wright, for the respondents.

E. R. Pepper, Q.C., for the Attorney-General of Ontario.

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

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal of Ontario[1] allowing an appeal from Morand J. who had dismissed an appeal from the Local Master of Titles. The Local Master had held that the appellant should be registered as owner of certain lands in the Township of Reach, County and Province of Ontario, as described in the application for first registration. The Local Master of Titles had overruled the objection of the respondent to the description of the lands in the application for first registration which objection was based on a metes and bounds description in the conveyance to the appellant's predecessor in title. Such metes and bounds description would have limited the area of the lands subject to the application for first registration with the result that part of these lands would have come to the respondent from his predecessor in title. The Local Master of Titles acting, at any rate in part, on what he believed was the admission of the respondent that the boundary between the two parcels of land was the centre line of Beaver Meadow Creek, proceeded to inquire and found as a fact that such centre line of Beaver Meadow Creek was in the position described in the applicant's application for first registration.

[1] [1962] O.R. 449, 32 D.L.R. (2d) 567.

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The respondent appealed to the Supreme Court of Ontario and Morand J. by order of October 17, 1961, dismissed the appeal. The respondent appealed from that order to the Court of Appeal and that Court by its judgment of January 23, 1962, allowed the appeal. The appellant now appeals to this Court.

A perusal of the reasons for judgment of Schroeder J.A., who gave judgment for the Court of Appeal, shows that after reciting the facts the learned Justice of Appeal dealt only with the issue of the jurisdiction of the Local Master of Titles to consider whether the boundary between the lands of the appellant and the respondent should be settled by the line of Beaver Meadow Creek as in the agreement for sale between their predecessors in title in 1861 or at the different line set out in the metes and bounds description in the conveyance, which was expressed to be pursuant to the agreement of 1861. In his reasons, Schroeder J.A. said:

> It is contended by counsel for the respondent that the Local Master of Titles did not assume the right to adjudicate upon the legal issues raised by the appellant. He maintains that his findings were based upon the appellant's alleged admission before him that the true boundary line between the properties in question was the centre of Beaver Meadow Creek. It is not easy to understand how such an admission could have been made on behalf of the appellant. It is wholly and utterly inconsistent with the objection based on the serious questions of law to which I have referred, and if the Master purported to deal with this application on a purely factual basis, completely ignoring the serious claims as to title advanced by the appellant, then on that ground alone his Order must be set aside.

In this Court, all counsel confined themselves to argument as to the Local Master's jurisdiction to make his order under these circumstances. Therefore, in these reasons I shall deal only with that topic.

Schroeder J.A. said:

> Counsel for the appellant contended that the Master did in fact purport to exercise the right and power of determining judicially the question of title between the parties and that in so doing he was acting without jurisdiction; that this was a judicial power which could only be exercised by a Court in the nature of a Superior, County or District Court, and that a provincially appointed officer who purported to exercise such powers was acting in contravention of section 96 of The British North America Act, 1867. That precise point was considered by the Court in re the application of *Etta K. E. Winter* in an unreported judgment delivered on 8th March, 1961 and was decided favourably to the appellant's contention. In my opinion the Master did purport to exercise such powers, and in doing so he rejected the argument advanced by counsel for the appellant.

If it were otherwise he would not have commented upon some of the appellant's submissions made upon the hearing of the application. It was settled in *Display Service Limited v. Victoria Medical Building Limited,* [1958] O.R. 759, affirmed *sub nomine Attorney General for Ontario v. Victoria Medical Building Limited,* [1960] S.C.R. 32, that a provincially appointed officer was not empowered to exercise powers of this nature. It is also beyond question that lack of jurisdiction to pronounce a judgment or order deprives it of any effect whatsoever, even as against the party who invoked the determination. *Archbishop of Dublin v. Trimlistone,* (1948) 12 I.R. Eq. R. 251 at page 268; *Toronto Railway Company v. Toronto,* [1904] A.C. 809 at page 815.

In the *Display Services* case, this Court was concerned with the constitutional validity of s. 31(1) of *The Mechanics' Lien Act,* R.S.O. 1950, c. 227, which provided:

> 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.

The validity of the section was attacked on the ground that the grant of such jurisdiction to the Master was 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 Court adopted the test of the validity of s. 31(1) of *The Mechanics' Lien Act* put by the Judicial Committee in *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.*[1], *per* Lord Simonds:

> 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?

Using this test and examining the various provisions of *The Mechanics' Lien Act,* the Court concluded, to quote Judson J. at pp. 42-43:

> 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.

It would seem that in determining the question of whether the jurisdiction given to "the proper master of titles" by s. 21 of *The Land Titles Act,* R.S.O. 1950, c. 197, is in violation of s. 96 of the *British North America Act* this Court

[1] [1949] A.C. 134 at 154, [1949] L.J.R. 66.

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must follow a similar investigation to determine whether the jurisdiction broadly conforms to the type exercised by Supreme, District, or County Courts.

It should be noted that the Notice of Constitutional Issue served pursuant to the direction of the late Chief Justice of this Court in the third paragraph gives notice that "the question will be raised by the respondent as to whether the powers given to the Master of Titles by the *Land Titles Act* of the Province of Ontario, being R.S.O. 1960, c. 204, are within the constitutional jurisdiction of the Legislature of the Province of Ontario" but the original application for first registration was dated the 8th day of November 1960 and the Revised Statutes of Ontario 1960 only came into force on January 1, 1961 (Proclamation of Governor in Council R.S.O. 1960, vol. 5, p. 311). However, for the purpose of this examination the sections, although differently numbered, are in substantially similar terms.

Section 21 of *The Land Titles Act* (now s. 44) provides:

44. The examination of a title shall be conducted in the prescribed manner, subject to the following:

1. Where notice has been given, sufficient opportunity shall be afforded to any person desirous of objecting to come in and state his objections to the proper master of titles.
2. The proper master of titles has jurisdiction to hear and determine any such objections, subject to an appeal to the court in the prescribed manner and on the prescribed conditions.
3. If the proper master of titles, upon the examination of any title, is of opinion that it is open to objection but is nevertheless a title the holding under which will not be disturbed, he may approve of it or may require the applicant to apply to the court, upon a statement signed by the proper master of titles, for its sanction to the registration.
4. It is not necessary to produce any evidence that by *The Vendors and Purchasers Act* is dispensed with as between vendor and purchaser or to produce or account for the originals of registered instruments unless the proper master of titles otherwise directs.
5. The proper master of titles may receive and act upon any evidence that is received in court on a question of title, or any evidence that the practice of conveyancers authorizes to be received on an investigation of a title out of court, or any other evidence, whether it is or is not receivable or sufficient in point of strict law, or according to the practice of conveyancers, if it satisfies him of the truth of the facts intended to be made out thereby.
6. The proper master of titles may refer to and act upon not only the evidence adduced before him in the proceeding in which it is adduced but also any evidence adduced before him in any other proceeding wherein the facts to which it relates were or are in question.

7. The proper master of titles may also act upon his own personal knowledge of material facts affecting the title upon making and filing a report, stating his knowledge of the particular facts and the means he had of obtaining such knowlege.

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It is, of course, necessary to consider not s. 21 in isolation but to have regard for the act as a whole and to consider its various sections, *Dupont v. Inglis*[1], *per* Rand J. at p. 539. *The Land Titles Act* of the Province of Ontario was first enacted in 1885 designed to facilitate and make more economical the registration of ownership and interest in lands within the province. The statute provides for the appointment of officers variously designated as Director of Titles, Master of Titles, Deputy Master of Titles, and Local Master of Titles, and puts upon such officers the duties of examining and approving for registration documents submitted by applicants. Perhaps the most essential feature of the legislation is the grant to the registered owner, whether it be upon first application to be registered as such under *The Land Titles Act* or by transfer, a title in fee simple free from all estates and interests whatsoever except those listed in the relevant sections (s. 9 in R.S.O. 1950, c. 197, now s. 52, and s. 41 in R.S.O. 1950, c. 197, now s. 86). The rights of those who may be damaged by the acceptance of the document for registration are protected by the following provisions, *inter alia*:

s. 21 (now s. 44) provides for opportunity to any person desirous of objecting to the first registration to come in and state his objection to the proper master of titles;

s. 144 (now. s. 29) provides any person affected by an order or decision of the director, master or local master, may appeal to a judge of the High Court and from them to the Court of Appeal;

s. 127 (now s. 60) provides for the establishment of an assurance fund;

s. 128 (now s. 63) provides for a right in damages against the applicant who has obtained the damaging registration and payment of such damages from the fund if he is unable to recover damages from the applicant.

It is true s. 131 (now s. 65) excludes from recovery from the fund those who have failed to pursue their rights under ss. 21 and 144 (now ss. 44 and 29) but the right of persons

[1] [1958] S.C.R. 535.

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who believe themselves damnified to proceed in the ordinary courts of the province and obtain rectification of the register is preserved fully by s. 119 (now s. 169) which reads:

> 169. Subject to any estates or rights acquired by registration under this Act, if a person is aggrieved by an entry made, or by the omission of an entry from the register, or if default is made or unnecessary delay takes place in making an entry in the register, the person aggrieved by the entry, omission, default or delay may apply to the court for an order that the register may be rectified, and the court may either refuse the application with or without costs to be paid by the applicant or may, if satisfied of the justice of the case, make an order for the rectification of the register.

The initial words of this section were interpreted in *Re Lord and Ellis*[1], where at p. 585, Meredith C.J.O. said:

> These sections are expressly made subject to rights acquired by registration under the Act; that I hold to mean such rights as a purchaser for valuable consideration from the registered owner would acquire. No reason has been suggested, nor can I find any, why justice may not be done between the original parties to the injustice.

A party damnified by a registration may protect himself against innocent purchasers for consideration by filing a caution under the provisions of s. 74 (now s. 135). It would appear from the consideration of those sections recited aforesaid and from a perusal of *The Land Titles Act* as a whole that a person claiming an interest in lands can proceed in the ordinary courts without regard for the decisions of the "proper master of titles" and may even protect himself from the intervention of innocent purchasers for value from the registered owner by filing a caution, although to preserve his rights to claim under the Assurance Fund he must proceed in accordance with the provisions of the Act.

The Master of Title's jurisdiction is limited to the consideration and determination of what documents should be registered upon the title and therefore who should have the protection of the guaranted title and the right to claim on the Assurance Fund. When the master of titles determines an application for first registration in favour of the applicant the effects of s. 9 (now s. 52) is to give to the first registered owner a fee simple but, despite the very positive words of that section, the register may be rectified by a procedure in the ordinary courts under s. 119 (now s. 169). The objections

[1] (1914), 30 O.L.R. 582.

which the Master "has jurisdiction to hear and determine" (s. 21, para. (2) now s. 44) are objections to the Master's acceptance of a document for registration. It is, of course, true that in discharging such duty the Master of Titles must act judicially, but such judicial action is necessary to enable him to perform his primary administrative duty and in so acting judicially the Master of Titles does not deprive himself of jurisdiction. *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd., supra, per* Lord Simonds, at p. 145; *Re Ontario Teachers Federation & Duncan*[1], *per* Aylesworth J.A. at p. 696. I adopt the words of Riddell J. (as he then was) in *Re Mutual Investments Ltd.*[2]:

> But it is said that the Master of Titles is a mere administrative officer, that he must register even a document which is a plain violation of the law and leave the person or company registering to take the consequences. I decline to accede to that argument; in view of the very great effect of registering such documents, I think that he may and, where necessary, should pass upon the legality of any document submitted to him.

(The underlining is mine.)

I am of the view that the jurisdiction conferred upon the Master of Titles by the provisions of *The Land Titles Act* of Ontario is, therefore, quite unlike the jurisdiction conferred on the Master of the Supreme Court by *The Mechanics' Lien Act* of Ontario considered in the *Display Service* case, *supra*. There, as I have pointed out, the Court found that jurisdiction was not merely analogous to the jurisdiction of that exercised by s. 96 but in fact that very jurisdiction. Under *The Land Titles Act,* the Master of Titles has a jurisdiction to determine whether an application for first registration under the Act should be granted and that jurisdiction was not exercised by any officer whatsoever prior to Confederation as the scheme of registration of titles did not exist in Ontario before 1885 and any judicial determinations he makes are merely necessarily incidental to the discharge of those duties which, therefore, are not analogous to those of a Superior, District, or County Court.

It would appear this situation bears more resemblance to that considered by this Court in *Dupont v. Inglis*[3], where the Court was concerned with whether the provisions of

[1] [1958] O.R. 691.
[2] (1924), 56 O.L.R. 29 at 31.
[3] [1958] S.C.R. 535.

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The Mining Act in Ontario gave to the Commissioner a jurisdiction which was in violation of s. 96. Rand J., in delivering the judgment of this Court, upheld the validity of the statute in question upon three grounds: firstly, that the jurisdiction was granted to a Crown officer to determine which of two or more competing parties should acquire rights over Crown owned lands; secondly, that a like jurisdiction existed prior to Confederation under *The Gold Mining Act* and was exercised by a provincially appointed officer so that the continuation of such jurisdiction was protected by s. 129 of the *British North America Act*; but thirdly, at pp. 544-5, Rand J. states:

> It was urged that the issue was in reality between the respondents and the individual appellants, but that confuses the matter. The question is the validity of the alleged first staking, and that is a matter between the licensee and the Crown. Its adjudication may affect a subsequent staking by another licensee; but there is no *vinculum juris* and no *lis* between the two licensees, and the disputant is before the tribunal only as he is permitted by the statue to have the claim of another put in question before the recorder.

Similarly, under *The Land Titles Act,* the objection is before the Master of Titles only as he is permitted by that statute to have the claim of the applicant for first registration put in question before the said Master.

Counsel for the respondent cited *Heller v. Registrar, Vancouver Land Registration District et al.*[1] That case concerned an attempt by a former registered owner of land in the Vancouver Land Registration District to require the Registrar of that district, pursuant to the powers conferred upon him by s. 256 of the *Land Registry Act* of British Columbia, to cancel a certificate of title for that land which had been issued to the wife of the former owner. Among other things, it was alleged that the wife had wrongfully obtained possession of the transfer, the registration of which had given rise to her title. At p. 235, Martland J. said:

> In my opinion, it is no part of the function of a Registrar, under this section, to adjudicate upon contested rights of parties, for the determination of which it would be necessary for him to hear, receive and weigh evidence. He can only act upon the material which is before him in his own records.
>
> I realize that the provisions of para. (*c*) of s. 256 may appear to be inconsistent with this conclusion. That paragraph relates to a situation where "any registration, instrument, entry, memorandum, or endorsement

[1] [1963] S.C.R. 229.

was fraudulently or wrongfully obtained". If, however, these words were to be construed in their widest sense, so as to enable a Registrar to act, under the section, upon evidence submitted to him upon which he could make a finding of fraud, I would have grave doubts as to whether this provision could be held to be *intra vires* of the Legislature of British Columbia. So construed, the Registrar would be clothed with an original jurisdiction to determine questions of title to land in relation to which fraud had been alleged (*Attorney-General for Ontario and Display Service Co. Ltd. v. Victoria Medical Building Ltd. et al.*, [1960] S.C.R. 32, 21 D.L.R. (2d) 97).

In the circumstances of that case the Registrar was being asked to exercise the powers for correction of the registry which it was alleged had been conferred upon him by the statute, in order to hear and determine legal issues which had arisen between two parties concerning the title to registered land, which involved allegations of fraud. The decision in that case was that s. 256 of the Act gave him no such powers. It should be observed that no attempt is made in *The Land Titles Act* of Ontario to clothe the Master of Titles with similar jurisdiction. Part IX thereof deals with fraud and s. 125 (now s. 164) provides that, subject to the provisions of the Act with respect to registered dispositions for valuable considerations, any fraudulent disposition of land is void notwithstanding registration.

In the reasons in the Court of Appeal, Schroeder J.A. refers to the then unreported decision of that Court in *Re Winter*. That judgment now appears at [1962] O.R. 402. That was an appeal from the judgment of Thompson J. who had affirmed the order of the Master of Titles under s. 123 of *The Land Titles Act* (now s. 167), purporting to rectify the register. Schroeder J.A. held that the Master had no jurisdiction to make the order as by the provisions of the Act itself s. 119 (now s. 169) such power was expressly conferred upon the Court. At p. 405, Schroeder J.A. continues:

> Of even graver import is the fact that the Master of Titles, a provincially appointed officer, purported to exercise a judicial power which could only be exercised by a Court in the nature of a Superior, County or District Court in contravention of s. 96 of the *British North America Act*, 1867: *Display Service Co. v. Victoria Medical Bldg. Ltd.*, 16 D.L.R. (2d) 1, [1958] O.R. 759, affirmed *sub nom. A.-G. Ont. & Display Service Co. v. Victoria Medical Bldg., Ltd.*, 21 D.L.R. (2d) 97, [1960] S.C.R. 32.

For the reasons which I have set out above, I am not willing to accept this view.

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There is, however, a judgment of this Court in 1962 which is relevant. In *Farrell v. Workmen's Compensation Board*[1], Judson J., delivering the judgment of the Court, considered the opinion of the judge who heard the application in the British Columbia Court, *inter alia,* that the provisions of s. 76(1) of the British Columbia *Workmen's Compensation Act* were *ultra vires* as in violation of s. 96 of the B.N.A. Act, and said:

> The Court of Appeal ruled against both these grounds and on appeal to this Court, counsel for the applicant abandoned any attack on the Board on the ground of infringement of s. 96 of the *British North America Act*. It is very questionable whether there could be any profitable argument on this point after the judgments in *Workmen's Compensation Board v. C.P.R.*, [1920] A.C. 184, 88 L.J.P.C. 169, *Kowanko v. J. H. Tremblay Co.*, [1920] 1 W.W.R. 787, 51 D.L.R. 174, 30 Man. R. 198, *Attorney-General of Quebec v. Slanec and Grimstead,* (1933) 54 Que. K.B. 230, 2 D.L.R. 289, *Reference re The Adoption Act,* [1938] S.C.R. 398, 71 C.C.C. 110, 3 D.L.R. 497, and *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.,* [1949] A.C. 134, [1949] L.J.R. 66.

In the result, therefore, I have concluded that the order of the Local Master of Titles confirmed by the Director was one which he had jurisdiction to make and such jurisdiction was not granted in violation of s. 96 of the *British North America Act.*

The Court of Appeal for Ontario not having considered the grounds for appeal other than that dealing with the jurisdiction of the Local Master of Titles, the case should be returned to the Court of Appeal for disposal upon the other grounds of appeal as set out in the notice of appeal to that Court, and also for the disposition of costs other than costs of appeal to this Court. I am of the opinion that in view of all the circumstances of this case, there should be no costs in this Court.

Appeal allowed; no costs in this Court.

Solicitors for the appellant: Greer & Kelly, Oshawa.

Solicitors for the respondents: Blake, Cassells & Graydon, Toronto.

[1] [1962] S.C.R. 48, 37 W.W.R. 39, 31 D.L.R. (2d) 177.