1938

* March 8, 9.
* June 23.

IN THE MATTER of a Reference Concerning the Authority of Judges and Junior and Acting Judges of the County and District Courts; Police Magistrates, Justices of the Peace and Judges of Juvenile Courts, to Perform the Functions Vested in Them Respectively by the Legislature of the Province of Ontario Pursuant to the Provisions of the Adoption Act; the Children's Protection Act; the Children of Unmarried Parents Act, and the Deserted Wives' and Children's Maintenance Act; being Chapters 218, 312, 217 and 211 Respectively of the Revised Statutes of Ontario, 1937.

Constitutional Law—Administration of justice, constitution of provincial courts, appointment of judges, judicial officers, magistrates, justices of the peace—B.N.A. Act, ss. 92 (14), 96—Provincial powers as to appointments, investment of jurisdiction—Authority of the judicial officers to perform functions vested in them respectively pursuant to provisions of the Adoption Act, the Children's Protection Act, the Children of Unmarried Parents Act, and the Deserted Wives' and Children's Maintenance Act, Ont., chapters 218, 312, 217, and 211, respectively, of R.S.O., 1937.

Each of the following judicial officers has authority to perform the functions which the Ontario legislature has purported to vest in him by the provisions of the following Acts respectively:

With reference to the *Adoption Act*, R.S.O., 1937, c. 218: the judge or junior or acting judge of the county or district court; a judge of the juvenile court designated a judge by the Lieutenant-Governor in Council pursuant to said Act.

* PRESENT AT THE HEARING:—Duff C.J. and Rinfret, Cannon, Crocket, Davis, Kerwin and Hudson JJ. Rinfret J. took no part in the decision.

With reference to the *Children's Protection Act,* R.S.O., 1937, c. 312: the judge or junior or acting judge of the county or district court; a police magistrate or judge of the juvenile court designated a judge by the Lieutenant-Governor in Council pursuant to said Act.

With reference to the *Children of Unmarried Parents Act,* R.S.O., 1937, c. 217: the judge or junior or acting judge of a county or district court; a police magistrate or judge of the juvenile court designated a judge by the Lieutenant-Governor in Council pursuant to said Act.

With reference to the *Deserted Wives' and Children's Maintenance Act,* R.S.O., 1937, c. 211: a justice of the peace; a magistrate; a judge of the juvenile court.

In point of substantive law, the matters which are the subjects of the aforesaid legislation are entirely within the control of the legislatures of the provinces; the legislature of Ontario has for that province legislative authority in respect of them just as unqualified, subject to the powers of reservation and disallowance, as that of the Imperial Parliament.

To invest the judicial officers aforesaid with authority to perform their functions as provided under said Acts, respectively, is within the competence of the provincial legislature; it is not contrary to s. 96 of the *B.N.A. Act* (requiring appointment by the Governor General of judges of superior, district and county courts); the said functions are not within the intendment of said s. 96.

The jurisdiction of inferior courts, whether within or without the ambit of said s. 96, was not by the *B.N.A. Act* fixed forever as it stood at the date of Confederation.

The legal history, in the way of legislation and of decided cases, as to jurisdiction and exercise of jurisdiction, under provincial authority, of courts of summary jurisdiction, reviewed. The *B.N.A. Act,* ss. 92 (14), 96, 97, 99, 129, considered. *Regina* v. *Coote,* L.R. 4 P.C. 599; *Maritime Bank's* case, [1892] A.C. 437; *Martineau* v. *Montreal City,* [1932] A.C. 113; *Toronto* v. *York,* [1938] A.C. 415; *Ganong* v. *Bayley,* 2 Cart. 509; *Burk* v. *Tunstall,* 2 B.C.R. 12; *Regina* v. *Bush,* 15 Ont. R. 398; *In re Small Debts Act,* 5 B.C.R. 246; *French* v. *McKendrick,* 66 Ont. L.R. 306, and other cases, discussed or referred to. The decisions in *Clubine* v. *Clubine,* [1937] Ont. R. 636, and *Kazakewich* v. *Kazakewich,* [1936] 3 W.W.R. 699, disapproved.

REFERENCE by Order of His Excellency the Governor General in Council (P.C. 111, dated January 12, 1938, as amended by P.C. 191, dated January 26, 1938) of the important questions of law hereinafter set out to the Supreme Court of Canada, for hearing and consideration, pursuant to s. 55 of the *Supreme Court Act,* R.S.C., 1927, c. 35.

The order of reference recited:

Whereas there has been laid before His Excellency the Governor General in Council, a report from the Right Honourable the Prime Minister, for the Minister of Justice, dated January 7th, 1938, representing as follows:—

In several of the provinces of Canada in the case of certain social legislation, the legislatures have purported to confer extensive judicial

1938

REFERENCE *re* AUTHORITY TO PERFORM FUNCTIONS VESTED BY THE ADOPTION ACT, THE CHILDREN'S PROTECTION ACT, THE CHILDREN OF UNMARRIED PARENTS ACT, THE DESERTED WIVES' AND CHILDREN'S MAINTENANCE ACT, OF ONTARIO.

powers upon officials appointed by the Lieutenant-Governor in Council to be members of tribunals constituted under the said legislation.

Questions have been raised whether these judicial powers are such as were theretofore exercised only by the Superior and District and County Courts of the provinces, in which event doubt arises as to whether the said judicial powers have been validly conferred. It has been held by the Courts of Appeal of Alberta and Ontario in two recently decided cases that only persons appointed by the Governor General were capable of exercising the powers so conferred (*Kazakewich* v. *Kazakewich*, 1936, 3 W.W.R. 699; *Clubine* v. *Clubine*, 1937, O.R. 636). In one of these cases, the Honourable the Chief Justice of Ontario described the question of jurisdiction as being of great public interest and importance and stated that it was desirable that it should be settled by the Court of final resort.

The Attorney-General of Ontario has represented to the Minister of Justice that there are four Ontario Statutes of widespread application in relation to which this question arises, namely—the *Adoption Act;* the *Children's Protection Act;* the *Children of Unmarried Parents Act,* and the *Deserted Wives' and Children's Maintenance Act,* and that judicial powers under these Acts are exercisable by Justices of the Peace, Magistrates and Juvenile Court Judges, and, in some cases concurrently with these officials, County or District Court Judges.

The Attorney-General of Ontario further represents that the effective administration of the aforesaid statutes has been greatly impeded by the doubt that has been raised as to the validity of their provisions relating to the exercise of judicial powers and has requested that the same be referred to the Supreme Court of Canada in order that the doubt may be set at rest.

And whereas for the aforesaid reasons and having in view the importance of the questions involved, it is deemed desirable to obtain the opinion of the Supreme Court of Canada.

The questions referred to the Court were as follows:

1. With reference to the *Adoption Act,* R.S.O. 1937, c. 218, has—

(*a*) the Judge or Junior or Acting Judge of County or District Court;

(*b*) a Judge of the Juvenile Court designated a Judge by the Lieutenant-Governor in Council pursuant to the aforesaid Act

authority to perform the functions which the legislature has purported to vest in him by the provisions of the said Act, and, if not, in what particular or particulars or to what extent does he lack such authority?

2. With reference to the *Children's Protection Act,* R.S.O. 1937, c. 312, has—

(*a*) the Judge or Junior or Acting Judge of the County or District Court; or

(*b*) a Police Magistrate or Judge of the Juvenile Court designated a Judge by the Lieutenant-Governor in Council pursuant to the aforesaid Act; or

(*c*) a Justice of the Peace

authority to perform the functions which the legislature has purported to vest in him by the provisions of the said Act, and, if not, in what particular or particulars or to what extent does he lack such authority?

3. With reference to the *Children of Unmarried Parents Act*, R.S.O. 1937, c. 217, has—

(*a*) the Judge or Junior or Acting Judge of a County or District Court; or

(*b*) a Police Magistrate or Judge of the Juvenile Court designated a Judge by the Lieutenant-Governor in Council pursuant to the aforesaid Act

authority to perform the functions which the legislature has purported to vest in him by the provisions of the said Act, and, if not, in what particular or particulars or to what extent does he lack such authority?

4. With reference to the *Deserted Wives' and Children's Maintenance Act*, R.S.O. 1937, c. 211, has—

(*a*) a Justice of the Peace; or

(*b*) a Magistrate; or

(*c*) a Judge of the Juvenile Court

authority to perform the functions which the legislature has purported to vest in him by the provisions of the said Act, and, if not, in what particular or particulars or to what extent does he lack such authority?

The answers of the Court to all the said questions were in the affirmative.

Due notice (pursuant to order of the Court) of the hearing of the said Reference was given to the respective Attorneys-General of the several Provinces of Canada.

J. C. McRuer K.C. and *F. A. Brewin* for the Attorney-General of Canada.

W. B. Common K.C., C. R. Magone and *J. J. Robinette* for the Attorney-General of Ontario.

P. H. Chrysler for the Attorney-General of Manitoba.

G. G. McGeer K.C. for the Attorney-General of British Columbia.

1938

REFERENCE *re* AUTHORITY TO PERFORM FUNCTIONS VESTED BY THE ADOPTION ACT, THE CHILDREN'S PROTECTION ACT, THE CHILDREN OF UNMARRIED PARENTS ACT, THE DESERTED WIVES' AND CHILDREN'S MAINTENANCE ACT, OF ONTARIO.

L. C. Moyer K.C. for the Attorneys-General of Prince Edward Island and Saskatchewan.

G. B. Henwood K.C. for the Attorney-General of Alberta.

W. L. Scott K.C. for the Canadian Welfare Council.

The reasons for the answers aforesaid were delivered by

THE CHIEF JUSTICE: The starting point for the consideration of the statutes referred to us is this: In point of substantive law it is not disputed that the matters which are the subjects of this legislation are entirely within the control of the legislatures of the provinces. We are not concerned with any ancillary jurisdiction in respect of children which the Dominion may possess in virtue of the assignment to the Dominion Parliament by section 91 of the subject Marriage and Divorce. Whatever may be the extent of that jurisdiction, we are not concerned with it here and I mention it only to put it aside.

The control by the legislatures over these subjects is supreme in this sense, that the Legislature of Ontario, for example, has for that province legislative authority in respect of them just as unqualified, subject to the powers of reservation and disallowance, as that of the Imperial Parliament. It is well not to forget, in examining the constitutionality of enactments of the character of those before us, that by section 93 (subject to provisions having for their purpose the protection of religious minorities) education is committed exclusively to the responsibility of the legislatures; and that, as regards that subject, the powers of the legislatures are not affected by the clause at the end of section 91. We should perhaps also recall that section 93 (as is well known) embodies one of the cardinal terms of the Confederation arrangement. Education, I may add, is, as I conceive it, employed in this section in its most comprehensive sense.

It is pertinent also to observe that the subject of relief, relief of persons in circumstances in which the aid of the State is required to supplement private charity in order to provide the necessaries of life, has become one of enormous importance; and that, primarily, responsibility for this rests upon the provinces; the direct intervention of the Dominion in such matters being exceedingly difficult, by reason of constitutional restrictions.

The responsibility of the state for the care of people in distress (including neglected children and deserted wives) and for the proper education and training of youth, rests upon the province; in all the provinces the annual public expenditure for education and the care of indigent people is of great magnitude, a magnitude which attests in a conclusive manner the deep, active, vigilant concern of the people of this country in these matters. Moreover, while, as subject matter of legislation, the criminal law is entrusted to the Dominion Parliament, responsibility for the administration of justice and, broadly speaking, for the policing of the country, the execution of the criminal law, the suppression of crime and disorder, has from the beginning of Confederation been recognized as the responsibility of the provinces and has been discharged at great cost to the people; so also, the provinces, sometimes acting directly, sometimes through the municipalities, have assumed responsibility for controlling social conditions having a tendency to encourage vice and crime.

The statutes before us constitute a part of the legislative measures in Ontario directed to these various ends. It would be competent to the Province of Ontario to put in effect a Poor Law system modelled upon that which prevails in England to-day. The province has not seen fit to do that but in some important respects the statutes that we have to consider embody features of the Poor Law system.

Perhaps the most important of these enactments now before us is the *Children's Protection Act*. The plan to which it gives effect is aimed at producing effective co-operation between organized voluntary services and public authorities, police officers, probation officers, justices of the peace, police magistrates, and a special tribunal known as the Juvenile or Family Court. The statute, as well as similar statutes in other provinces, has proved an admirable agency for the purpose for which it was designed. The practical problem raised by this reference is whether or not it is competent to the province to invest the officers presiding over these special tribunals, as well as justices of the peace and police magistrates, with the powers of summary adjudication conferred upon them by the statute, or whether, on the other hand, as is contended by those who attack the legislation, they are disabled in some important

1938

REFERENCE *re* AUTHORITY TO PERFORM FUNCTIONS VESTED BY THE ADOPTION ACT, THE CHILDREN'S PROTECTION ACT, THE CHILDREN OF UNMARRIED PARENTS ACT, THE DESERTED WIVES' AND CHILDREN'S MAINTENANCE ACT, OF ONTARIO.

Duff C.J.

respects by Section 96 of the *B.N.A. Act* from taking advantage of this convenient summary procedure which has proved so efficacious.

Now, it seems to be indisputable that sections 96 and 97 of the *British North America Act* contemplate the existence of provincial courts and judges other than those within the ambit of section 96. Indeed, it would be a non-natural reading of those sections to construe them as applying to such courts of summary jurisdiction as magistrates and justices of the peace. Besides, such a construction, having regard to the circumstances, even if the language in its ordinary sense extended to such judicial officers, would seem to be excluded by the fact that all judges appointed by the Governor General are to be selected from the bars of the respective provinces. That the statesmen responsible for Confederation could in fact have contemplated such a restriction upon the appointment of magistrates and justices of the peace would be a supposition that nobody having any knowledge of the circumstances of the country could countenance.

Nor so far as I know, has it been contended since 1892 that magistrates and justices of the peace and courts presided over by them at the time of Confederation fell within the intendment of section 96. Nevertheless, the argument before us in support of the attack on the constitutionality of the legislation based upon some dicta and decisions of the last few years appears logically to involve the conclusion that magistrates and justices of the peace exercising civil jurisdiction are within the purview of sections 96 and 97 and it is necessary to examine the validity of this position.

In the early years of Confederation, the view was advanced and found vigorous support for nearly a quarter of a century that, since the appointment of all judges, including technically magistrates and justices of the peace, was matter of prerogative (and since, as was contended, every prerogative had been vested exclusively in the Governor General as the sole representative of the Sovereign in the Dominion), the Lieutenant-Governors possessed strictly in point of law no authority to appoint such functionaries and the legislatures none to legislate with regard to such appointments.

Shortly after the *B.N.A. Act* came into force, the view was put forward by the Department of Justice in reporting on provincial legislation that no prerogative rights of property and no prerogative power passed to the provinces and that the provinces had no legislative jurisdiction in respect of such rights or powers. Notwithstanding the convincing argument set forth in a memorable state paper by Mr. Mowat, in which he expounded the views of the government of Ontario touching the relation of the provincial executive to the Crown; notwithstanding the decision in *Regina* v. *Coote* (1) affirming the unanimous judgment of the Court of Queen's Bench for Quebec; notwithstanding the decisions of the Ontario judges supporting the doctrine advocated by Mr. Mowat on which the Ontario legislation was based (*Regina* v. *Wason* (2); *A.-G. for Canada* v. *A.-G. for Ontario* (3)), the Department of Justice did not yield the ground it had taken up in this controversy until the decision of the Privy Council in the *Maritime Bank's* case (4). That decision gave final judicial sanction to the views of Ontario as expounded by Mr. Mowat nearly twenty years before. In the meantime, the authority of the provinces in respect of the appointment of justices of the peace and other judicial officers of summary jurisdiction had come before the courts. In 1877, the Supreme Court of New Brunswick (in *Ganong* v. *Bayley* (5)) had to consider the validity of provincial legislation constituting a small debts court with limited jurisdiction in contract and in tort presided over by judicial officers designated as commissioners. The legislation was sustained by the majority of the court; but the minority, the Chief Justice and Duff J., held it unconstitutional upon the ground that it dealt with matter of prerogative over which the province had no jurisdiction, and declared at the same time that another statute of that province, passed in 1873, dealing with the appointment of justices of the peace, was *ultra vires* because that matter, the appointment of justices of the peace, being likewise matter of prerogative, was also beyond the powers of provincial legislatures under

(1) (1873) L.R. 4 P.C. 599.
(2) (1890) 17 Ont. A.R. 221.
(3) (1890) 20 Ont. R. 222; (1892) 19 Ont. A.R. 31.
(4) *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, [1892] A.C. 437.
(5) 2 Cart. 509.

1938

REFERENCE *re* AUTHORITY TO PERFORM FUNCTIONS VESTED BY THE ADOPTION ACT, THE CHILDREN'S PROTECTION ACT, THE CHILDREN OF UNMARRIED PARENTS ACT, THE DESERTED WIVES' AND CHILDREN'S MAINTENANCE ACT, OF ONTARIO.

Duff C.J.

the subject, the administration of justice and constitution of courts.

This view expressed by the minority of the Supreme Court of New Brunswick met with no concurrence in the Canadian courts until, in the year 1890, Drake J., of the Supreme Court of British Columbia, pronounced a decision in *Burk* v. *Tunstall* (1) based in part at least upon the same grounds, a decision which has assumed a great importance in the discussion of these matters and to which particular reference will be made later.

In the meantime, in Ontario, judicial authority and opinion had pronounced themselves finally against this view of the minority of the New Brunswick court. The subject of the authority of the provinces in relation to the appointment of justices of the peace came before a Divisional Court in Ontario in 1888 (Armour C.J., Street J. and Falconbridge J.) in *Regina* v. *Bush* (2). Street J., a judge of exceptional experience in such matters, reviewed the subject in an admirable judgment in the course of which he said that, subject to sections 96, 100 and 101, the words of paragraph 14 of section 92

> confer upon the Provincial Legislatures the right to regulate and provide for the whole machinery connected with the administration of justice in the Provinces, including the appointment of all the judges and officers requisite for the proper administration of justice in its widest sense, reserving only the procedure in criminal matters.
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> * * * * * * * * * *
>
> It is clearly the intention of the Act that the Provincial Legislatures shall be responsible for the administration of justice within their respective Provinces, excepting in so far as the duty was cast upon the Dominion Parliament. The only duty cast upon the Dominion Parliament in the matter is contained in the clauses to which I have referred, by which the appointment of the judges of certain courts is reserved to it. The administration of justice could not be carried on in the Provinces effectually without the appointment of justices of the peace and police magistrates, and the conclusion seems to me to be irresistible that it was intended that the appointment of these and other officers, whose duty it should be to aid in the administration of justice, should be left in the hands of the Provincial Legislatures. (pp. 403-405.)

In 1896, *In re Small Debts Act* (3), the full court of the Supreme Court of British Columbia had to pass upon a controversy touching the validity of a statute investing justices of the peace with small debts jurisdiction up to $100. The argument based upon the absence of author-

(1) 2 B.C.R. 12.
(2) 15 Ont. R. 398.
(3) 5 B.C.R. 246.

ity in the provinces to legislate touching the prerogative was rejected on the authority of the *Maritime Bank's* case (1), which had, in the meantime, been decided. I do not dwell upon the able judgments delivered by McCreight and Walkem JJ. but it is necessary to take note of that of Drake J., in view of the importance that has been attached to some language of his in the earlier judgment, already mentioned, delivered some six years before in 1890 and before the decision in the *Maritime Bank's* case (1). In his judgment in 1896, Mr. Justice Drake makes it plain that in his view sections 96 and 97 of the *British North America Act* recognize provincial courts and judges other than those enumerated in section 96; and at the conclusion of his judgment he uses these words:

> In holding this particular Act *intra vires*, I do not intend to lay down any strict line of demarcation between the courts over which the Dominion Government have the power of appointing and paying the judges, and those other smaller and inferior courts which the Provincial Legislature may establish. No line can be drawn; every case must depend on the particular circumstances, and will be dealt with when the necessity to do so arises.

I consider it important to call attention to these words because a construction has been put upon a passage which has been cited and relied upon in his earlier judgment in *Burk* v. *Tunstall* (2) which would give to section 96 a wider scope and make it applicable to all provincial courts. The discrepancy is easily understood when the judgment in *Burk* v. *Tunstall* (2) is read as a whole. In that case, which was an application for a writ of prohibition, nobody appeared in opposition to the application and there was no argument in support of the validity of the impugned legislation. The controversy concerned the Mining Court of British Columbia, a court established prior to Confederation. After Confederation the jurisdiction of this Court had been increased by successive increments until the jurisdiction exercised by the Mining Court was vastly more important than that exercised by any County Court in Canada. In British Columbia from the beginning there were officials styled Gold Commissioners who within their respective districts were charged with very important administrative functions under the *Mineral Act*, under other statutes and in still other respects. By the Act constitut-

(1) [1892] A.C. 437. (2) (1890) 2 B.C.R. 12.

1938

REFERENCE *re* AUTHORITY TO PERFORM FUNCTIONS VESTED BY THE ADOPTION ACT, THE CHILDREN'S PROTECTION ACT, THE CHILDREN OF UNMARRIED PARENTS ACT, THE DESERTED WIVES' AND CHILDREN'S MAINTENANCE ACT, OF ONTARIO.

Duff C.J.

ing the Mining Court, the Gold Commissioner of the District was made the judge of that Court. Mr. Justice Drake undoubtedly held the view that the Mining Court, as constituted in 1890, was a court within the contemplation of s. 96; but it is right to point out that there is no sort of resemblance between the jurisdiction and powers of the Mining Court of British Columbia at that date and the jurisdiction of the tribunals we have now to consider. The Mining Court was a court of record and was in explicit words invested with the authority of a court of law and equity to deal with all manner of disputes concerning mining lands, mining property, mining rights, and in respect of claims for supplies against free miners (who would virtually constitute every corporation and individual of the population of a mining district) without restriction as to amount or value, with authority to issue writs of *ca. sa. ne exeat* and so on. I do not doubt that the actual decision of Mr. Justice Drake in that case was right.

A passage from his judgment expressing certain views as to the construction of section 96 is quoted with approval in the judgment of the Judicial Committee of the Privy Council in *Martineau* v. *Montreal City* (1). Their Lordships' observations are in these words:

> But by s. 92, head 13, of the Act, as is well remembered, there is conferred upon the Provincial legislature the exclusive right of making laws in relation to property and civil rights in the Province and (by head 14) in relation to the administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in these Courts. These exclusive Provincial powers have made it extremely difficult in many cases to draw the line between legislation which is within the competence of the Province under s. 92 of the Act, and legislation which is beyond its competence by reason of s. 96. This observation may be illustrated by two instances, neither of them remote from the present case, the first on the one side of the line and the second on the other. In *Regina* v. *Coote* (2) it was held by this Board, in an appeal upon which, it must be noticed, the respondent was not represented, that certain statutes of Quebec appointing officers named "fire marshals," with power to examine witnesses under oath and to inquire into the cause and origin of fires and to arrest and commit for trial in the same manner as a justice of the peace, was within the competence of the Provincial legislature. On the other hand, in a British Columbia case in 1890—*Burk* v. *Tunstall* (3)—it was held by Drake J. that while it was within the competence of the Province to create mining courts and to fix their jurisdiction, it was not within its competence to

(1) [1932] A.C. 113, at 121-122. (2) (1873) L.R. 4 P.C. 599.
(3) (1890) 2 B.C.R. 12.

appoint any officers thereof with other than ministerial powers. The learned judge, in the course of his judgment, referring to s. 96 of the Act, observes, as their Lordships think with reason:

> It is true that the language used in that section is limited to the judges of the superior, district and county courts in each Province, and it might be contended that these Courts having been expressly named, all other Courts were excluded. If this were so the Provincial legislature would only have to constitute a Court by a special name to enable them to avoid this clause. But in the section itself, after the special Courts thus named, the Courts of probate in Nova Scotia and New Brunswick are excepted from the operation of the clause, thus showing that s. 96 was intended to be general in its operation.

This passage in their Lordships' judgment is the basis on which the argument directed against the jurisdiction of courts of summary jurisdiction in this and in other cases of recent years, has mainly rested. It has, I venture to think, been misunderstood but it has been cited again and again as authority for the proposition that it is incompetent to the provincial legislatures to legislate for the appointment of any officer of any provincial court exercising other than ministerial functions, and for the proposition that s. 96 is general in its character in the sense that all provincial courts come within its scope, including courts of summary jurisdiction such as justices of the peace, and that, as regards all such courts exercising, at all events, civil jurisdiction, the appointment of judges and officers presiding over them is vested exclusively in the Dominion.

It is quite clear, I think, that this is a wholly unwarranted view of *Martineau's* case (1) and I shall revert to the judgment of their Lordships a little later. It is necessary, I think, before doing so, to consider a little further the judgment of Mr. Justice Drake in *Burk* v. *Tunstall* (2).

That judgment is based on two grounds. One ground is that the appointment of all judges, without distinction, being matter of prerogative right, is, conformably to the view of the minority of the judges of the Supreme Court of New Brunswick in *Ganong* v. *Bayley* (3) (which in 1890 was still the view of the Department of Justice), entirely outside the ambit of provincial jurisdiction in relation to the administration of justice and the constitution of courts. The judgment is also put on the ground indicated in the passage quoted above from the Judicial Com-

(1) [1932] A.C. 113. (2) (1890) 2 B.C.R. 12.
(3) (1877) 2 Cart. 509.

1938

REFERENCE *re* AUTHORITY TO PERFORM FUNCTIONS VESTED BY THE ADOPTION ACT, THE CHILDREN'S PROTECTION ACT, THE CHILDREN OF UNMARRIED PARENTS ACT, THE DESERTED WIVES' AND CHILDREN'S MAINTENANCE ACT, OF ONTARIO.

DUFF C.J.

mittee in *Martineau's* case (1) that the Mining Court was a court within the purview of section 96. Mr. Justice Drake did, I am convinced, intend to say that, under its powers in relation to the administration of justice and of constitution of courts of the province, a province has no power to appoint any officer of any such court other than officers charged with strictly ministerial functions. The view he then held touching the prerogative necessarily excluded from the authority of the provinces power to appoint judges of provincial courts, including judicial officers such as magistrates and justices of the peace, which he considered was vested exclusively in the Governor General; and he intended to say that this exclusive authority was in no way restricted by section 96. He would not have taken this view had his attention been called to *Regina* v. *Coote* (2); but, as mentioned above, he had not the benefit of any argument in support of the legislation.

As I have already observed, his views had changed in 1896 and his judgment of that year gives the simple explanation, viz., that he loyally accepted, as, of course, it was his duty to do, the judgment of the Judicial Committee in the *Maritime Bank's* case (3) as negativing the views he had formerly held with regard to the prerogative. He points out in the later judgment that the views of the Chief Justice and of Duff J., in the New Brunswick case (4), touching the prerogative had necessarily been displaced by the *Maritime Bank's* case (3). Therefore, he definitely recognized, as appears from the passage I have quoted, the authority of the Province to constitute courts to which section 96 has no application and to appoint the judges or judicial officers to preside over them.

After the decision in the *Maritime Bank's* case (3) down to the judgment of the Judicial Committee in *Martineau's* case in 1932 (5), the view, to which effect was given in *Regina* v. *Bush* in 1888 (6), and in the British Columbia case, *In re Small Debts Act,* in 1896 (7), was generally accepted in Canada; the view, that is to say, that it is competent to the provinces to legislate for the appointment of

(1) [1932] A.C. 113, at 121-122.
(2) (1873) L.R. 4 P.C. 599.
(3) [1892] A.C. 437.
(4) *Ganong* v. *Bayley,* (1877) 2 Cart. 509.
(5) [1932] A.C. 113.
(6) 15 Ont. R. 398.
(7) 5 B.C.R. 246.

justices of the peace and invest them as well as other courts of summary jurisdiction with civil and criminal jurisdiction. Even the Department of Justice accepted this view, as appears from the report of Mr. Fitzpatrick, as Minister of Justice, of December 31st, 1901, where, in referring to the district courts of the Province of New Brunswick invested with a jurisdiction to deal with claims on contract up to $80 and in tort up to $40, he says:

> These courts appear, however, to be intended to take the place of the parish courts and magistrates' courts, having limited civil jurisdiction, heretofore established, and they are not courts in the opinion of the undersigned having the dignity of the district courts intended by the British North America Act.

In 1917 there was a reference by the Lieutenant-Governor in Council of Alberta touching the validity of the *Small Debts Recovery Act* of that province (1). The question was fully discussed in the judgments of Harvey C.J. and Beck J. and determined in the sense of the British Columbia decision of 1896.

The attack on the validity of such provincial legislation based upon the argument drawn from the Justice Department's theory as to prerogative powers having received its quietus from the decision in the *Maritime Bank's* case (2), justices of the peace of almost every province of Canada, along with other courts of summary jurisdiction, exercised without question civil jurisdiction in the character of small debts courts and otherwise until the judgment of the Privy Council in *Martineau's* case (3) which seemed to start a fresh series of attacks upon the provincial jurisdiction in relation to the administration of justice.

Now, I think the observations of the Judicial Committee in *Martineau's* case (3) were not directed to magistrates' courts and courts of justices of the peace or, indeed, to courts of summary jurisdiction of any kind; and, when the whole of the passage in Lord Blanesburgh's judgment on pages 121 and 122 is read, this seems to be clear. It is quite true it is observed that the respondent was not represented in *Regina* v. *Coote* (4), but it must be noticed that in that case the Court of Queen's Bench in Quebec had unanimously held the legislation in question there,

(1) *In re Small Debts Recovery Act*, [1917] 3 W.W.R. 698.
(2) [1892] A.C. 437.
(3) [1932] A.C. 113.
(4) (1873) L.R. 4 P.C. 599.

1938

REFERENCE *re* AUTHORITY TO PERFORM FUNCTIONS VESTED BY THE ADOPTION ACT, THE CHILDREN'S PROTECTION ACT, THE CHILDREN OF UNMARRIED PARENTS ACT, THE DESERTED WIVES' AND CHILDREN'S MAINTENANCE ACT, OF ONTARIO.

Duff C.J.

which provided for the appointment of fire marshals, with the powers of justices of the peace, and with authority to investigate and report on the origin of fires and to commit persons for trial if the facts should warrant that course, to be within the competence of the provincial legislature and this their Lordships appear to have considered, as did the Court of Queen's Bench, a question upon which it was necessary to pass; and they did so by expressly approving the decision of the Court of Queen's Bench.

But their Lordships' judgment in *Martineau's* case (1) does not profess to overrule the previous decision in *Regina* v. *Coote* (2) which, it may be observed, was decided by a board that included Sir Montague Smith.

I have already said that, in my view, Drake J. in the earlier case did mean to say that section 96 applies to all provincial courts of every description because his view as touching the prerogative necessarily excluded the authority of the province; but it is equally clear to me that their Lordships in the Privy Council, had not their attention called to this aspect of the subject and are not giving their sanction to the words of Drake J. in the extended sense in which I think he intended to employ them. Indeed, it is quite plain that they could not do so consistently with the previous decision in *Regina* v. *Coote* (2) which explicitly recognized the authority of the provinces to legislate for the appointment of judicial officers with the powers of justices of the peace; and, as I humbly think, it cannot be supposed that their Lordships could have given their adherence to a pronouncement at variance with all Canadian decisions and all Canadian practice since 1892 without some reference to such decisions and practice.

It cannot, therefore, be seriously disputed that, on enactment of the *British North America Act*, and on the subsequent extension of the Act to the provinces of British Columbia and Prince Edward Island, magistrates and justices of the peace remained outside the scope of section 96. Some more or less obvious consequences follow from that.

At the date of the Union, in Upper Canada, justices of the peace exercised jurisdiction in civil matters; in respect notably of claims for wages and of orders for the protection of the earnings of married women. In Nova Scotia they possessed a small debts jurisdiction up to $80

(1) [1932] A.C. 113. (2) (1873) L.R. 4 P.C. 499.

in contract and to a lower limit in tort. In British Columbia, they possessed jurisdiction in respect of protection orders, in respect of claims for ferry tolls, in respect of line fences; and in disputes respecting the ownership of stolen cattle. At least in the Maritime provinces, in Quebec and British Columbia there was, under the *Seamen's Acts* and under the *Merchants Shipping Act,* jurisdiction to entertain claims for seamen's wages.

By section 129 (*B.N.A. Act*) it was enacted as follows:

> 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.

The effect of this section, of course, was that the authority of magistrates and justices of the peace in these civil matters, as well as of all judicial officers not within section 96 continued after Confederation in the provinces mentioned, subject to alteration by the legislature.

As regards seamen's wages, the Dominion, no doubt, possessed some authority to deal with that subject under section 91 and the jurisdiction of magistrates under the *Merchants Shipping Act* continued unaltered; and, in the case of Inland Waters, jurisdiction was given to justices of the peace in respect of such claims by a statute of 1873.

As regards jurisdiction in all the other matters mentioned, there can be no doubt that the Dominion possesses no authority under the *B.N.A. Act* to abate it by one jot. The *B.N.A. Act,* therefore, by its express terms provided for the continuance of courts possessing civil jurisdiction which were not within the scope of section 96 and concerning the powers of which the provinces had exclusive authority in virtue of section 92 (14).

The provinces acquired plenary authority, not only to diminish the jurisdiction of such courts, but also to increase it, subject only to any qualification arising in virtue of s. 96.

(1) (1873) L.R. 4 P.C. 599.

1938

REFERENCE *re* AUTHORITY TO PERFORM FUNCTIONS VESTED BY THE ADOPTION ACT, THE CHILDREN'S PROTECTION ACT, THE CHILDREN OF UNMARRIED PARENTS ACT, THE DESERTED WIVES' AND CHILDREN'S MAINTENANCE ACT, OF ONTARIO.

Duff C.J.

My view of the effect of s. 96 as regards such courts existing at the date of Confederation (that is to say, outside the scope of that section) is this: the provinces became endowed with plenary authority under s. 92 (14), but, a province is not empowered to usurp the authority vested exclusively in the Dominion in respect of the appointment of judges who, by the true intendment of the section, fall within the ambit of s. 96, or to enact legislation repugnant to that section; and it is too plain for discussion that a province is not competent to do that indirectly by altering the character of existing courts outside that section in such a manner as to bring them within the intendment of it while retaining control of the appointment of the judges presiding over such courts. That, in effect, would not be distinguishable from constituting a new court as, for example, a Superior Court, within the scope of section 96 and assuming power to appoint the judge of it. In principle, I do not think it is possible to support any stricter limitation upon the authority of the provinces, and I do not think what I am saying is in substance inconsistent with what was laid down by Lord Atkin speaking on behalf of the Judicial Committee in *Toronto* v. *York* (1).

One of the contentions of the appellants in that case was that the Ontario Municipal Board was invalidly constituted as being a Superior Court constituted in violation of sections 96, 99 and 100 of the *British North America Act*. The conclusion of their Lordships in the Privy Council on this contention was that the Municipal Board is primarily in "pith and substance," an administrative body. As to Part III of the Act (22 Geo. V, 1932, cap. 27), especially sections 41-46, 54 and 59, in which the Board

shall for all purposes of this Act have all the powers of a court of record (sec. 41),

and

shall as to all matters within its jurisdiction under this Act have authority to hear and determine all questions of law or of fact (sec. 42),

and

for the due exercise of its jurisdiction and powers and otherwise for carrying into effect the provisions of this or any other general or special Act, shall have all such powers, rights and privileges as are vested in the Supreme Court with respect to the amendment of proceedings, addition or substitution of parties, attendance and examination of witnesses, production and inspection of documents, entry on and inspection of property;

(1) [1938] A.C. 415.

enforcement of its orders and all other matters necessary or proper therefor (sec. 45),

their Lordships said it was difficult to avoid the conclusion that the sections in question purport to clothe the Board with the functions of a Court, and to vest in it judicial powers, and held that

so far, therefore, as the Act purports to constitute the Board a Court of Justice analogous to a Superior, District, or County Court it is *pro tanto* invalid.

But it is obvious that their Lordships were not considering, because there was no occasion to do so, the distinction between the courts that come within the intendment of section 96 of the *British North America Act* and other courts or tribunals.

In effect, it was argued before us that provincial legislation is repugnant to section 96 if in any particular the jurisdiction of one of these courts of summary jurisdiction existing at the date of Confederation is increased. That, in my view, is quite inadmissible in principle as it is incompatible with practice and authority since Confederation with the exception of one or two decisions in very recent years which are put upon the authority of *Martineau's* case (1).

Before proceeding further, it will be convenient to advert to some general considerations. In the argument addressed to us there is an underlying assumption that the interest of the people of this country in the independent and impartial administration of justice has its main security in sections 96, 97 and 99. Now, there were weighty reasons, no doubt, for those sections, and a strict observance of them as regards the judges of courts within their purview is essential to the due administration of justice. But throughout the whole of this country magistrates daily exercise, especially in the towns and cities, judicial powers of the highest importance in relation more particularly to the criminal law, but in relation also to a vast body of law which is contained in provincial statutes and municipal by-laws. The jurisdiction exercised by these functionaries, speaking generally, touches the great mass of the people more intimately and more extensively than do the judgments of the Superior Courts; and it would be an extraordinary supposition that a great community like the

(1) [1932] A.C. 113.

1938

REFERENCE *re* AUTHORITY TO PERFORM FUNCTIONS VESTED BY THE ADOPTION ACT, THE CHILDREN'S PROTECTION ACT, THE CHILDREN OF UNMARRIED PARENTS ACT, THE DESERTED WIVES' AND CHILDREN'S MAINTENANCE ACT, OF ONTARIO.

Duff C.J.

province of Ontario is wanting, either in the will or in the capacity, to protect itself against misconduct by these officers whom it appoints for these duties; and any such suggestion would be baseless in fact and altogether fallacious as the foundation of a theory controlling the construction of the *B.N.A. Act.*

Moreover, except in the case of the Superior Court judges of the provinces, who, by force of section 99, hold office during good conduct and are removable only by the Governor General on address by the Senate and the House of Commons, the *British North America Act* provides no security of tenure for judges coming within s. 96.

It is very clear to me, therefore, that, if you were justified in holding that by force of s. 96 the provinces have been disabled since Confederation from adding to the jurisdiction of judges not within that section, there would be equally good ground for holding that by force of s. 99 the provinces are disabled from extending the jurisdiction of the County Courts and the District Courts in such a way as to embrace matters which were then exclusively within the jurisdiction of Superior Courts.

Now, the pecuniary limit of claims cognizable by County Court judges has been frequently enlarged since Confederation and nobody has ever suggested so far as I know that the result has been to transform the County Court into a Superior Court and to bring the County Court judges within s. 99. Perhaps the most striking example of these enlargements of jurisdiction was that which occurred in British Columbia when the jurisdiction of the Mining Court, after the judgment of Mr. Justice Drake referred to above, was transferred to the County Court, and the County Court in respect of mines, mining lands and so on was given a jurisdiction unrestricted as to amount or value with all the powers of a court of law or equity.

It has never been suggested, so far as I know, that the effect even of that particular enlargement of the jurisdiction of the County Courts of British Columbia was to deprive the County Court and the County Court judges of their characters as such and to transform them into Superior Courts and Superior Court judges; or that s. 99 has, since these increases took place, been applicable to

County Court judges. In point of fact, as everybody knows, the practice has been opposed to this.

If the provinces have no authority to increase the jurisdiction of the County Courts without depriving them of their character as such, then no such jurisdiction exists anywhere. As Mr. Justice Strong, speaking for this Court, said in *Re County Courts of British Columbia* (1):

> * * * The jurisdiction of parliament to legislate as regards the jurisdiction of provincial courts is, I consider, excluded by subsection 14 of s. 92, before referred to, inasmuch as the constitution, maintenance and organization of provincial courts plainly includes the power to define the jurisdiction of such courts territorially as well as in other respects. This seems to me too plain to require demonstration.

In answer to the suggestion that a territorial increase of jurisdiction ought to be followed by a fresh commission to the judge of the County Court, he observed that the suggestion was a "preposterous" one.

There is a strong current of authority against the proposition I am discussing. Small debts courts presided over by judges appointed by the provinces were established in New Brunswick in 1877, in British Columbia in 1895, in Alberta in 1917, and, no doubt, elsewhere, and the validity of this legislation has been uniformly sustained. The jurisdiction of the Nova Scotia magistrates in such matters (vested in them before Confederation) is still exercised without challenge.

In *French* v. *McKendrick* (2), the Court of Appeal in Ontario unanimously held the 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, not to be courts within the scope of s. 96. The Court of Appeal unanimously took the view that the enactment authorizing the appointment of a deputy judge from the bar by a County Judge was competent and also that legislation enlarging the pecuniary limits of jurisdiction was competent.

I agree with the view expressed by Mr. Justice Drake, in his judgment in *Re Small Debts Act* (3), that it is inadvisable to attempt to draw an abstract line for the purpose of classifying courts as falling within section 96 or

(1) (1892) 21 Can. S.C.R. 446, at 453.

(2) (1930) 66 Ont. L.R. 306.

(3) (1896) 5 B.C.R. 246.

1938

REFERENCE *re* AUTHORITY TO PERFORM FUNCTIONS VESTED BY THE ADOPTION ACT, THE CHILDREN'S PROTECTION ACT, THE CHILDREN OF UNMARRIED PARENTS ACT, THE DESERTED WIVES' AND CHILDREN'S MAINTENANCE ACT, OF ONTARIO.

Duff C.J.

otherwise. I think, with respect, that this is not in the least inconsistent with Lord Atkin's observations in *Toronto* v. *York* (1).

Then, it should be observed that, if you have a provincial court outside the scope of s. 96 and the province enlarges its jurisdiction or its powers, but not in such a manner as to constitute a court of a class within the intendment of s. 96, I, as a judge, charged solely with the application of the law, have no further concern with what the legislature has done. It is no part of my function as a judge to consider whether, if the province should go on enlarging the jurisdiction and powers of the court, it might arrive at a point when the tribunal would cease to be one outside the ambit of s. 96. I have nothing to do with that. It may be a very excellent ground for disallowance of the legislation by the Governor General. Even if I am satisfied that there is something in the nature of an abuse of power, that in itself is no concern of mine. If, in its true character, the legislation is legislation concerning the administration of justice and the constitution of provincial courts and is not repugnant to the *B.N.A. Act* as a whole, that is the end of the matter. As Lord Herschell said in the first *Fisheries* case (2), the supreme legislative power is always capable of abuse, but the remedy lies with those who elect the legislature. In the case of provincial legislatures there is the additional remedy which the Imperial Parliament has committed to the Governor General and not to the courts.

I am unable to accept the view that the jurisdiction of inferior courts, whether within or without the ambit of s. 96, was by the *B.N.A. Act* fixed forever as it stood at the date of Confederation.

Coming now to the legislation before us. I do not intend to examine it in detail. Let me first observe that the jurisdiction of the Legislature to pass the *Adoption Act* appears to me too clear for discussion and I add nothing to that.

The remaining three statutes fall into two classes. As regards the *Children of Unmarried Parents Act* and the

(1) [1938] A.C. 415.
(2) *Attorney-General for Canada* v. *Attorneys-General for Ontario, Quebec and Nova Scotia,* [1898] A.C. 700, at 713.

Deserted Wives' and Children's Maintenance Act, these statutes, broadly speaking, aim at declaring and enforcing the obligations of husbands and parents to maintain their wives and children and these, self-evidently, are peculiarly matters for provincial authority. As regards the maintenance of illegitimate children and deserted wives and children, the public responsibility, as already mentioned, rests exclusively with the provinces and it is for the provincial legislatures, and for them alone, to say how the incidence of that responsibility shall be borne. The enactments are closely analogous to certain of the enactments forming part of the Poor Law system as it has developed in England since the time of Elizabeth; and the jurisdiction vested by these statutes in magistrates and judges of the Juvenile Court is not in substance dissimilar to the jurisdiction of magistrates under that system. I agree with the Supreme Court of British Columbia in *Dixon* v. *Dixon* (1) that there is no little analogy between the pre-Confederation legislation in British Columbia and in Ontario by which the earnings of the wife, which are the property of the husband, can be taken from the husband by a protection order and placed under the control of the wife. I agree with that, on the assumption upon which the argument against this legislation proceeded, that a maintenance order against a delinquent husband at the instance of a deserted wife is to be treated as on the same footing as alimony.

I think, with great respect, however, that the matter is of little importance. The subject is envisaged by these statutes from a different point of view. It is dealt with from the point of view of the obligation of the community and of the husband to the community. That is to say, it recognizes, first, the obligation of the community to protect women and children afflicted by misfortune through the default of their natural protector in the discharge of his natural obligations and, as one means of securing that end, it imposes upon the defaulting father and husband the legal duty enforceable by summary proceedings to support his children and his wife. The statute places the obligation to care for the deserted wife and children on the shoulders of that member of the community whose duty it is to the

(1) (1932) 46 B.C.R. 375.

1938

REFERENCE *re* AUTHORITY TO PERFORM FUNCTIONS VESTED BY THE ADOPTION ACT, THE CHILDREN'S PROTECTION ACT, THE CHILDREN OF UNMARRIED PARENTS ACT, THE DESERTED WIVES' AND CHILDREN'S MAINTENANCE ACT, OF ONTARIO.

Duff C.J.

community as well as to his family to bear the burden. The distinction is well brought out in a passage in a judgment of Lord Atkin in *Hyman* v. *Hyman* (1), cited in Mr. Scott's factum:

> While the marriage tie exists the husband is under a legal obligation to maintain his wife. The duty can be enforced by the wife, who can pledge his credit for necessaries as an agent of necessity, if, while she lives apart from him with his consent, he either fails to pay her an agreed allowance or fails to make her any allowance at all; or, if she lives apart from him under a decree for separation, he fails to pay the alimony ordered by the Court. But the duty of the husband is also a public obligation, and can be enforced against him by the State under the Vagrancy Acts and under the Poor Relief Acts.

One further point made against this feature of the statute is that there is no pecuniary limit. This again I regard as of small importance. The jurisdiction is not without limit; it is necessarily limited by the purpose for which the order is made.

In *Clubine* v. *Clubine* (2) the Court of Appeal for Ontario, following the judgment of the Court of Appeal for Alberta in *Kazakewich* v. *Kazakewich* (3), held that section 1 (1) of the *Deserted Wives' and Children's Maintenance Act* is *ultra vires* on the ground that it is beyond the powers of a provincial legislature to invest a court of summary jurisdiction, such as a magistrate's court, with a jurisdiction theretofore exclusively exercised by a Superior Court of the province. I have given my reasons for thinking that the proposition in that sweeping form cannot be sustained and, with the greatest possible respect, I think, moreover, that the Court of Appeal for Ontario have not given due weight to the special character of the jurisdiction vested in the courts of summary jurisdiction under the *Deserted Wives' and Children's Maintenance Act,* or to the close analogy between that jurisdiction and the jurisdiction exercised for centuries by courts of summary jurisdiction in England and in Canada. With the greatest possible respect, I am unable to concur in the decisions in *Clubine* v. *Clubine* (2) and *Kazakewich* v. *Kazakewich* (3).

In *Rex* v. *Vesey* (4) the Supreme Court of New Brunswick pronounced a decision based upon the view that such legislation was not beyond the competence of a provincial legislature.

(1) [1929] A.C. 601, at 628.
(2) [1937] O.R. 636.
(3) [1936] 3 W.W.R. 699.
(4) (1937) 12 M.P.R. 307.

Looking at the question in controversy from the point of view most favourable to the attack, the question one must ask oneself is this: does the jurisdiction conferred upon 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? There can be only one answer to that question. It is proper beyond doubt to look at the practice in England for this purpose (*Croft* v. *Dunphy*) (1). The summary of statutes in the factum for British Columbia is conclusive. Moreover, the statute referred to by Mr. Scott, and printed in full also in the factum for the Dominion, of the year 1718 (5 Geo. I, ch. 8), entitled "An Act for the more effectual relief of such wives and children, as are left by their husbands and parents, upon the charge of the parish," bears a close analogy to this feature of the legislation which is that upon which the attack is mainly based. This statute was certainly in force in British Columbia at the date of Confederation and, probably, was in force in Ontario.

Coming to the *Children's Protection Act*. Having regard to the purpose of the Act and its machinery, it appears to me to be precisely the kind of legislation which might be described as the modern counterpart of the Poor Law legislation in those features of it which are concerned with the care of neglected children. With great respect, I am unable to perceive any ground upon which it can be validly affirmed that magistrates exercising jurisdiction under this statute are entering upon a sphere which, having regard to legal history, belongs to the Superior Courts rather than to courts of summary jurisdiction; or that in exercising the functions attributed to them by this legislation they come within any fair intendment of section 96.

It is proper, perhaps, to advert particularly to the circumstance that, by section 26 of the statute, a Supreme Court judge has authority at any time to put an end to the guardianship of a Children's Aid Society and to return the child to the parents (*Re Maher* (2)).

Having given my reasons for thinking that these statutes are validly enacted in respect of the jurisdiction vested in

(1) [1933] A.C. 156. (2) (1913) 28 Ont. L.R. 419.

1938

REFERENCE *re* AUTHORITY TO PERFORM FUNCTIONS VESTED BY THE ADOPTION ACT, THE CHILDREN'S PROTECTION ACT, THE CHILDREN OF UNMARRIED PARENTS ACT, THE DESERTED WIVES' AND CHILDREN'S MAINTENANCE ACT, OF ONTARIO.

Duff C.J.

the magistrates and justices of the peace as such, I come now to the Juvenile Court.

There is one general observation which must first be made. If you have a jurisdiction which can be exercised by a tribunal not within section 96, that is to say, by a tribunal presided over by a judge or officer appointed by the province, it is entirely for the province to say how the tribunal shall be constituted and by what name judicial officers presiding over it shall be called. *Regina* v. *Coote* (1) is, on this point conclusive.

Now, the Juvenile Court is recognized and, to my mind, properly beyond all doubt recognized as a properly constituted court for the purpose of dealing with offences under the Dominion *Juvenile Delinquents' Act,* 1929 (19-20 Geo. V, ch. 46) and the amendments of 1935 and 1936 (25-26 Geo. V, ch. 41, and 1 Edw. VIII, ch. 40).

Jurisdiction under the old law of the Province of Canada in respect of offences by juvenile delinquents was exercisable by two justices of the peace, by a recorder, or by a stipendiary magistrate. A Juvenile Court constituted for exercising this jurisdiction in respect of juvenile offenders is plainly to my mind a court not within s. 96 and it does not become so by virtue of the fact that the officers presiding over it are invested with further jurisdiction of the same character as is validly given to magistrates and justices of the peace.

All the Interrogatories will, therefore, be answered in the affirmative.

The questions referred, answered in the affirmative.

Solicitor for the Attorney-General of Canada: *W. Stuart Edwards.*

Solicitor for the Attorney-General of Ontario: *William B. Common.*

Attorney-General of Manitoba: *W. J. Major.*

Solicitor for the Attorney-General of British Columbia: *H. Alan MacLean.*

Solicitor for the Attorney-General of Saskatchewan: *Alex. Blackwood.*

Solicitor for the Attorney-General of Alberta: *W. S. Gray.*

Solicitors for The Canadian Welfare Council: *Ewart, Scott, Kelley, Scott & Howard.*

(1) (1873) L.R. 4 P.C. 599.