1933

*Mar. 16
*Oct. 3

WILLIAM JAMES KERR (PLAINTIFF) APPELLANT;

AND

FRANCES MARGARET KERR AND THE ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law—Marriage—Action for declaration that marriage ceremony null and void—Want of parent's consent—Marriage Act, R.S.O. 1927, c. 181, ss. 17, 34—Validity of legislation—Jurisdiction of Supreme Court of Ontario—The divorce Act (Ontario), 1930 (Dom.)—B.N.A. Act, ss. 91 (26), 92 (12) (14).

Plaintiff, aged 20, and defendant, aged 17, went through a form of marriage in Ontario on December 2, 1930. To obtain the marriage licence, defendant swore (falsely, as known to both parties) that she was 18 years of age. No parent's consent, as required by s. 17 of the *Marriage Act*, R.S.O. 1927, c. 181, was obtained. Carnal intercourse had previously taken place between the parties. The marriage was not consummated nor did the parties since the ceremony cohabit or live together as man and wife. Plaintiff sued for a declaration that the marriage ceremony was null and void.

Held: The action should be dismissed, as the Supreme Court of Ontario had no jurisdiction to grant the decree sued for.

S. 17 (requiring in certain cases parental consent as a condition precedent to a valid marriage) and s. 34 (providing that a form of marriage gone through without the required consent should be void; and giving the Supreme Court of Ontario power to entertain an action and declare the marriage void, but limited with regard to circumstances or conditions, such limitation excluding jurisdiction in the present case) of the *Marriage Act* (as it stood in 1930 and when the judgment at trial was pronounced) were *intra vires* of the Ontario legislature (Crocket J. dissenting as to the jurisdictional enactment in s. 34).

The construction and effect of ss. 17 and 34 discussed.

In the exercise of its jurisdiction in relation to "the solemnization of marriage in the province" (*B.N.A. Act, s. 92 (12)*), a provincial legislature may require parental consent to the marriage of a minor as a condition precedent to a valid marriage.

The Dominion statute, *The Divorce Act (Ontario), 1930* (c. 14) (the construction and effect of it discussed) did not affect the Ontario legislation in question, nor do the facts in the present case afford any ground for annulment of marriage under the Dominion statute.

The obtaining of the marriage licence by defendant's false affidavit as to age did not afford plaintiff a ground for annulment of the marriage (*Plummer* v. *Plummer*, [1917] P. 163, cited by Lamont J.).

Per Duff C.J.: The province's authority as to "solemnization of marriage" is plenary (*Liquidators of the Maritime Bank of Canada* v.

*PRESENT:—Duff C.J. and Rinfret, Lamont, Smith, Cannon and Crocket JJ.

Receiver-General of New Brunswick, [1892] A.C. 437, at 442) and extends *(inter alia)* to attaching the consequence of invalidity absolutely or conditionally. It is not necessary to decide whether the requirements of s. 34, controlling its courts in exercising the jurisdiction thereby conferred, had the effect of qualifying any rule of substantive law as to the invalidity of marriages which might be established by ss. 17 (1) and 34. The province has power to prescribe rules governing its courts in exercising the jurisdiction conferred upon them by s. 34 (for giving effect by remedial process to rules of substantive law relating to "solemnization of marriage") because that power (1) *prima facie* affects matters falling within "solemnization of marriage" or "administration of justice" (in *B.N.A. Act,* s. 92 (12) (14)), and (2) could not be brought under any jurisdiction appertaining to the Dominion Parliament under any of the enumerated heads of s. 91 of the *B.N.A. Act;* as regards process designed to give effect to substantive rules of law competently enacted by a province in execution of its exclusive authority under s. 92 (12) (solemnization of marriage), the Dominion could not intervene in any way with a view to sanctioning or controlling any jurisdiction or procedure established for that purpose by a province (and therefore the power must be vested in the province—*Att. Gen. for Ontario* v. *Att. Gen. for Canada,* [1912] A.C. 571, at 581).

Per Rinfret, Smith and Cannon JJ.: The provincial legislature had power to provide that the stipulated consent must be had under certain circumstances but should not be necessary under certain other circumstances. But irrespective of the question of the validity of the marriage under (and on construction of) ss. 17 and 34 (2), the plaintiff could not succeed in his action; the Ontario court had no inherent jurisdiction to entertain it—its jurisdiction rested entirely upon the provisions of the Act, and s. 34 (2) excluded jurisdiction under the circumstances of this case.

Per Lamont J.: The provincial legislature had full power, under s. 92 (14) (administration of justice in the province) of the *B.N.A. Act,* to enact s. 34; to give jurisdiction to the court in some cases and conditions and withhold it in others; and without s. 34 the court had no jurisdiction to declare null and void the going through of a form of marriage.

Per Crocket J.: The limitations in s. 34 upon the court's jurisdiction to declare a marriage void for want of consent, in effect prescribed conditions to the jurisdiction depending on matters which did not pertain in any way to "solemnization of marriage," but went beyond that subject and invaded the exclusive legislative authority of the Dominion Parliament in relation to all other matters pertaining to the larger subject of "marriage and divorce" (*B.N.A. Act,* s. 91 (26)). and therefore the jurisdictional enactment in s. 34 (which, however, was severable from the substantive enactment therein) was *ultra vires.* But, apart from s. 34 (purporting to give jurisdiction only under conditions which did not exist in the present case) there was no enactment authorizing the court to pronounce the decree asked for; (the jurisdiction conferred by the Dominion Act, 1930, c. 14, did not cover any jurisdiction to grant a decree of annulment for any cause which the provincial legislature has validly declared as a cause of annulment in exercise of its exclusive legislative authority upon the

1933

KERR v. KERR

subject of Solemnization of Marriage); nor (with some doubt —reference to *Board* v. *Board* [1919] A.C. 956; also to the reasons in *Vamvakidis* v. *Kirkoff*, 64 Ont. L.R. 585) has the Supreme Court of Ontario inherent jurisdiction to do so.

Judgment of the Court of Appeal, Ont., [1932] O.R. 601, affirmed in the result.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) which (reversing the judgment of Logie J., pronounced on March 17, 1932 (2)) dismissed the plaintiff's action, which was for a decree declaring the ceremony of marriage performed between the plaintiff (then aged 20 years) and the defendant Mrs. Kerr (then aged 17 years) on December 2, 1930, at Hamilton, Ontario, null and void. The material facts of the case are sufficiently stated in the judgment of Lamont J. now reported. Leave to appeal to this Court was granted by the Court of Appeal. The appeal to this Court was dismissed.

O. M. Walsh and *F. J. L. Evans* for the appellant.

Joseph Sedgwick, K.C. for the respondent Attorney-General for Ontario.

W. P. McClemont for the respondent Mrs. Kerr.

DUFF C.J.—I concur with the view of the Appellate Division that s. 17 (1) of the *Marriage Act* is *intra vires* of the Provincial Legislature. I have no doubt that, in exercise of its jurisdiction in relation to the subject reserved to the provinces by s. 92 (12), "Solemnization of Marriage," the legislature of a province may lawfully prescribe the consent of the parents or guardian to the marriage of a minor as an essential element in the ceremony of marriage itself. Nor have I any doubt that by s. 17 (1) the consents required are prescribed as elements in the ceremony. These requirements apply to all marriages celebrated in Ontario, and to no marriages but those celebrated in Ontario, whether the parties to the marriage be domiciled in Ontario or elsewhere. The legislature is, I think, dealing with the solemnities of marriage and not with the capacity of the parties.

(1) [1932] O.R. 601; [1932] 4 D.L.R. 288.

(2) [1932] O.R., 289; [1932] 2 D.L.R. 349.

It is not suggested that, according to the practice prevailing in the different provinces of Canada at the time of Confederation, the giving of such consents pursuant to the requirements of the law, would not properly have been regarded as belonging to such solemnities. The province, therefore, has power to require such consents as a condition of the validity of the solemnization of marriages within the province. But, it should be observed that the jurisdiction of the province is not limited to that. The authority with regard to the subject "Solemnization of Marriage" is plenary. Lord Watson, in *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (1), said:

> In so far as regards those matters which, by s. 92, are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act.

The authority of the provinces, therefore, extends not only to prescribing such formalities as properly fall within the matters designated by "Solemnization of Marriage"; they have the power to enforce the rules laid down by penalty, by attaching the consequence of invalidity, and by attaching such consequences absolutely or conditionally. It is within the power of a province to say that a given requirement shall be absolute in marriages of one class of people, while it may be dispensed with in other marriages. This, of course, is always subject to the observation that a province cannot, under the form of dealing with the "solemnization of marriage," enact legislation which, in substance, relates to some part of the subject of "marriage" which is not reserved to the provinces as a subject of legislative jurisdiction.

I must not be understood as expressing the view that it would not be competent to the Dominion, in exercise of its authority in relation to the subject of "marriage," in matters which do not fall within the subject of "solemnization of marriage," to deprive minors domiciled in Canada of the capacity to marry without the consent of their parents. No such question arises here, and it is quite unnecessary to pass an opinion upon it. The authority of the Dominion to impose upon intending spouses an incapacity

(1) [1892] A.C. 437, at 442.

1933

KERR
v.
KERR

Duff C.J.

which is made conditional on the absence of certain nominated consents is not in question.

One principle it is essential to bear in mind, in construing the *British North America Act,* is that a matter which, for one purpose and from one point of view, may fall within a subject reserved to the Dominion, may, for another purpose and from another point of view, fall within a subject reserved to the provinces; and that, when such is the case, legislation regarding such matters, from the proper provincial point of view, and for the proper provincial purpose, will take effect in the absence of legislation in the same field by the Dominion.

Nor is it necessary to consider whether or not the requirements of s. 34, which, admittedly, control the courts of Ontario in exercising the jurisdiction thereby conferred, have the effect of qualifying any rule of substantive law in respect to the invalidity of marriages which may be established by s. 17 (1) and s. 34. The point might be of considerable practical importance, but it does not arise on this appeal. The province unquestionably has authority (whether in relation to the Administration of Justice (s. 92 (14)), or in relation to Solemnization of Marriage (s. 92 (12)), it is needless to determine) to prescribe rules governing the courts of the province in exercising the jurisdiction conferred upon these courts by s. 34. That power is vested in the province, first, because *prima facie* it affects matters falling within the subject "Solemnization of Marriage," or the subject "Administration of Justice"; and second, because the authority to prescribe rules governing the courts of Ontario, in exercising the jurisdiction conferred upon them by the legislature of Ontario, for giving effect by remedial process to rules of substantive law relating to "Solemnization of Marriage," a subject within the exclusive jurisdiction of the legislature, could not be brought under any jurisdiction appertaining to the Dominion Parliament under any of the enumerated heads of s. 91. For our present purpose, we may assume that some jurisdiction is vested in the Dominion in respect of remedial process touching matters within "Marriage," and not within either "Divorce" or "Solemnization of Marriage." But, as regards process designed to give effect to substantive rules of law competently

enacted by a province, in execution of the exclusive authority belonging to it in virtue of s. 92 (12), the Dominion would be powerless to intervene in any way with a view to sanctioning or controlling any jurisdiction or procedure established for that purpose by a province. If there is no such authority vested in the Dominion, it follows that it must be vested in the province. "Now, there can be no doubt," said Lord Loreburn in *Attorney-General for Ontario* v. *Attorney-General for Canada* (1),

> that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada.

This alone is fatal to the appeal.

Nor do I think the Dominion statute of 1930 (20 & 21 Geo. V., c. 14) affects any matter in controversy. Minors above the age of consent (14 in males, and 12 in females) were undoubtedly capable of contracting marriages under the law of England as it existed on the 15th of July, 1870. As I have already pointed out, the provisions of the legislation before us do not affect this matter of capacity—a matter which is not touched by them. They deal exclusively with matters which are properly treated as comprised within the solemnities of marriage. If the effect of the Dominion Act is to make available the procedure of the probate and divorce court in England for the purpose of obtaining a declaration of invalidity on the ground that, under the provisions of s. 17 (1) and s. 34, a marriage is void for want of observing the formalities therein prescribed (formalities comprised within the subject "Solemnization of Marriage"), then, as already indicated, to that extent, the Dominion statute is *ultra vires*. The Dominion, to repeat, has no power to prescribe such a procedure for such a purpose, either explicitly or referentially.

But I am by no means satisfied that such is the effect of the Act of 1930. The phrase "annulment of marriage" may not unreasonably be read as restricted to proceedings impeaching a marriage on grounds other than some defect in "solemnization" within the meaning of s. 92 which would vitiate *ab initio* the ceremony itself by force of the

(1) [1912] A.C. 571, at 581

1933
KERR
v.
KERR
Duff C.J.

law of the province alone. In view of the then existing state of Ontario law, the qualfication "in so far as it can be made to apply in the province of Ontario," may, perhaps, be paraphrased "in so far as it can properly be made to apply to that province by the Dominion legislation" and this consideration may afford, as Riddell J.A. thinks, a good ground for so construing the words "annulment of marriage."

The appeal must be dismissed with costs.

The judgment of Rinfret, Smith and Cannon JJ. was delivered by

SMITH J.—The facts and secs. 17 and 34 of the Ontario *Marriage Act,* R.S.O. 1927, ch. 181, are set out in the reasons of my brother Lamont.

The appellant, in his statement of claim, pleads the provisions of *The Divorce Act (Ontario), 1930,* being Statutes of Canada, 20-21 Geo. V., ch. 14, and amendments thereto, and the provisions of the Ontario *Marriage Act;* and claims, by virtue of these Acts, a decree declaring the ceremony of marriage celebrated between the parties null and void.

The Divorce Act referred to does not deal in any way with the solemnization of marriage, which is a matter entirely within provincial jurisdiction. It is applicable to divorce and to the annulment of marriages where there has been valid solemnization. A marriage validly solemnized may, under the English law, be void or voidable on grounds other than those giving a right to divorce. The facts established in this case would not, under the English law, constitute a ground for annulment of a validly solemnized marriage, for the reasons stated by the learned Chief Justice of Ontario.

The question of whether or not there was a validly solemnized marriage in this case depends entirely upon the provisions of the Ontario *Marriage Act.* If, under the terms of that Act, there was a valid solemnization of marriage, the appellant's action necessarily fails. That question turns upon the construction to be given to the provisions of sec. 17 when read in conjunction with subsec. 2 of sec. 34, which reads as follows:

(2) The Court shall not declare a marriage void where carnal intercourse has taken place between the parties before the ceremony.

If this subsection is to be construed as dealing with jurisdiction without any other signification, and sec. 17 is to be regarded as alone dealing with the question of validity and as making the marriage void under the circumstances of this case, then we have the peculiar situation of an enactment making a marriage void and at the same time forbidding the court so to declare in an action between the parties. It is difficult to understand what object would be served by such prohibition.

On the other hand, if sec. 17 and this subsec. 2 are to be read together, it may be that the proper construction is that subsec. 2 makes an exception to the provision of sec. 17 requiring consent and making consent a condition, in which event the marriage would be valid, notwithstanding the provisions of sec. 17. If such is the proper construction, there can be no doubt that such a provision is *intra vires* because the legislature clearly has jurisdiction to provide that the stipulated consent must be had under certain circumstances but shall not be necessary under certain other circumstances.

It is pointed out, however, that it is not necessary in this particular action to pass upon the question of the validity of the marriage, because the appellant cannot succeed unless the marriage was void, and the court, by the statute, is expressly prohibited, in this kind of an action, from making any such declaration.

There seems to be no doubt that the court has no inherent jurisdiction to entertain an action of this kind between the parties to the marriage ceremony, and that the jurisdiction rests entirely upon the provisions of the statute. That being so, subsec. 2 excludes jurisdiction under the circumstances of this case.

I am therefore refraining from expressing an opinion as to the proper construction to be placed upon the provisions of sec. 17 and subsec. 2 of sec. 34. I concur in the view that in any event the court had no jurisdiction to declare the marriage void, as prayed in the statement of claim, and that the appeal should be dismissed. There will be no order as to costs.

1933

KERR v. KERR

Lamont J.

LAMONT J.—This is an appeal from the judgment of the Court of Appeal for Ontario (1) reversing a judgment of Mr. Justice Logie (2) in favour of the appellant, in an action for a declaration that the form of marriage solemnized between the appellant and the respondent, Frances Margaret Kerr (née Smith), was null and void.

The facts of the case are not in dispute. The parties first met in April, 1930, and sexual intercourse took place between them on some four occasions. In September, 1930, Frances Margaret Smith found herself to be pregnant and she and some of her friends urged the appellant to marry her. He objected, claiming that he was not the cause of her condition. Yielding, however, to their importunities, the appellant, on December 2nd, 1930, went through a form of marriage with her at Hamilton, Ontario, where they both resided. To obtain the marriage licence Frances Margaret Smith made an affidavit that she was eighteen years of age, although she was then only seventeen. When the affidavit was made both the appellant and Miss Smith knew that the statement therein contained as to her age was false, and knew also that it was made for the purpose of procuring the marriage licence. The ceremony was performed without the knowledge of the parents or family of either of the parties. No consent to the marriage was obtained from the mother of Frances Margaret Smith as required by section 17 of the *Marriage Act* (R.S.O., 1927, ch. 181). The marriage was never consummated and the parties, since the ceremony, have not cohabited or lived together as man and wife.

On these facts the trial judge gave judgment for the appellant, declaring the marriage ceremony between the parties to be null and void upon the ground that the consent of the girl's mother to the marriage (her father being dead) had not been obtained, and that section 34 of the Act was *ultra vires* of the provincial legislature.

From that judgment an appeal was taken to the Court of Appeal by the respondent, Frances Margaret Kerr, and by the Attorney-General for Ontario, who had been added as a party to the action. The Court of Appeal reversed the judgment of the trial judge, holding that section 34 was

(1) [1932] O.R. 601; [1932] 4 D.L.R. 288.

(2) [1932] O.R. 289; [1932] 2 D.L.R. 349.

1933

KERR v. KERR

Lamont J.

within the competence of the provincial legislature. The appellant now appeals to this Court and asks that the judgment of the trial judge be restored.

The appeal turns upon the construction to be placed upon sections 17 and 34 of the *Marriage Act*. The relevant parts of these sections are:—

17. (1) Save in cases provided for by subsections 3 and 4 of this section and by section 18, where either of the parties to an intended marriage, not a widower or a widow, is under the age of eighteen years, the consent in writing of the father if living, or, if he is dead, or living apart from the mother and child, and is not maintaining or contributing to the support of such child, the consent in writing of the mother if living, or of a guardian if any has been duly appointed, shall be obtained from the father, mother or guardian before the licence is issued * * * and such consent shall be deemed to be a condition precedent to a valid marriage, unless the marriage has been consummated or the parties have after the ceremony cohabited and lived together as man and wife.

34. (1) Where a form of marriage is gone through between persons either of whom is under the age of eighteen years without the consent of the father, mother or guardian of such person, when such consent is required by the provisions of this Act, * * * such form of marriage shall be void and the Supreme Court shall have jurisdiction and power to entertain an action by the person who was at the time of the ceremony under the age of eighteen years, to declare and adjudge that a valid marriage was not effected or entered into, and shall so declare and adjudge if it is made to appear that the marriage has not been consummated and that such persons have not, after the ceremony, cohabited and lived together as man and wife, and that the action is brought before the person bringing it has attained the age of nineteen years.

(2) The Court shall not declare a marriage void where carnal intercourse has taken place between the parties before the ceremony.

The contention of the appellant is:—

1. That section 17 (1) is competent provincial legislation in so far as it requires the consent of the parents or guardians of a contracting party—not a widower or a widow—to an intended marriage before the issue of the licence if the party is under the age of eighteen years, and also in so far as it enacts that such consent shall be a condition precedent to a valid marriage.

2. That section 34 is *ultra vires* of the provincial legislature, as it is legislation on the subject of marriage and divorce which, by section 91 (26) of the *British North America Act, 1867,* is exclusively assigned to the Dominion Parliament.

3. That, as the consent required by section 17 (1) was not obtained, and as section 34 is *ultra vires,* the marriage

1933

KERR
v.
KERR

Lamont J.

should be held null and void by virtue of *The Divorce Act (Ontario), 1930,* enacted by the Dominion Parliament.

By the *British North America Act, 1867,* the power to make laws respecting marriage and its solemnization was distributed between the Dominion Parliament and the provincial legislatures. To the Dominion was assigned the exclusive legislative jurisdiction over the subject of Marriage and Divorce (section 91 (26)); while to the provinces was given the exclusive legislative jurisdiction over the solemnization of marriage in the provinces (section 92 (12)). The solemnization of marriage might readily have been included within the general description of "Marriage and Divorce," but it seemed wise to the framers of our constitutional Act to carve out of the field which marriage and divorce would otherwise have covered, a small but distinct and essential part designated "The Solemnization of Marriage in the Province" and give the provincial legislatures the exclusive right to make laws in respect thereof. Each legislative body is supreme within its own sphere and the question we have to determine is, does the impeached legislation (s. 34) fall within any one of the subjects exclusively assigned to the provincial legislatures?

Since the decision of the Privy Council in *In re Reference Concerning Marriage* (1), it has been settled law that the exclusive power of the provincial legislatures to make laws relating to the solemnization of marriage in the province operates by way of exception to the powers conferred upon the Dominion Parliament as regards marriage, by section 91 (26), and enables the provincial legislatures to enact conditions as to the solemnization which may affect the validity of the contract.

Solemnization of marriage within the meaning of section 92 includes not only the essential ceremony by which the marriage is effected, but also parental consent where such consent is required by law. In *Sottomayor* v. *DeBarros* (2) Cotton, L. J., says:—

> It only remains to consider the case of *Simonin* v. *Mallac* (3). The objection to the validity of the marriage in that case, which was solemnized in England, was the want of consent of parents required by the law of France, but not under the circumstances by that of this country. In

(1) [1912] A.C. 880. (2) (1877) 3 Prob. Div. 1, at 7.
(3) (1860) 2 Sw. & Tr. 67.

our opinion, this consent must be considered a part of the ceremony of marriage, and not a matter affecting the personal capacity of the parties to contract marriage.

The provincial legislature is, therefore, competent by apt legislation to make the preliminaries, leading up to the marriage ceremony, conditions precedent to the solemnization of the marriage. From this it follows, in my opinion, that the legislature is also competent to declare that in the event of these conditions precedent not being complied with no valid marriage has taken place.

Section 17, however, does not make consent a condition precedent to a valid marriage in every case where a contracting party is under the age of eighteen years. The legislation does not apply to cases coming within subsections 3 and 4 of this section, nor where the contracting party is a widow or widower, nor does it apply where the marriage has been consummated, or the parties have, after the ceremony, cohabited and lived together as man and wife.

Then are subsections 1 and 2 of section 34 competent provincial legislation?

It will be observed that subsection 1 deals, not with marriage, but with a "form of marriage," which indeed is all that the performing of the ceremony can be where no valid marriage takes place.

Section 34 (1) declares that if the consent, required by section 17, has not been obtained "such form of marriage shall be void."

The object of these two sections is, I think, clear. By them the legislature was endeavouring:

1. To provide that a failure to furnish the consent to an intended marriage, required by section 17 in case of a contracting party thereto under the age of eighteen years who has gone through a form of marriage, would in certain cases have the effect of preventing a valid marriage from taking place, and

2. To bestow on the Supreme Court of Ontario jurisdiction to entertain an action and to declare and adjudge that the going through of such a form of marriage, under the circumstances, would not constitute a valid marriage.

1933

KERR
v.
KERR

Lamont J.

This jurisdiction was bestowed on the court only in those cases in which the conditions prescribed by the statute had been complied with. That is to say where:

1. The action is brought by a contracting party who at the time of the ceremony was under the age of eighteen years, and who brought the action before he or she reached the age of nineteen years.

2. It is made to appear that the marriage had not been consummated and that such persons have not, after the ceremony, cohabited and lived together as man and wife.

The onus of establishing each of these requisites is on the person bringing the action and if the onus is not discharged the court has no jurisdiction to declare that a valid marriage has not taken place.

Apart, therefore, from enacting that the furnishing of the consent should be a condition precedent to a valid marriage and that when a form of marriage had been gone through without such consent being obtained such form should be null and void—which it is not disputed is within the competence of the legislature—the whole enactment in these two sections concerns the bestowal of jurisdiction on the Supreme Court of Ontario to try an action and make a declaration that there has been no valid marriage in certain cases and under certain conditions, and the withholding of such jurisdiction in others, particularly subsection 2 where the Act expressly states that the court should not declare a marriage void where carnal intercourse has taken place between the parties before the ceremony. Is it within the competence of the legislature to give jurisdiction to the court in some cases and withhold or deny it in others?

In the case of a marriage void by the law of the place where it was celebrated, on account of lack of essential formalities, a declaration that it is invalid has been described as " merely a judicial ascertainment of facts." It ascertains but does not change the status of the parties. If that is so, and I think it is, it is difficult to see why the legislature should not be competent to invest the courts with jurisdiction to ascertain a fact. The jurisdiction of the Supreme Court of Ontario is statutory. Without this enactment the court would have no jurisdiction to declare null and void the going through of a form of marriage.

In my opinion the bestowing upon the court jurisdiction to entertain an action to make a finding of fact thereon and to make a declaration in accordance with that fact, is clearly within the competence of the legislature under section 92 (14) which, subject to section 101 of the Act, assigns to the legislature the exclusive power to make laws respecting 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." This includes the power to define the jurisdiction of the courts as well as the jurisdiction of the judges who constitute the same. *(In re County Courts of British Columbia* (1)). It also includes the power to enlarge, alter or diminish such jurisdiction. *(Regina* v. *Levinger* (2)).

If we examine sections 91 and 92 it will be seen, speaking generally, that the power to legislate in respect of practice and procedure (adjective law) has been exclusively assigned to the provincial legislatures except so far as relates to divorce and criminal law, subject, of course, to s. 101 of the Act; that in matters relating to the subjects over which exclusive legislative jurisdiction has been, by section 91, assigned to the Dominion Parliament, whenever it was intended that Parliament should also legislate as to the practice and procedure to be adopted, an express statement to that effect is found in section 91. In this case I have no doubt that the provincial legislature had full power, under section 92 (14), to enact the impeached legislation.

It was also contended that the marriage should be annulled on the ground that the marriage licence was obtained by the false affidavit of the respondent, Frances Margaret Kerr, as to her age. A similar contention was made in *Plummer* v. *Plummer* (3). In that action, although the notice or declaration required by the Acts contained statements false to the knowledge of both parties, it was held that a marriage by licence was not to be invalidated by reason of a false statement in the notice. The same principle, in my opinion, applies here.

The appeal should therefore be dismissed.

(1) (1891) 21 Can. S.C.R., 446. (2) (1892) 22 Ont. R. 690.
(3) [1917] P. 163.

1933

KERR v. KERR

Crocket J.

CROCKET J.—I regret that I cannot agree with my brethren upon the question of the constitutionality of the provisoes of sec. 34 of the Ontario *Marriage Act* as it stood in that statute at the time of the commencement and trial of this action.

The impugned section deals with two distinct subjects. The first part concerns the requirement of the consent of a parent or guardian to the marriage of a person under the age of 18 years and unqualifiedly enacts that a form of marriage gone through by such a person without such consent shall be void. The remainder of the section deals entirely with the jurisdiction of the Supreme Court to pronounce a decree of annulment in the case of such a marriage. It purports to empower the court to entertain an action for annulment only by the person who was at the time of the marriage ceremony under the age of 18 years, and then to adjudge that a valid marriage was not effected or entered into only "if it is made to appear that the marriage has not been consummated and that such persons have not, after the ceremony, cohabited and lived together as man and wife, and that the action is brought before the person bringing it has attained the age of nineteen years." It then, by subsec. 2, expressly prohibits the court from declaring a marriage void where carnal intercourse has taken place between the parties before the ceremony.

The consent of a parent or guardian of the person under the age of 18 years, concerning, as it intrinsically does, the subject matter of the solemnization of marriage (See *Sottomayor* v. *De Barros* (1), unmistakably falls under sec. 92 (12) of the *British North America Act,* and is a subject respecting which the legislature by that section is given exclusive capacity to legislate, by way of exception to the exclusive legislative authority which sec. 91 (26) vests in the Parliament of Canada in relation to all other matters pertaining to the larger subject of Marriage and Divorce.

The report of the Judicial Committee of the Privy Council on the Canadian *Marriage Reference* of 1912 (2) distinctly laid down the principle that sec. 92 (12) enables the provincial legislature "to enact conditions *as to solemnization* which may affect the validity of the contract"

(1) (1877) 3 Prob. Div. 1. (2) [1912] A.C. 880.

1933

KERR v. KERR

Crocket J.

of marriage. I have no doubt that in accordance with the principle of this decision, this exclusive legislative authority in the provincial legislature comprises not only the power to declare void a marriage for want of the required consent of a parent or guardian in the case of a marriage solemnized between persons, one of whom is under the age of 18 years, but the power to confer upon the Supreme Court jurisdiction to pronounce a decree of nullity for want of such consent in such case, or for any other reason which in reality pertains to the subject matter of the solemnization of marriage.

I find it impossible, however, to assent to the view that the conditions prescribed by the provisoes in sec. 34 as conditions, not as to the validity or invalidity of the marriage ceremony, but as conditions to the right of the court to pronounce a decree of nullity in the case of such a marriage, are conditions which do pertain in any way to the subject matter of the solemnization of marriage. The manifest intent, and the real pith and substance of these provisoes, is to prevent the Supreme Court from declaring void any marriage ceremony for want of the required consent of a parent or guardian of a person under the age of 18 years, except at the instance of the party to the marriage ceremony who was under the prescribed age at the time of the performance of that ceremony; and, even where an action for annulment is brought by such party, to prohibit the court from granting such a decree if, after the ceremony, there has been consummation and cohabitation as husband and wife between the parties; or if the plaintiff has failed to bring his or her action for such annulment before attaining the age of 19 years; or, further, if the parties to the marriage have had carnal intercourse before the performance of the ceremony. The provisoes prescribe conditions which, whether they do or do not themselves strictly affect the validity of the marriage contract, make a judicial declaration or judgment of annulment impossible in such a case. They are an absolute bar to such a decree, and in reality dispense with the requirement of a parent's or guardian's consent to the solemnization of the marriage ceremony, which the statute has previously enacted as a condition of validity, making, as they do, the neglect or laches of the party under age to bring his or her action for

1933

KERR v. KERR

Crocket J.

annulment before attaining the age of 19 years, or carnal intercourse between the parties, either before or after the marriage ceremony, conclusive, so far as the court is concerned, of a valid marriage relationship quite irrespective of the required consent of parent or guardian or of the solemnization of the marriage ceremony at all. None of these conditions pertain to any of the requisite preliminaries or formalities of the marriage ceremony. They treat of matters which are wholly extraneous thereto, i.e., the conduct of the parties before and after the ceremony. Consummation and cohabitation as husband and wife are, no doubt, the natural consequences of a marriage ceremony, but obviously, whether consummation or subsequent cohabitation take place or not, could not conceivably affect the right of any person, possessing the requisite governmental authority for the purpose, to solemnize or perform the ceremony, or even the right or capacity of the parties themselves to have it solemnized; neither could the neglect or laches of either party to bring an action for annulment before attaining the age of 19 years. In my opinion, they go entirely beyond the subject matter of the solemnization of marriage and consequently invade the exclusive legislative authority of the Dominion Parliament in relation to all other matters pertaining to the larger subject of Marriage and Divorce.

That "Solemnization of Marriage in the Province" does not comprehend the whole subject of marriage, as used in sec. 91 (26), and connotes only a limited division of the larger field of the whole relationship of marriage, is self-evident. The report of the Judicial Committee on the *Marriage Reference* case of 1912 (1), already referred to, as well as the argument of counsel who combatted the legislative power of the Parliament of Canada to enact the proposed Marriage Bill, then under review, clearly demonstrates that there is a broad distinction between marriage and the solemnization of marriage, and that there are many conditions which may affect the validity of the contract of marriage which do not touch the subject of the solemnization of marriage. All that that case decided was that the jurisdiction of the Dominion Parliament does not, on the

(1) [1912] A.C. 880.

true construction of secs. 91 and 92, cover the whole field of validity, and that the provincial legislatures had the exclusive capacity to determine by whom the marriage ceremony might be performed and to make the officiation of the proper person a condition of the validity of the marriage—a condition which, unlike any of those now in question, manifestly and inherently concerns the solemnization of the ceremony of marriage. The plain implication of the decision is that all matters respecting Marriage and Divorce, which do not strictly concern the subject matter of the Solemnization of Marriage, lie exclusively within the legislative capacity of the Dominion Parliament, whether they be dealt with as grounds or conditions of annulment or as discretionary or absolute bars to the granting by any court of decrees of annulment.

It seems to me that if it is now to be held that the provincial legislatures can validly impose any such restrictions as are here in question upon the right of the Supreme or any other provincial court to grant decrees of annulment for want of the requisite consent of a parent or guardian to the solemnization of a marriage ceremony, they may quite as logically impose any other imaginable restrictions, not only as conditions to the granting of such decrees, but as conditions to the validity of a marriage, and thus exhaust and effectively control the whole field of validity. If they can prescribe the fact of no previous carnal intercourse having taken place between the parties to the solemnization of a marriage ceremony, either as a condition of the validity of the marriage or as a condition of the power of the court to grant a decree of annulment, why may they not likewise, for instance, prescribe the condition that the parties be not related by consanguinity or that there is no impotence upon the part of either as further conditions of validity or of the jurisdiction of the court to pronounce a decree of annulment in such a case?

In the Province of New Brunswick, the legislature, long before confederation, constituted a Court of Divorce and Matrimonial Causes which, by virtue of sec. 129 of the *British North America Act,* still exists, for the determination of all matters and questions touching and concerning marriage and contracts of marriage, and divorce, as well from the bond of matrimony as divorce and separation

1933
KERR
v.
KERR
Crocket J.

from bed and board, and alimony. The statute establishing this court prescribes as the only causes for divorce from the bond of matrimony and of dissolving and annulling marriage frigidity or impotence, adultery and consanguinity within the prohibited degrees. Whether consanguinity and impotence are regarded as grounds of divorce from the bond of matrimony or as grounds of annulment, I venture to think that neither is a matter which concerns Solemnization of Marriage within the contemplation of sec. 92 (12) of the *British North America Act,* and that, since that Act came into operation, only the Parliament of Canada could validly legislate with respect to them, either as grounds of divorce or as grounds of annulment. The provincial legislatures may enact conditions as to solemnization which may affect validity, but such conditions must not go beyond those matters which in reality pertain either to the act or ceremony of solemnization itself or to the preliminary steps leading thereto. They cannot, by annexing to a condition which does thus concern the solemnization of marriage, such as the consent of a parent or guardian of one under age, further conditions, which do not themselves pertain to solemnization, but have to do with the capacity of the parties and their conduct as well after as before the performance of the marriage ceremony, as conditions either of validity of the ceremony or of the rights of the parties to obtain judicial declarations of annulment, trench upon that field which the *British North America Act* has exclusively reserved for the Parliament of Canada, viz: Marriage and Divorce, except the Solemnization of Marriage. Such further conditions, as I have indicated, either concern or they do not concern the subject matter of the solemnization of marriage. If they are to be regarded as concerning that subject matter, the words "marriage and" in enumeration 26 of the classes of subjects with respect to which sec. 91 of the *British North America Act* provides that the Parliament of Canada may exclusively make laws, would, in my opinion, be rendered meaningless and of no effect, and the provincial legislatures enabled to occupy the entire field of validity of marriage, for, as I have already endeavoured to point out, there would be no condition which they could not enact as a prerequisite of the valid solemnization of a marriage, whether such condition con-

cerned the capacity of the parties or not. "Solemnization of marriage in the province," as enumerated in sec. 92 (12), would not operate "by way of exception" to the powers conferred on the Parliament of Canada by sec. 91 (26) to make laws in relation to "marriage and divorce," as held by the Judicial Committee on the Reference of 1912 (1), but by way of a complete abrogation of those powers, in so far as "marriage" is concerned.

For these reasons I think the enactment that a marriage ceremony solemnized between persons, one of whom is under the age of 18 years, without the consent of a parent or guardian of such person, shall be void, is valid as touching a matter which directly pertains to the solemnization of the marriage ceremony, and that it is severable from the rest of the section, which deals with another distinct subject, viz: the conditions upon which the Supreme Court may exercise its jurisdiction to pronounce decrees of annulment; and that the rest of that section is *ultra vires* of the provincial legislature. The use of the conjunction "and" and of the definite article "the" before the words "person who was at the time of the ceremony under the age of eighteen years" does not, I think, render the substantive enactment disseverable from the jurisdictional enactment, any more than if the two were contained in separate sections. There is certainly nothing in the jurisdictional clauses which limits or in any way alters the effect of the substantive enactment, while subsec. 2 absolutely prohibits the court from declaring "a marriage void" where carnal knowledge has taken place between the parties before the ceremony. The whole of the jurisdictional enactment could be deleted from the section without affecting the substantive enactment in any manner.

The question remains as to whether, apart from the provisions of sec. 34, the Supreme Court of Ontario possessed the jurisdiction to declare such a marriage void for want of the consent of a parent or guardian of the party who was at the time of the ceremony under the prescribed age. The section itself purports to give the court jurisdiction only under the conditions stated, which do not exist in the present case, notwithstanding that it has previously and

(1) [1912] A.C. 880.

1933

KERR v. KERR

Crocket J.

unqualifiedly enacted that every and any form of marriage gone through between persons, one of whom is under the age of 18 years, without the required consent, shall be void.

If I am right in the view that the unqualified nullification enactment for want of the consent of a parent or guardian of the party to the marriage who was under the age of 18 years is valid and severable from the rest of the section, and the rest of the section *ultra vires*, it follows that it is or was at the time of the commencement and trial of the action enacted as substantive law in the Province of Ontario that the solemnization of such a marriage ceremony without the required consent was absolutely void. But where, apart from the enactments of sec. 34, does the Supreme Court of Ontario derive its authority to pronounce a decree of annulment?

It is argued that *The Divorce Act (Ontario)*, enacted by the Dominion Parliament in 1930, conferred the necessary jurisdiction. This Act reads as follows:—

1. The law of England as to the dissolution of marriage and as to the annulment of marriage, as that law existed on the fifteenth day of July, 1870, in so far as it can be made to apply in the province of Ontario, and in so far as it has not been repealed, as to the province, by any Act of the Parliament of the United Kingdom or by any Act of the Parliament of Canada or by this Act, and as altered, varied, modified or affected, as to the province, by any such Act, shall be in force in the province of Ontario.

2. The Supreme Court of Ontario shall have jurisdiction for all purposes of this Act.

By the law of England a marriage was not on the date mentioned void for want of consent of a parent or guardian of a person under the age of 18 years nor has it since been so enacted. In any event the law of Ontario, in so far as it was validly enacted in relation to the solemnization of marriage, would not be affected thereby. In relation to any conditions affecting the validity of marriage or the annulment of marriage other than conditions as to solemnization the law of England, in my opinion, would apply, by virtue of the Dominion Act. The conferring of jurisdiction upon the Supreme Court of Ontario by sec. 2 of the Dominion Act " for all purposes of this Act " does not therefore, I think, cover any jurisdiction to grant a decree of annul-

ment for any cause which the provincial legislature has validly declared as a cause of annulment in exercise of its exclusive legislative authority upon the subject matter of the solemnization of marriage.

It is contended also that the Supreme Court, apart from the provisions of sec. 34 of the provincial *Marriage Act,* possessed inherent jurisdiction as His Majesty's Supreme Court of Judicature for the Province, without any express authorization, to apply and give judicial effect to any substantive law competently enacted by the provincial legislature, such as the enactment now in question, unqualifiedly declaring void any marriage ceremony gone through by a person under the age of 18 years without the consent of a parent or guardian of such person. I confess that I have felt considerable doubt upon this question in view of the judgment of the Judicial Committee of the Privy Council in *Board* v. *Board* (1), an Alberta case involving the jurisdiction of the Supreme Court of that Province, in which the substantive law enacted by the English *Matrimonial Causes Act,* 1857, had been introduced, to give effect to that law in the absence of any specific statutory authority to try matrimonial causes. After anxious consideration of the reasons for that decision, as stated by Viscount Haldane, and of the reasons for judgment of the Court of Appeal of Ontario in *Vamvakidis* v. *Kirkoff* (2), in which the history of the several courts, established in Upper Canada and in the Province of Ontario, which were finally "consolidated" as the Supreme Court of Ontario in 1881, and their jurisdiction, were exhaustively considered in the light of the reasons for the decision in *Board* v. *Board* (3), I have reached the conclusion, though not without some difficulty, that it cannot be presumed in the case of the Supreme Court of Ontario, that it possessed inherent authority to entertain a suit for the declaration of nullity of marriage, and that no statutory authority existed whereby the learned trial judge could validly adjudge, as he did, that a valid marriage was not effected between the parties in this case.

(1) [1919] A.C. 956. (2) (1929) 64 Ont. L.R., 585.
(3) [1919] A.C. 956.

1933

KERR
v.
KERR

Crocket J.

For this reason, though of opinion that the provisoes of sec. 34 of the Ontario *Marriage Act*, as they stood in 1930, were *ultra vires* of the Provincial Legislature, I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant: *Walsh & Evans.*

Solicitors for the respondent Mrs. Kerr: *McClemont & McClemont.*

Solicitor for the respondent The Attorney-General for Ontario: *E. Bayly.*

PRESENT:—Duff C.J. and Rinfret, Lamont, Smith and Hughes JJ.