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*May 2.
*June 6.

THE ATTORNEY GENERAL FOR ALBERTA (INTERVENER) AND GERTRUDE MARY NEILSON, THE YOUNGER, AN INFANT, (OTHERWISE UNDERWOOD), BY HER NEXT FRIEND GERTRUDE MARY NEILSON (PLAINTIFFS) ..... APPELLANTS;

AND

WILLIAM KENNETH UNDERWOOD (DEFENDANT) ..... RESPONDENT;

AND

THE ATTORNEY GENERAL OF CANADA (INTERVENER).

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Constitutional law—Solemnization of Marriage Act, Alta., 1925, c. 39, s. 20, as amended in 1931, c. 16—Requirement of parental consent in certain cases as condition precedent to valid marriage—Constitutional validity—"Solemnization of Marriage in the Province" (B.N.A. Act, s. 92 (12)).

Sec. 20 of *The Solemnization of Marriage Act,* Alberta, 1925, c. 39, (requiring parental consent to marriage under a certain age), as amended in 1931, c. 16, (making the consent a condition precedent to a valid marriage except in certain circumstances) is *intra vires.* (*Kerr* v. *Kerr,* [1934] Can. S.C.R. 72).

"Solemnization of Marriage" is not confined to the ceremony itself. It legitimately includes the various steps or preliminaries leading to it. The said statute, in its essence, deals with those steps or preliminaries in the province. The requirement, in the statute, of parental consent is one similar in quality to the other requirements therein concerning the banns or the marriage licences. It is one of the forms to be complied with for the marriage ceremony, and it does not relate to capacity. It is a requirement which a provincial legislature may competently prescribe in the exercise of its jurisdiction in relation to "the solemnization of marriage in the province" (*B.N.A. Act,* s. 92 (12)) and to which it may "attach the consequence of invalidity absolutely or conditionally" (*Kerr* v. *Kerr, supra,* at 75; *Marriage Reference,* [1912] A.C. 880).

It was pointed out that the judgment does not express any view as to the competency of the Dominion, in the exercise of its proper authority, to legislate in relation to the capacity to marry of persons domiciled in Canada, that question not arising in this case. Dominion legislation, as it stands, does not affect the present case.

Judgment of the Appellate Division, Alta., [1933] 2 W.W.R. 609; [1933] 4 D.L.R. 154, reversed.

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

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APPEAL by the Attorney General for Alberta and by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Alberta (1) which, by a majority, affirmed, in the result, the judgment of Simmons, C.J.T.D., dismissing the plaintiff's action. The action was for a declaration adjudging that a valid marriage was not effected or entered into between the plaintiff and the defendant and annulling the marriage. The ground of decision of the Appellate Division was that subs. 3 of s. 20 of *The Solemnization of Marriage Act*, being c. 39 of the statutes of Alberta, 1925, which subs. 3 (making the consent required by s. 20 a condition precedent to a valid marriage except in certain circumstances) was enacted by *The Solemnization of Marriage Act Amendment Act, 1931*, (c. 16 of the statutes of Alberta, 1931), was *ultra vires* the legislature of the Province of Alberta.

Special leave to appeal to the Supreme Court of Canada was granted by the Appellate Division of the Supreme Court of Alberta.

The material facts of the case and the questions in issue are sufficiently stated in the judgment now reported.

D. K. MacTavish for the appellants.

F. P. Varcoe K.C. for the Attorney General of Canada.

(No one appeared for the respondent.)

The judgment of the court was delivered by

RINFRET J.—The appellant, Gertrude Mary Neilson, by her next friend, her mother, brought this action for a declaration that the ceremony of marriage solemnized between her and the respondent, William Kenneth Underwood, on the 26th day of August, 1932, at the town of Okotoks, in the province of Alberta, was not valid, and to have the said marriage annulled under section 20 of *The Solemnization of Marriage Act* (c. 39 of statutes of Alberta, 1925), as amended by *The Solemnization of Marriage Act Amendment Act, 1931* (c. 16 of statutes of Alberta, 1931).

Section 20 of *The Solemnization of Marriage Act*, prior to the 1931 amendment, read thus:

20. (1) If either of the parties to an intended marriage, not being a widower or widow, is under the age of twenty-one years, then, before

(1) [1933] 2 W.W.R. 609; [1933] 4 D.L.R. 154.

a licence is issued in respect of such marriage, or, before the publication of the banns, or in other cases before any such marriage is contracted or solemnized, one of the parties to the intended marriage shall deposit with the issuer of marriage licences, or with the clergyman a consent thereto in form C of the schedule hereto, of the persons hereinafter mentioned.

(2) The persons whose consent is required are as follows, that is to say:

(a) the father and mother, or such of them as may be living, of the minor if such minor is under eighteen years of age, and the father, if living, or the mother, if living, if such minor is between the ages of eighteen and twenty-one years;

(b) If both the father and mother are dead, then a lawfully appointed guardian or the acknowledged guardian who may have brought up or may, for three years immediately preceding the intended marriage, have supported the minor.

By the Amendment Act of 1931, section 20 was amended by adding at the end thereof the following subsection:

(3) The consent required by this section 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.

The undisputed facts are the following:

On the 26th day of August, 1932, when Miss Neilson went through a form of marriage with the respondent Underwood, she was slightly over nineteen years and nine months of age, while Underwood was within a few days of his twenty-first birthday.

The father of Miss Neilson was dead. Her mother was living, and she did not give her consent to the marriage. In fact, she did not know that the ceremony was being performed.

The father and mother of Underwood were living. They were also kept in ignorance of the marriage ceremony; and accordingly neither of them gave their consent.

The parties to the marriage did not come within any of the exceptions wherein, under the Act, the consent of the parents need not be required.

The marriage has not been consummated and the parties have not, after the ceremony, cohabited and lived together as man and wife.

It may be added, in order to exclude any possible objection under the statute, that no carnal intercourse had taken place between the parties before the ceremony (subs. 2 of s. 30a, as enacted by c. 16 of the Amendment Act of 1931).

It is admitted that the marriage licence was obtained by false affidavits with regard to the age of the parties.

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The learned trial judge (Simmons, C.J.) dismissed the action because he was of opinion that the granting of a decree of nullity was a matter of discretion. He followed a number of Alberta cases, where it was unanimously held that the legislation, as it stood previous to the Amendment Act of 1931, was directory only, and that the absence of the parental consent did not nullify the marriage. In his view, the "discretion was not removed from the court" by the amending legislation; and, under the circumstances of this case, he thought he "would still have to exercise his discretion against the plaintiff." He would "leave it fairly open for the Court of Appeal" to deal with the matter.

The Appellate Division of the Supreme Court of Alberta was unanimously of opinion that in the enactment of the Amendment Act of 1931, "the legislature had in mind changing the law as laid down in the former decisions"; there was "no room for doubt that subs. 3 of s. 20 is mandatory in character and that, if the subsection is within the legislative competency of the Alberta legislature, this marriage must, on the facts of this case, be held to be invalid." However, the court, by a majority (Clarke and Lunney, JJ.A., dissenting), came to the conclusion that the amendment of 1931 (subs. 3 of s. 20) was in pith and substance directed, not to the solemnization of marriage, but to the capacity of minors to marry and, as such, "an encroachment upon the general power of the Dominion to exclusively make laws upon the subject of marriage, excepting only solemnization of marriage." As a result, and for that reason only, the court affirmed the judgment in the court below and dismissed the appeal.

But McGillivray, J.A., who delivered the judgment of the majority, added this to his reasons:

> In a case of such importance involving a question upon which there has been such a striking difference of judicial opinion in Canada, it may not be amiss to say that it is hoped that the Attorney General for Alberta may see fit to carry the case to a higher court.

As a consequence, special leave to appeal to the Supreme Court of Canada was granted by the Appellate Division. The Attorney General for Canada, who was not represented before the courts in Alberta, was permitted to intervene here. He supported the views of the Attorney

General for Alberta and he submitted that the provincial legislation was valid.

The real question now remaining to be considered, and the only question, is the following:

> Is the requirement as to consent, in the relevant statute, a matter having to do with the solemnization of marriage in the province (in which case it comes within the authority of the provincial legislature), or is it an encroachment upon the general legislative power of the Dominion relating to marriage, out of which the subject of solemnization of marriage "has been carved" in the distribution of legislative powers provided by the *British North America Act?*

In this court, the question of the validity of the Alberta legislation is concluded by our decision in the case of *Kerr* v. *Kerr & the Attorney General for the Province of Ontario* (1), not yet delivered at the time when judgment in the present case was pronounced by the Appellate Division. The two statutes under consideration in the respective cases are substantially similar; and it is quite clear that the same reasoning and the same ruling must apply to both. Indeed, the material enactments in *The Solemnization of Marriage Act Amendment Act, 1931,* of Alberta, appear to have been taken from the *Marriage Act* of Ontario.

The whole question depends upon the distinction to be made between the formalities of the ceremony of marriage and the status or capacity required to contract marriage. Solemnization of marriage is not confined to the ceremony itself. It legitimately includes the various steps or preliminaries leading to it. The statute of Alberta, in its essence, deals with those steps or preliminaries in that province. It is only territorial. It applies only to marriages solemnized in Alberta and it prescribes the formalities by which the ceremony of marriage shall be celebrated in that province (*Brook* v. *Brook* (1)). It does not pretend to deprive minors domiciled in Alberta of the capacity to marry outside the province without the consent of their parents. Moreover, it requires that consent only under certain conditions and it is not directed to the question of personal status.

(1) [1934] Can. S.C.R. 72.

(1) (1861) 9 H.L.C. 193.

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Under the provisions of that statute, no clergyman shall solemnize marriage, unless the parties to the intended marriage produce to him the marriage licence prescribed for by the Act, or a certificate of the due publication of banns (sec. 4). The manner in which banns of marriage shall be published and the conditions under which marriage licences are to be issued are dealt with in separate sections of the Act. And among the preliminaries required before the publication of the banns, or before the issue of the licence, or at all events before any marriage is contracted or solemnized, it is enacted by sec. 20 that if either of the parties to the intended marriage is under the age of twenty-one years, a certain consent in a certain prescribed form shall be deposited with the issuer of the marriage licence, or with the clergyman who is to solemnize the marriage. That consent is required, according to circumstances, from the father and mother, or from one of them, or from a lawfully appointed guardian, or from the acknowledged guardian. And it is expressly enacted that the consent so required "shall be deemed to be a condition precedent to a valid marriage," except in certain events not material in the premises. Under the circumstances, the parental consent is a requirement similar in quality to the other requirements concerning the banns or the marriage licences. It is one of the forms to be complied with for the marriage ceremony, and it does not relate to capacity.

It is a requirement which a provincial legislature may competently prescribe in the exercise of its jurisdiction in relation to the solemnization of marriage in the province and to which it may "attach the consequence of invalidity absolutely or conditionally" (*Kerr* v. *Kerr* (1); *Marriage Reference* (2)).

In this case, parental consent was required "as a condition of the validity of the solemnization of the marriage within the province." Such enactment being legislation within the province's authority and the required consent not having been obtained, it follows that the ceremony itself was void *ab initio* and that no valid marriage has taken place. The appellant was therefore entitled to the declaration prayed for and her action ought to have been maintained.

(1) [1934] Can. S.C.R. 72, at 75. (2) [1912] A.C. 880.

Unlike the case of *Kerr* v. *Kerr* (1), the jurisdiction of the Alberta courts to grant a declaration of nullity is not questioned. It is common ground that the jurisdictional limitations of the courts of Ontario, discussed in the *Kerr* case (1), present no problem in this appeal.

It must further be understood that our judgment does not express any view as to the competency of the Dominion, in the exercise of its proper authority, to legislate in relation to the capacity to marry of persons domiciled in Canada. In the absence of legislation by the Dominion, that question does not arise here and is fully reserved. All that we decide in regard to it is that the Dominion legislation, as it stands, does not affect the present case.

The appeal will be allowed and the judgments of the courts below will be set aside. There will be a declaration that subsection 3 of section 20 of *The Solemnization of Marriage Act,* being c. 39 of the statutes of Alberta, 1925, enacted by *The Solemnization of Marriage Act Amendment Act, 1931,* (c. 16 of the statutes of Alberta, 1931), is *intra vires* of the legislature of the province of Alberta. The action of Gertrude Mary Neilson will accordingly be maintained; and it will be declared that her pretended marriage with the respondent William Kenneth Underwood was null and void and is therefore annulled. There will be no costs to either party or to the interveners.

Appeal allowed.

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

Solicitors for the appellant plaintiff: *Fenerty & McLaurin.*

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

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(1) [1934] Can. S.C.R. 72.