

THE SCOPE OF THE FEDERAL LEGISLATIVE AUTHORITY IN RELATION TO MARRIAGE*

*Leslie Katz***

I. INTRODUCTION

Parliament has not significantly exploited its marriage power,¹ but its recent exercise² of its divorce power³ in a substantial way leads one to speculate about the possibility that the marriage power may shortly receive similar attention.

Whatever might have been the scope of the marriage power when construed in the abstract, it was certainly narrowed by the inclusion within the provincial catalogue of powers of legislative authority in relation to both solemnization of marriage⁴ and property and civil rights.⁵

Only one of the very few pieces of federal legislation attempted to be supported under the marriage power has come before the courts, while a number of the much more numerous pieces of provincial legislation concerning marriage and attempted to be supported under either of the heads of provincial legislative authority referred to above have done so. The cases involving these statutes will be discussed in an attempt to delineate the scope of the federal marriage power. This will be done in two parts, the first dealing with the ability to legislate with respect to the requirements for entering into the marital relationship and the second dealing with the ability to legislate with respect to the consequences of the relationship.

II. ENTERING INTO THE MARITAL RELATIONSHIP

The question of the division of legislative authority in relation to marriage first came before the courts in 1912, when the Governor-in-Council referred to the Supreme Court of Canada, for a determination of its validity,

* Mr. Katz is pleased to be able to thank publicly Messrs. J. Payne and F. Jordan, both of Ottawa, for acting as critics during the preparation of the paper of which this comment forms part.

** Lecturer, Faculty of Law, University of Sydney.

¹ B.N.A. Act, § 91(26).

² Divorce Act, CAN. REV. STAT. c. D-8 (1970), first enacted in 1968.

³ *Supra* note 1.

⁴ B.N.A. Act, § 92(12).

⁵ B.N.A. Act, § 92(13).

an amendment to the federal Marriage Act⁶ which declared valid anywhere in Canada a marriage validly performed by the laws of the jurisdiction in which the marriage occurred. Four of the five justices held that the federal enactment was ultra vires. The decision was then affirmed by the Privy Council.⁷

The enduring importance of the decision rests in the following views of the Board, expressed by Viscount Haldane:

In the course of the argument it became apparent that the real controversy between the parties was as to whether all questions relating to the validity of the contract of marriage, including the conditions of that validity, were within the exclusive jurisdiction conferred on the Dominion Parliament by s. 91. If this is so, then the provincial power extends only to the directory regulation of the formalities by which the contract is to be authenticated, and does not extend to any question of validity. This was the view contended for by one set of the learned counsel who argued the case at their Lordships' Bar. The other learned counsel contended that the power conferred by s. 92 to deal with the solemnization of marriage within a province had cut down the effect of the words in s. 91, and effected a distribution of powers under which the Legislature of the province 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

Notwithstanding the able argument addressed to them, their Lordships have arrived at the conclusion that the jurisdiction of the Dominion Parliament does not, on the true construction of ss. 91 and 92, cover the whole field of validity. They consider that the provision in s. 92 conferring on the provincial Legislature the exclusive power to make laws relating to the solemnization of marriage in the province operates by way of exception to the powers conferred as regards marriage by s. 91, and enables the provincial Legislature to enact conditions as to solemnization which may effect the validity of the contract.⁸

It will be seen from this quotation that, aside from its establishment of the proposition that the provincial legislative authority in relation to solemnization allowed the enactment of certain conditions which, if not complied with, could affect a marriage's validity, the case also gave some indication as to the possible nature of such conditions. Reference was made both to provincial "regulation of the formalities by which the contract is to be authenticated" and to the provincial position that it alone could "determine by whom the marriage ceremony might be performed" The reference to "the formalities by which the contract is to be authenticated" is especially important, because it introduced into Canadian constitutional law not only a term borrowed from the field of conflict of laws but also that field's concepts.

The act of marrying has traditionally been bisected for the purpose of

⁶ The Marriage Act, CAN. REV. STAT. c. 105 (1906).

⁷ Reference re Marriage Legislation in Canada, [1912] App. Cas. 880 (P.C.), *affg* 46 Sup. Ct. 132 (1912).

⁸ *Id.* at 886-87.

conflict of laws into the capacity of the parties to contract the marriage and the formalities surrounding entering into the contract. The formalities include certain procedures leading up to the performance of the ceremony, such as securing a license or publishing banns, as well as the rites of solemnization themselves. Capacity, on the other hand, includes such matters as age, mental and physical condition and degrees of kinship of the prospective spouses.

After the Privy Council decision in the *Marriage Act Reference*,⁹ the provincial legislative authority in relation to solemnization was considered by the courts to be co-extensive with a legislative authority in respect of formalities as defined in conflict of laws, while the federal marriage power in so far as it concerns entering into the marriage contract was considered co-extensive with a power to legislate regarding capacity as that term is defined in conflict of laws.

With this capacity-formalities dichotomy in mind, it is intended to canvas the cases which have enumerated matters which fall to the provincial legislatures under the "solemnization" power and to Parliament under the "marriage" power, remembering that because of the *Marriage Act Reference*, the provinces are competent to invalidate marriages which do not comply with their solemnization requirements.

A. Parental Consent

The year 1934 brought before the Supreme Court of Canada two cases in which the validity of provincial laws dealing with the requirement of parental consent in the case of minors seeking to marry was challenged. In the first case, *Kerr v. Kerr*,¹⁰ the impugned sections of the Ontario Marriage Act¹¹ provided that a person under 18 years intending marriage must obtain the written consent of his father, mother or guardian. Such consent was "deemed to be a condition precedent to a valid marriage" (save in certain circumstances), and a form of marriage entered into without the requisite consent was declared to be void. It should be noted that the legislation dealt with in this case was significantly different than that argued by the provinces in the *Marriage Act Reference* to be within their exclusive legislative authority. In that case, it will be recalled from Viscount Haldane's comments quoted above, the provinces had argued that they "had the exclusive capacity to determine by whom the marriage ceremony might be performed" Now they were arguing for legislative authority in respect of a matter unconnected with the performance of the ceremony. The learned justices did not, however, choose to explore this difference and unanimously upheld the provincial legislation. Mr. Justice Lamont, for instance, stated:

Solemnization of marriage within the meaning of section 92 includes not only the essential ceremony by which the marriage is effected, but also

⁹ *Supra* note 7.

¹⁰ [1934] Sup. Ct. 72, [1934] 2 D.L.R. 369 (1933).

¹¹ The Marriage Act, ONT. REV. STAT. c. 181 (1927).

parental consent where such consent is required by law. In *Sottomayor v. De Barros Cotton*, L.J., says:—

It only remains to consider the case of *Simonin v. Mallac*. 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 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.¹²

Having accepted the notion that solemnization was synonymous with formalities, the court, when confronted with authority that placed parental consent requirements within formalities, naturally concluded that parental consent fell within solemnization and was thus a provincial matter.

It must be added that the learned justices also raised, but did not answer, the question of whether Parliament's authority in relation to marriage included the prospect of a power to deal with consent as a matter of capacity. For instance, Chief Justice Duff stated:

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 which is made conditional on the absence of certain nominated consents is not in question.¹³

He then concluded by citing the aspect doctrine and noting that the provincial law was effective "in the absence of legislation in the same field by the Dominion."¹⁴

Having reached the conclusion it did in the *Kerr* case, the court could easily conclude in *Attorney-General of Alberta v. Underwood*¹⁵ that similar provisions governing consent in the Alberta Solemnization of Marriage Act¹⁶ were *intra vires* as well. However, two points may be noted concerning this judgment. First, it was a reversal of the ruling of the Appellate Division of the Alberta Supreme Court which, by a majority, had held the legislation invalidating marriages performed without consent to be a matter not of solemnization but of capacity of minors to marry and hence "an encroachment upon the general power of the Dominion to exclusively make laws upon the subject of marriage, excepting only solemnization of marriage."¹⁷

¹² *Supra* note 10, at 82-83. *Sottomayor v. De Barros*, 3 P.D. 1, at 7 (1877); *Simonin v. Mallac*, 2 Sw. & Tr. 67, 164 E.R. 917 (1860).

¹³ *Supra* note 10, at 75-76.

¹⁴ *Id.* at 76.

¹⁵ [1934] Sup. Ct. 635, [1934] 4 D.L.R. 167.

¹⁶ Solemnization of Marriage Act, Alta. Stat. 1925 c. 39, *as amended*, Alta. Stat. 1931 c. 16.

¹⁷ *Supra* note 15, at 638.

Secondly, the Attorney-General for Canada had supported the provincial arguments upholding the validity of the legislation.

Mr. Justice Rinfret, for the court, disposed of the appeal summarily without further exploration of the distribution of legislative authority in relation to marriage, but not without making it clear that the jurisdictional cleavage was governed by the classifications of "formalities" and "capacity":

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 Under the circumstances, the parental consent is a requirement similar in quality to the other requirements concerning the bans 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.¹⁸

The court again, as in the *Kerr* case, reserved its opinion on the power of Parliament to legislate regarding capacity to marry:

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.¹⁹

The express reservation in both the *Kerr* and the *Underwood* cases of the question whether Parliament could legislate regarding parental consent requirements when that question need not have been referred to at all should be read, it is submitted, as implying that the court considered the field one that was appropriate for concurrent legislative activity. If this was the court's opinion, it is submitted that, far from being generous to Parliament, it was unjustifiably generous to the provinces and that the field of parental consent requirements of the sort dealt with in the *Kerr* and *Underwood* cases should properly fall exclusively to Parliament.

This submission is pressed on two fronts. First, the power to make laws in relation to solemnization ought not to be equated with the power to legislate in respect of formalities generally, and parental consent, though it may be included in formalities, should not be included in solemnization. This argument can be supported by referring to the fact that at the time the B.N.A. Act was being enacted the distinction between "capacity" and "formalities" had already been drawn in conflict of laws. If the provincial legislative authority had been intended to be co-extensive with an authority in relation to formalities, that term could have been used.

Secondly, in conflict of laws, parental consent does not relate necessarily to formalities of marriage in any event, but may relate rather to capacity to marry if the legislation purports to invalidate marriages performed without

¹⁸ *Id.* at 639-40.

¹⁹ *Id.* at 641.

the required consents. In the *Kerr* case, Mr. Justice Lamont referred to Lord Justice Cotton's comments in the *Sottomayor*²⁰ case on the case of *Simonin v. Mallac*²¹ to support his conclusion that the parental consent requirement being dealt with fell within formalities and, hence, within solemnization. It had, however, previously been pointed out by J. R. Cartwright (later Chief Justice of Canada) in a pre-judicial comment²² that Lord Justice Cotton's observations on the *Simonin* case were obiter and that in the *Simonin* case the requirement dealt with was one of seeking parental consent, which, if it were withheld, left the parties free to marry nevertheless. Furthermore, in the *Simonin* case the court itself had intimated that had the parental consent provision being scrutinized imposed a prohibition against such marriages rather than merely required the formal requesting of consent, such a provision might have been treated differently.²³ A subsequent English case which purportedly relied on the *Simonin* case, but which ignored this suggested distinction has been, says Morris,²⁴ the most criticized in English conflict of laws. He quotes Falconbridge, who says of the requirement of parental consent:

[It] cannot be characterized in the abstract and for all cases either as a matter of formalities of celebration or as a matter of capacity to marry, but . . . in the law of one country it may by its terms and in the light of its context in that law be a matter of capacity, and in the law of another country it may by its terms and in the light of its context in that law be a matter of formalities.²⁵

Thus, it is submitted that to permit the provinces to legislate regarding consent requirements as they have done is to allow these legislatures to intervene in matters which go beyond their powers regarding solemnization, even if solemnization is equivalent to formalities.

If the courts were belatedly to accept this position, then the matter of mandatory parental consent requirements, except insofar as it is dealt with in pre-Confederation legislation, would await federal legislative action, there being no received English law on the point.²⁶

Finally, it is submitted that if parental consent requirements of the sort dealt with in the *Kerr* and *Underwood* cases do fall within provincial legislative authority, the field cannot be a concurrent one as is suggested by the cases, but must be exclusively provincial. The solemnization power was, after all, carved out of the larger marriage power, which means that any matter which can be dealt with under solemnization could, in the absence of that power, have been dealt with under the marriage power. The suggestion

²⁰ *Supra* note 12.

²¹ *Id.*

²² Annotation, [1925] 1 D.L.R. 5.

²³ *Supra* note 12, at 77.

²⁴ J. MORRIS, *THE CONFLICT OF LAWS* 91 (1971). The case he refers to is *Ogden v. Ogden*, [1908] P. 46 (C.A.).

²⁵ *Id.*

²⁶ English parental consent requirements are considered directory only. See *Morris*, *supra* note 24, at 90.

that there is at least one matter which could fall under both heads necessarily implies that all matters falling under solemnization can also be dealt with by Parliament under the marriage power, which in turn necessarily implies that the solemnization power has no impenetrable core. Since this conclusion is impossible, it must be the case that there are no matters which fall to the provinces under the solemnization power which could also be dealt with by Parliament under the marriage power. It is submitted that the judicial suggestion of concurrency arises from reading the relevant heads of power as though they said "capacity" and "formalities" rather than "marriage" and "solemnization of marriage".

B. Age

The minimum age for marriage has, unlike the question of whether parental consent is required, always been considered for conflict of law purposes to be a matter of capacity.²⁷ This being the case, the authority to legislate in respect of minimum age should, even on the authority of the parental consent cases, be considered to be exclusively federal. Nevertheless, in *Ross v. MacQueen*,²⁸ provincial legislation which forbade the issuing of licences, publishing of banns and solemnization of marriages in respect of all males and certain females under 16 years of age was held to be *intra vires*. (Females who were pregnant and had parental consent to marry were not subject to the prohibition.) The parental consent cases were relied upon to support the legislation in issue, but it is submitted that this was done without warrant and that only Parliament can alter the common law minimum age for marriage of 14 for males and 12 for females unless it has already been done for any province by pre-Confederation legislation. If the reasoning in the *Ross* case were sound, any conditions could be validly imposed on intending spouses by provincial legislation so long as they were expressed as conditions precedent to obtaining a marriage licence.

C. Qualifications of Persons Performing Ceremony

In the case of *Gilham v. Steele*,²⁹ the British Columbia Court of Appeal held *intra vires* a provision in provincial legislation which provided that a marriage solemnized by a clergyman who did not have the required qualifications to do so was a nullity. It will be recalled that this was the sort of provision the provinces, with the approval of the Privy Council, had argued they could validly enact in the *Marriage Act Reference*.³⁰

D. Consanguinity and Affinity

Two judicial decisions have recognized that legislation concerning pro-

²⁷ *Id.* at 41 & 104-05.

²⁸ [1948] 1 W.W.R. 258, [1948] 2 D.L.R. 536 (Alta. High Ct.).

²⁹ 8 W.W.R. (n.s.) 62, [1953] 2 D.L.R. 89 (B.C.).

³⁰ *Supra* note 7.

hibited degrees of consanguinity and affinity is exclusively within federal jurisdiction as a matter of capacity. In *Teagle v. Teagle*,³¹ Mr. Justice Whittaker held that the received law of British Columbia prohibited a man from marrying his divorced wife's sister and then continued:

I feel that I ought to express the view that the present obscure state of the law might well be considered by the Dominion Parliament, and the law clarified by legislation either permitting or prohibiting such marriages as this. Failure to deal with the matter federally has resulted in a regrettable lack of uniformity in the laws of some of the provinces. Ontario, Manitoba and Saskatchewan have adopted their own tables of prohibited degrees of consanguinity and affinity purporting to have the force of law. The jurisdiction of those provinces to legislate in matters affecting the validity of marriages may be open to question but presumably marriage licences are issued in consonance with the tables they have adopted.³²

In *Re Schepull*,³³ Mr. Justice Spence held that the received law of Ontario did not prohibit a similar marriage and that the province could not legislate on prohibited degrees of affinity.

Neither of these cases, however, actually dealt with the validity of provincial legislation which contained explicit reference to consanguinity and affinity. If such legislation invalidated marriages between people who were not prohibited from marrying by received English law or pre-Confederation or federal legislation, its constitutionality would be questionable. It might be seen as legislation relating to solemnization if, for instance, it made the obtaining of a licence conditional on the parties affirming that they were not within specified prohibited degrees. This is the sort of legislation Mr. Justice Whittaker was referring to in his remarks quoted above and which was upheld in the *Ross* case regarding age. It is submitted, however, that such legislation ought to be seen as a colourable attempt by the provinces to legislate in respect of capacity, since questions of consanguinity and affinity have never been considered to be part of the formalities of a marriage. In any event, it might be seen as inoperative if the Marriage Act³⁴ were held to have been intended as occupying the field of reform of the prohibited degrees of consanguinity and affinity. That statute has removed the former received prohibition against persons marrying their deceased spouse's siblings.

E. Ability to Remarry

In *Hellens v. Densmore*,³⁵ the Supreme Court of Canada held that the legislative authority to deal with the ability of divorced persons to remarry was exclusively federal as a matter of capacity to marry. Parliament has exercised this power in section 16 of the Divorce Act.³⁶

³¹ 6 W.W.R. (n.s.) 327, [1952] 3 D.L.R. 843 (B.C. Sup. Ct.).

³² *Id.* at 330-31.

³³ [1954] Ont. 67, [1954] 2 D.L.R. 5 (High Ct.).

³⁴ CAN. REV. STAT. c. M-5 (1970).

³⁵ [1957] Sup. Ct. 768 (4:3 decision), 10 D.L.R.2d 561; *see also Forsythe v. Forsythe*, 54 W.W.R. (n.s.) 577, 56 D.L.R.2d 322 (B.C. 1965).

³⁶ *Supra* note 2.

F. *Issuing of Licences and Publications of Banns*

In *Alspector v. Alspector*,³⁷ Mr. Justice Roach stated: "The issuance of a licence or special permit and the publication of banns as pre-ceremonial requirements, are formalities within the matters designated by 'Solemnization of Marriage'."³⁸ It is submitted that this proposition is beyond dispute, but must be tempered by the repetition of the statement that a province cannot condition the issuing of a licence on the parties meeting certain requirements which in truth relate to capacity rather than formality and which impose different standards than those in the received English law or pre-Confederation or federal legislation.

G. *Other Matters*

Two other matters remain to be mentioned, although neither has been the subject of reported cases. The first is the nature and recording of the marriage ceremony. It can safely be assumed that this falls within provincial legislative authority because it so clearly falls within the notion of the solemnization of a marriage. The second is the mental and physical condition of the parties. This, it is submitted, is a federal matter because it so clearly falls within the notion of the capacity of a person to contract marriage. Nevertheless, it has been dealt with by the provinces by the familiar device of prohibiting the issuing of licenses or the performing of ceremonies in respect of persons who do not meet the criteria established.³⁹ Such legislation is, it is submitted, *ultra vires* for the same reason that mandatory parental consent requirements have been argued to be *ultra vires*.

III. THE CONSEQUENCES OF THE MARITAL RELATIONSHIP

Could Parliament, although it has never attempted to do so, enact legislation dealing with the consequences of marriage, for instance, defining the parties' obligations *inter se* or rights *vis-à-vis* their children?

It is clear that, at one time, the federal government did not believe that Parliament had the power to do so. In 1929, the Minister of Justice of the day, Mr. Lapointe, in a renunciation of federal authority characteristic at that time, said in the House:

Power to legislate regarding marriage does not include power to legislate regarding the consequences flowing from marriage. It is for parliament to say who may properly marry, but it is for the provincial legislature to declare what shall be the property rights and the respective duties and liabilities and privileges as between married persons. . . .⁴⁰

He then continued:

³⁷ [1957] Ont. 454, 9 D.L.R.2d 679.

³⁸ *Id.* at 464.

³⁹ See The Marriage Act, SASK. REV. STAT. c. 338, § 56 (1965).

⁴⁰ 2 H.C. DEB. 2223 (1929).

Similarly, the power to legislate regarding divorce gives power to bring about a dissolution of marriage, but it does not include power to deal with property rights and obligations as between the divorced persons this being a matter of property and civil rights in the province.⁴¹

It is true that there were cases decided before,⁴² as well as after,⁴³ this statement which contained comments denying federal power to legislate regarding the consequences flowing from marriage. It must be pointed out, however, that these comments were merely obiter dicta, since what was being considered and upheld in every case was provincial legislation, there being no federal legislation in the area. In addition, these comments appeared in cases which went no higher than the provincial level, while we do have, also in obiter, Chief Justice Duff's statement in the Supreme Court of Canada in the *Adoption Act Reference*⁴⁴ that there could well be "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 of Marriage and Divorce."⁴⁵

If the marriage power could support legislation in respect of children, presumably it could also support legislation on other matters arising from the institution of marriage, such as the right to alimony as an independent remedy, a matter which was the subject of a number of the cases denying federal power which were referred to above.

Furthermore, the Minister apparently thought his second point, regarding the divorce power, to be justified by the same reasoning as his first point, regarding the marriage power. The cases supporting his view of the marriage power are all many years old and thus pre-date the numerous cases following the enactment of the Divorce Act⁴⁶ which repudiate his view of the divorce power.⁴⁷ His view of the divorce power having been repudiated, surely his view of the marriage power is in jeopardy as well. As Mr. Justice Menzies stated in the Australian *Marriage Act*⁴⁸ case:

It would be quite unrealistic to construe [the Australian federal marriage and divorce powers] together as according power to provide for the vows with which marriage shall begin and the grounds for divorce to bring it to an end but as having nothing to do with the obligations one to another of those who marry, the disregard of which obligations is the basis for divorce.⁴⁹

⁴¹ *Id.*

⁴² See *Lee v. Lee*, [1920] 3 W.W.R. 530 (Alta.); *Holmes v. Holmes*, [1923] 1 W.W.R. 86, [1923] 1 D.L.R. 294 (Sask. 1922).

⁴³ See *H. v. H.*, [1933] Ont. W.N. 490, [1933] 3 D.L.R. 792 (High Ct.).

⁴⁴ Reference as to Constitutionality of the Adoption Act, The Children's Protection Act, The Children of Unmarried Parents Act, The Deserted Wives' & Children's Maintenance Act, [1938] Sup. Ct. 398, [1938] 3 D.L.R. 497.

⁴⁵ *Id.* at 402.

⁴⁶ *Supra* note 2.

⁴⁷ The most important are *Jackson v. Jackson*, [1972] 6 W.W.R. 419, 29 D.L.R.3d 641; *Zacks v. Zacks*, [1973] Sup. Ct. 891, 10 R.F.L. 53.

⁴⁸ *Attorney-General of Victoria v. Australia*, 107 Commw. L.R. 529 (High Ct. 1962).

⁴⁹ *Id.* at 572.

More recently, another officer of the federal government expressed a view similar to that of Mr. Lapointe. Mr. Driedger, then Deputy Minister of Justice, describing in 1966 for the Special Committee on Divorce his "own personal opinions"⁵⁰ on the question of whether Parliament could deal in divorce legislation with the division of matrimonial property, made remarks also relevant to the scope of the marriage power. He stated:

[S]uch matters as marriage settlements, dower, homestead rights, the right of married women to own property and sue in their own names, etc., may well stand on a different footing [than the maintenance of divorcing spouses and the maintenance and custody of their children.] These matters do involve rights and obligations between husband and wife, but they seem to me to relate more to the property and civil rights of the parties to the marriage than to their legal status as married persons. They could vary from time to time and from jurisdiction to jurisdiction and a particular rule is not necessary or essential to constitute a marriage.⁵¹

His views were later repeated by his successor, Mr. Maxwell, to the Senate Standing Committee on Banking, Trade and Commerce to which the divorce bill was referred after second reading.⁵² In response to Mr. Driedger's remarks, it should be pointed out that the mere fact that any legislative rule of the type he referred to "is not necessary or essential to constitute a marriage" is not, contrary to what appears to be his view, relevant to a determination of the scope of Parliament's legislative authority. A list of the rules conventionally associated with marriage reveals the minimum content of that authority rather than its maximum scope.⁵³

Reference has already been made to the Australian *Marriage Act* case, and it would perhaps be apposite to refer to this decision further as an alternative approach to that taken by Mr. Driedger and others concerning the scope of the federal marriage power. In the *Marriage Act* case, the High Court of Australia was confronted with Commonwealth legislation dealing with, *inter alia*, legitimation of children by subsequent marriage of their parents. This legislation was upheld as a valid exercise of the Commonwealth marriage power in spite of its effects on various matters within the legislative competence of the states. In the course of their judgments, various judges in the majority expressed their opinion as to the scope of the marriage power. The views of the dissenting judges will not be canvassed because they did not rest on any constitutional issues, but rather on the interpretation of the sections in the statute being challenged.⁵⁴ For the majority, Mr. Justice Menzies has already been quoted.⁵⁵ Mr. Justice Owen stated:

⁵⁰ Divorce Committee Proceedings at 621 (1966).

⁵¹ *Id.* at 622-23.

⁵² Senate Proceedings of the Standing Committee on Banking and Commerce at 208 (1967-68).

⁵³ A similar criticism of a similar error in Australia can be found in Sackville & Howard, *The Constitutional Power of the Commonwealth to Regulate Family Relationships*, 4 F.L. Rev. 30, at 52 (1970-71).

⁵⁴ *Id.* at 41.

⁵⁵ *Supra* note 48.

There can, in my opinion, be no doubt that under the marriage power the Commonwealth Parliament may make laws regulating the mutual rights and obligations of those who marry and I can see no reason why the power should not be wide enough to enable the relationship between those who marry and their children to be defined and regulated whether those children be born before or after marriage.⁵⁶

Mr. Justice Taylor stated:

[I] regard the paragraph as justification for the enactment of any law with respect to marriage considered as an institution. That is to say, that it extends not only to laws prescribing the form and requisites of a valid marriage but also to laws defining and regulating the respective rights duties and obligations of the parties *inter se*. Indeed, the full measure of the legal effect of a marriage can be determined only by reference to the rights duties and obligations, which, by law, arise out of the relationship and I can see no reason why a constitutional power to make laws with respect to the subject matter of "Marriage" should not be thought to authorize laws defining or modifying and re-defining the legal incidents of the relationship.⁵⁷

It is submitted that this attitude could easily be assumed with respect to the federal marriage power in Canada. In fact, the attitude should be capable of adoption more easily in Canada because the Commonwealth Parliament in Australia is one of enumerated powers only, while our federal Parliament is not.

Some recent hint of a change in attitude in Canadian courts may be gleaned from the case of *Papp v. Papp*.⁵⁸ This decision was one of those which repudiated Mr. Lapointe's view regarding the ability of Parliament to deal with corollary relief as an aspect of divorce, but, in the course of his judgment, Mr. Justice Laskin (as he then was) also made some comments regarding the scope of the marriage power. A representative one was the following:

In the absence of competent and conflicting federal legislation, a provincial Legislature may deal with custody of children as it may deal with the relations of husband and wife excluding any question of divorce. The enactment by Parliament of divorce legislation alone would still leave . . . custody, and such incidents of the matrimonial relationship as alimony, to provincial law . . .⁵⁹

These quoted remarks and others in the judgment imply that custody and alimony, *inter alia*, can be dealt with under the marriage power, and this in spite of the earlier suggestions to the contrary. In fact, Mr. Justice Laskin specifically expressed his disagreement with one of these judicial suggestions to the contrary and his choice of words in the passage quoted above is telling, since he refers to a federal power respecting "relations of husband and wife", while in the earlier case, *Lee v. Lee*,⁶⁰ Chief Justice

⁵⁶ *Id.* at 602.

⁵⁷ *Id.* at 560-61.

⁵⁸ [1970] 1 Ont. 331, 8 D.L.R.3d 869.

⁵⁹ *Id.* at 335.

⁶⁰ *Supra* note 42.

Harvey had said that "it is not the subject of 'husband and wife' but of 'marriage and divorce' which is assigned to the Dominion Parliament."⁶¹

IV. CONCLUSIONS

It is submitted that the federal marriage power gives Parliament authority to legislate with respect to both the entering into of the marital relationship and the consequences of that relationship.

In connection with the first aspect of the power, a conflict arises with the provincial legislative authority in relation to solemnization of marriage. This latter authority was first treated as one in relation to the formalities of marriage. Although this in itself may have been unjustified, the courts then expanded the notion of formalities to include parental consent requirements, the consequence of non-compliance with which was invalidity of marriage. They next considered an age requirement as a solemnization requirement when it was phrased in terms which prohibited the solemnization of marriage of underage persons, even though age has never been considered part of formalities. This last leap, which can turn all capacity requirements into solemnization requirements so long as they are phrased in an appropriate way, threatens to make the whole area of requirements for entering into a valid marriage a concurrent one. If national standards are more appropriate, these could be achieved by federal legislation enacting universal requirements concerning age, parental consent, mental and physical condition and consanguinity and affinity of intending spouses. Such legislation could be enacted even on the authority of the current case law.

In connection with the second aspect of the federal marriage power, that dealing with legislation concerning the consequences of the relationship, a conflict arises with the provincial legislative authority in relation to property and civil rights. Because Parliament has never entered the field, its authority therein has never been directly tested. Earlier judicial asides denying the possibility of federal entry have been contradicted by later ones, while the attitude of the Supreme Court of Canada to the scope of our divorce power and of the High Court of Australia to the scope of their marriage power suggest the existence of federal authority. Whether any of this authority will be exercised remains to be seen.

⁶¹ *Id.* at 534.