Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal in the Matter of a Reference to the Supreme Court of Canada pursuant to Section 60 of the Supreme Court Act of certain questions concerning Marriage for hearing and consideration, from the Supreme Court of Canada; delivered the 29th July 1912.

PRESENT AT THE HEARING:

THE LORD CHANCELLOR.
EARL OF HALSBURY.
LORD MACNAGHTEN.
LORD ATKINSON.
LORD SHAW.
LORD CHIEF BARON PALLES.

[DELIVERED BY THE LORD CHANCELLOR.]

The questions to be decided arise on an Appeal, for which special leave was given, from the answers returned by the Supreme Court of Canada to certain questions submitted by the Government of Canada pursuant to Section 60 of the Supreme Court Act.

The questions so submitted were the following:—

1. (*a*) Has the Parliament of Canada authority to enact in whole or in part, Bill No. 3 of the First Session of the Twelfth Parliament of Canada, intituled "An Act to amend the "Marriage Act"?

The Bill provides as follows:—

"(1.) The Marriage Act, Chapter 105 of the "Revised Statutes, 1906, is amended by "adding thereto the following section:—

"(3.) Every ceremony or form of marriage "heretofore or hereafter performed by any

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" person authorised to perform any ceremony of marriage by the laws of the place where it is performed, and duly performed according to such laws, shall everywhere within Canada be deemed to be a valid marriage, notwithstanding any differences in the religious faith of the persons so married and without regard to the religion of the person performing the ceremony."

" (2.) The rights and duties, as married people of the respective persons married as aforesaid, and of the children of such marriage, shall be absolute and complete, and no law or canonical decree or custom of or in any Province of Canada shall have any force or effect to invalidate or qualify any such marriage or any of the rights of the said persons or their children in any manner whatsoever."

(*b*) If the provisions of the said Bill are not all within the authority of the Parliament of Canada to enact, which, if any, of the provisions are within such authority ?

2. Does the law of the Province of Quebec render null and void unless contracted before a Roman Catholic priest, a marriage that would otherwise be legally binding, which takes place in such Province,

(*a*) between persons who are both Roman Catholics, or

(*b*) between persons one of whom, only, is a Roman Catholic.

3. If either (*a*) or (*b*) of the last preceding question is answered in the affirmative, or if both of them are answered in the affirmative, has the Parliament of Canada authority to enact that all such marriages, whether,

(*a*) heretofore solemnized, or

(*b*) hereafter to be solemnized,

shall be legal and binding ?

The answers of the learned Judges of the Supreme Court were in substance to the following effect:—

(1.) As to the first question the Chief Justice, Mr. Justice Davies, Mr. Justice Duff, and Mr. Justice Anglin, were of opinion that the proposed legislation was *ultra vires* of the Parliament of Canada. Mr. Justice Idington differed.

(2.) As to the second question all the learned Judges concurred in holding that the law of Quebec does not render null and void unless contracted by a Roman Catholic priest a marriage which takes place in that Province between persons one of whom only is a Roman Catholic. As to the validity of such marriages between persons who are both Roman Catholics the Chief Justice asked permission to decline to answer. Sir Louis Davies, Idington and Duff, JJ., were of opinion that they were valid, and Anglin, J., held that they were null and void.

(3.) As to the third question, all the Judges except Mr. Justice Idington were of opinion that the Parliament has no power to enact such remedial legislation.

The decision of these questions turns on the construction to be placed on Sections 91 and 92 of the British North America Act, 1867. Section 91 enacts that the Parliament of the Dominion may make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by the Act assigned exclusively to the legislatures of the Provinces, and, for greater certainty, but not so as to restrict the generality of the foregoing terms of the section, declares that, notwithstanding anything in the Act, the exclusive legislative authority of the Parliament of the Dominion extends to all matters coming within

the classes of subjects enumerated. One of these is marriage and divorce. The section concludes with a declaration that any matter coming within any of the enumerated classes shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by the Act assigned exclusively to the legislatures of the Provinces.

Section 92 enacts that in each Province the legislature may exclusively make laws in relation to matters coming within the classes of subjects enumerated in this section. Among these is the solemnization of marriage in the Province. The enumeration also includes, *inter alia*, property, and civil rights, and generally matters of a merely local or private nature in the Province.

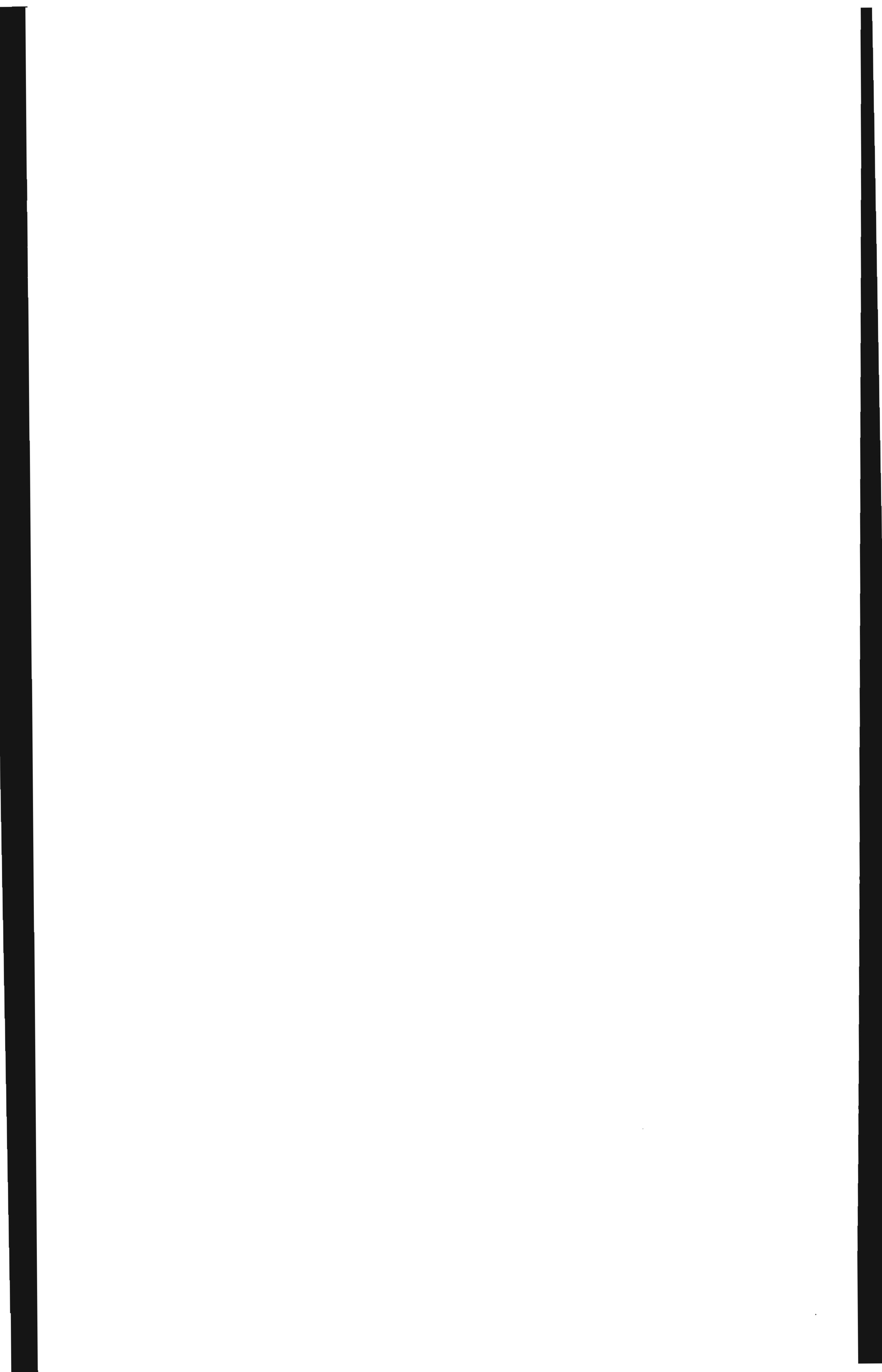
In the course of the argument it became apparent that the real controversy between the parties was as to whether all questions relating to the validity of the contract of marriage, including the conditions of that validity, were within the exclusive jurisdiction conferred on the Dominion Parliament by Section 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 Section 92 to deal with the solemnization of marriage within a Province had cut down the effect of the words in Section 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.

If the latter view is taken, it is clear how the questions must be answered. For it was agreed between Counsel that the Bill referred to in the first question was intended to enable a person with any authority to perform the ceremony to perform it validly whatever the religious faith of those married by him. On the footing indicated the Bill would therefore be *ultra vires* of the Dominion Parliament. The third question would also be disposed of, for the Parliament of Canada would, in the events indicated in the question, have no authority. The second question consequently becomes, not only unimportant, but superfluous.

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 Sections 91 and 92, cover the whole field of validity. They consider that the provision in Section 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 Section 91, and enables the Provincial Legislature to enact conditions as to solemnization which may affect the validity of the contract. There have doubtless been periods, as there have been and are countries, where the validity of the marriage depends on the bare contract of the parties without reference to any solemnity. But there are at least as many instances where the contrary doctrine has prevailed. The common law of England and the law of Quebec before confederation are conspicuous examples, which would naturally have been in the minds of those who inserted the words about solemnization into the statute. *Primâ facie* these words appear to their Lordships to import that the whole of what

solemnization ordinarily meant in the systems of law of the Provinces of Canada at the time of confederation is intended to come within them, including conditions which affect validity. There is no greater difficulty in putting on the language of the statute this construction than there is in putting on it the alternative construction contended for. Both readings of the provision in Section 92 are in the nature of limitations of the effect of the words in Section 91, and there is, in their Lordships' opinion, no reason why what they consider to be the natural construction of the words "solemnization of marriage," having regard to the law existing in Canada when the British North America Act was passed, should not prevail.

This conclusion disposes of the questions raised, and their Lordships will humbly advise His Majesty accordingly.



In the Privy Council.

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