NOTE

Thrice The Brinded Cat Hath Mewed

Stephen A. Scott *

...a rose

I. By any other name would smell as sweet...

Had the B.N.A. Act styled the provincial legislatures *'parliaments'*, the fact, no one need doubt, would have been seized gleefully by Lords Watson and Haldane; for the name itself, involving strictly speaking little if any juridical consequence, might entail political results like higher status in the public view and greater judicial psychological readiness — or excuse — to construe largely provincial powers. Polemicists of the last century [1] did make the difference in styles the basis of a controversy which, centring as it did largely on the extent of the privileges of the houses of provincial legislatures, not only assumed a rather dated appearance once the Privy Council accorded [2] the legislatures broad authority to prescribe the privileges of their respective houses, but also took on a look of sterility with the vindication of their status as fully legislative (and not municipal) bodies supreme in their sphere [3] operating directly in conjunction with the Crown [4] in an ever-widening field of exclusive authority which could only be evaded with confidence on the rare occasions

---

* Second year law student of the Junior Board of Editors.

[1] Fennings Taylor, *Are Legislatures Parliaments?* (Montreal, 1879). S. J. Watson, *The Powers of the Canadian Parliaments* (Toronto, 1880). Taylor was Deputy Clerk and Clerk Assistant to the Canadian Senate, and answered his own question in the negative; Watson was Librarian of the 'Parliament of Ontario' and answered it in the affirmative. Taylor appropriately enough dedicated his work to Sir John A. Macdonald (in a rather effusive inscription); Watson's was dedicated to Hon. Edward Blake — not, in truth, inappropriately, but a trifle incongruously : see note 10 *infra*.

[2] *Fielding* v. *Thomas* [1896] A.C. 600.

[3] *Hodge* v. *The Queen* (1883-4) 9 App. Cas. 117.

[4] *Liquidators of the Maritime Bank* v. *Receiver-General of N.B.* [1892] A.C. 437.

[5] *Toronto Electrical Commissioners* v. *Snider* [1925] A.C. 396 at p. 412.

when the nation, doubtless seeking refuge from its partly judicially-imposed ills, held its orgies of drunkenness [5] in the banks.[6]

In another context the dispute was not new found; secondary [7] sources indicate [8] an early [9] abortive attempt by the Newfoundland House of Assembly to become 'the Commons House of Assembly in Parliament assembled', and after Confederation successive Ministers of Justice objected in reports on provincial legislation to the use of the adjective 'parliamentary' in connection with provincial legislatures; [10] nor does the controversy show signs of withering away with age; renewed by the late Dr. Arthur Beauchesne and M. Louis-Philippe Pigeon, Q.C.,[11] it was most tantalisingly if obliquely raised by a

---

[6] *A.-G. for Alta.* v. *A.-G. for Can.* [1939] A.C. 117.

[7] The requisite primary sources were not available to the author.

[8] D. W. Prowse, *History of Newfoundland*, 2nd ed. (London, 1896) 434 : 'Carson and Kent, in the House of Assembly, kept up a continual quarrel with Boulton [Chief Justice and President of the Council] and Simms [Attorney-General] ... When the lower branch styled themselves the *Commons* House of Assembly in *Parliament* assembled, they were ordered to strike out the word *"Parliament"*.' See also Lilly J. in *Re Edward Kielley* (1838) 2 Nfld. L.R. 72 at p. 82 : 'it is not long since the executive government, upon view of the style of Parliament which the Legislature had arrogated to itself, disallowed the title as wholly inapplicable ...'

[9] The first Legislature was opened on January 1, 1833.

[10] See Hodgins, *Dominion and Provincial Legislation (1867-1895)* (Ottawa, 1896). At p. 80 Sir John A. Macdonald, reporting on 31 Vic. c. 30 *(Ont.)* recommending drawing attention of the Ontario government to the objectionable words: 'Parliamentary elections' with amendment in view: 'To avoid confusion, the Union Act confines the name of Parliament to the general legislature — the provincial legislative bodies are styled uniformly as legislatures.' Similarly at p. 261 Edward Blake on 38 Vic. c. 7 *(Que.)*; at p. 264-5 Edward Blake on 38 Vic. c. *(Man.)*; at p. 282 Edward Blake on 38 Vic. c. 41 & c. 42 *(Que.)*; again at p. 800 Edward Blake on 38 Vic. c. 2 *(Man.)*; at p. 819 R. Laflamme concurring in the Deputy Minister's report on 40 Vic. c. 17 *(Man.)*. For earlier uses of the term 'Parliament' in what is new Canada, see Taylor, *op. cit.*, p. 65 and pp. 101-102. The first representative Legislature in Quebec met under the *Constitutional Act* of 1791, 31 Geo. III c. 31 *(G. Br.)*, on December 17, 1792, and was described in the Journals of the Legislative Council as the 'Provincial Parliament'. In Upper Canada, Legislative Councillors and 'Knights, Citizens and Burgesses elected to serve in the Legislative Assembly' were summoned by Proclamation to a meeting of the 'Provincial Parliament'. The title 'M.P.' appears to have been used. In the *Union Act* of 1841 (3 & 4 Vic. c. 35 *(U.K.)*), the word 'Parliament' appears in the marginal notes to ss. 30 ('Place and times of holding Parliament') and 31 ('Duration of Parliament'), but not in the text of the Act, which refers only to the 'Legislature'.

[11] Beauchesne, *Rules and Forms of the House of Commons of Canada* 3rd ed., (Toronto, 1943), *Introduction*, p. xx ff. Omitted in 4th ed. (Toronto, 1958). Beauchesne adverts to pre-Confederation official use of the term 'Parliament' in

1955 Quebec statute [12] amending the *Legislature Act* [13] to provide as regards members of the Legislative Assembly (commonly referred to in the Canadian provinces as "M.L.A.'s"):

> '19*a*. Such members shall be entitled to the title of "Member of the Provincial Parliament", and shall have the exclusive use of the abbreviation "M.P.P."'

The last session of the Quebec Legislature saw Premier Lesage introduce Bill 19 to transform the Attorney-General into a Minister of Justice [14] with a view (let us be unkind) to keeping Attorney-General Wagner, recently embroiled in controversies embarrassing to the Government, happy and (from M. Lesage's standpoint, *hopefully*) quiet; is it too cynical to suspect that — since in a period of provincial self-assertion others in expansive mood may have to be given something from time to time to keep them (relatively) quiet and (hopefully) happy — the term *legislature* in the B.N.A. Act may soon be dismissed as generic only and quite compatible with the title 'The Parliament of Quebec'? The word *Parliament*, after all, is of French origin, and means a 'talk-fest' — sufficiently broad, indeed, to embrace housewives at tea and scholars (and others) at Couchiching — and if so, perhaps only prompt action under the *Trade Marks Act* will enable cigarette manufacturers and federal authorities alike to bring passing-off suits when false goods are offered as *Parliaments*.

---

reference to the Legislature, but concludes that the term is no longer applicable to provincial legislatures in view of their restricted authority; even if the inference be not a *non sequitur*, the premise — restricted and narrow authority — is surprising at so late a date. Concluding from the absence of a section analogous in favour of the provinces to s. 18 of the B.N.A. Act (allowing Parliament to confer on the Senate and Commons of Canada privileges as at Westminster) that the provinces enjoy no similar power, he seeks to distinguish *Fielding* v. *Thomas* (*supra* note 2) in rather obscure and very doubtful passages of his *Introduction*. His conclusion on the point concerning us, at p. xxiv, is that 'Whatever sovereigu parliamentary powers these provinces enjoyed prior to 1867, they lost them when their jurisdiction over about three-fourths of public affairs was taken away from them.' Pigeon's reply is at (1943) 21 *Can. Bar Rev.* 826; he argues *inter alia* that the words of B.N.A. Act s. 17 : 'There shall be One Parliament for Canada' refer to Canada not as a geographical area but as the federal juristic unit, and concludes that they do not preclude the provincial legislatures from the status or title.

[12] 4 & 5 Eliz. II c. 16 *(Que.)*; assented to December 15, 1955.

[13] R.S.Q. 1941, c. 4.

[14] Passed by the Legislative Assembly April 7, 1965, it has since become law. The Minister remains *ex officio* Attorney-General.

II. Let me not to the marriage of true minds Admit impediments...

The Parliament of Canada enjoys exclusive authority to legislate with respect to '91:26 Marriage and Divorce'. Apart from their relevant jurisdictions in regard to '92:13 Property and Civil Rights in the Province' [15] and '92:16 Matters of a Merely Local or Private Nature in the Province' [16] the provincial legislature enjoy exclusive authority over '92:12 The Solemnization of Marriage in the Province'.

The long and bitterly-controverted question whether impediments to marriage under the ecclesiastical laws of various religious communities could under the laws of Quebec constitute civil impediments to marriage, was only settled in 1921 in the negative by the Privy Council decision in *Despatie* v. *Tremblay* [17] where Lord Moulton ruled for the Board that ministers of religion acting as officers of civil status empowered to keep registers were officers of state authorized to solemnize marriages independently of the religious professions of the parties; [18] that the guarantees under the treaty of cession and the

[15] Which is overridden by — or made subject to — the exclusive federal authority over 'Marriage and Divorce' by virtue of one or other of the following: (i) the words 'notwithstanding anything in this Act' found in the opening paragraph of s. 91; (ii) the so-called 'deeming-clause' at the conclusion of s. 91: 'And any Matter coming within any of the Classes of Subjects enumerated in this section 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 this Act assigned exclusively to the Legislatures of the Provinces' — but the latter only because the Board in *A.-G. Ont.* v. *A.-G. Can.* [1896] A.C. 348 at p. 359 declared *per* Lord Watson: 'It was observed by this Board in *Citizens Insurance Co. of Canada* v. *Parsons* that the paragraph just quoted "applies in its grammatical construction only to No. 16 of s. 92". The observation was not material to the question arising in that case, and it does not appear to their Lordships to be strictly accurate. It appears to them that the language of the exception in s. 91 was meant to include and correctly describes all the matters enumerated in the sixteen heads of s. 92, as being, from a provincial point of view, of a local or private nature.'

[16] From which latter every matter is excluded which comes within 'Marriage and Divorce' by virtue of the literal, primary, and (it is submitted) proper, application of the 'deeming clause' quoted in note 15 *supra*.

[17] [1921] 1 A.C. 702.

[18] Art. 127 of the *Civil Code* (a pre-Confederation statute) provided that: 'The other impediments recognized according to the different religious persuasions, as resulting from relationship or affinity or from other causes, remain subject to the rules hitherto followed in the different churches and religious communities... The right, likewise, of granting dispensations from such impediments appertains, as heretofore, to those who have hitherto enjoyed it.' This article was thus held to leave the law as before, to enact civil impediments and give effect to no others, but to leave ministers (see Art. 129) free to decline to solemnize marriages objectionable to them on religious grounds.

Quebec Act of 1774 were guarantees to individuals of liberty to profess the Roman Catholic religion, and not guarantees to an institution of coercive power; that in Quebec one may change his religious professions and submission to religious authority *at will.* This late decision, given in the face of a steady stream of jurisprudence and writing to the contrary,[19] merely vindicated the most minimal freedom of conscience against pretensions to a brazen and insolent tyranny whose proponents,[20] we should do well to remember, included Langelier,[21] Mignault,[22] and, most extreme, Loranger;[23] not surprisingly, therefore, legislation was earlier introduced into Parliament to correct what then seemed to be the state of the law, a situation which many regarded as absolutely intolerable. Reference to the Supreme Court of Canada produced a majority decision[24] (Fitzpatrick C.J., Davies, Duff and Anglin JJ.; Idington J. dissenting) holding *ultra vires* of Parliament the enactment of a bill providing that:

> 'Every ceremony or form of marriage heretofore or hereafter performed by any person authorized to perform any ceremony of marriage by the laws of any 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.'

and that

> '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 in 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.'

though the judges, in answer to further questions, held unanimously that the laws of Quebec did not render null unless contracted by a Roman Catholic priest a marriage taking place in Quebec between

---

[19] For relevant statutes, jurisprudence, and legal writing on the controversy, see e.g. Lovell C. Carroll, *Marriage in Quebec* (Montreal, 1936), Chapter V : The Religious Controversy, p. 46 ff.

[20] Arguments asserting coercive jurisdiction to be a necessary part of Roman Catholic religious liberty would on the same principle equally subject to coercive ecclesiastical power all aspects of human activity, since all alike are equally open to evaluation and censure on moral and religious grounds.

[21] *Cours de Droit Civil* (Montreal, 1905), I, 250 ff.

[22] *Droit Civil Canadien* (Montreal, 1895), I, 358 ff.

[23] *Commentaire sur le Code Civil* (Montreal, 1879), II : *Du Mariage*, 164 ff.

[24] *In the Matter of the Authority of the Parliament of Canada to Enact a Proposed Measure Amending "The Marriage Act".* (1912) 46 S.C.R. 132.

persons one of whom only is a Roman Catholic,[25] and held by a majority (Davies, Idington and Duff JJ; Anglin J. dissenting and Fitzpatrick C.J. asking leave to decline to answer) that the same was true even where both parties were Catholics. The Privy Council,[26] though declining to interpret the existing law, affirmed the Supreme Court's ruling that the remedial Bill was *ultra vires*. Those seeking more explanation for this judgment than the fact of its delivery by Viscount Haldane, L.C., may note that the 'Marriage and Divorce' power, fortified though it was by the *non obstante* and *'deeming'* clauses, did not exclude or even override the provincial power over the solemnization of marriage, which, contrary to the ordinary rule [27]

> '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 affect the validity of the contract'

and does not only extend to [28] 'the directory regulation of the formalities by which the contract is to be authenticated' such as could be enforced, it had been argued, by fine and imprisonment without nullity; so that [29]

> 'the jurisdiction of the Dominion Parliament does not, on the true construction of ss. 91 and 92, cover the whole field of validity',

and an ideal opportunity for the application of the 'aspect doctrine' was allowed to escape.

Attention has not, it seems, been given to the implications of the fact the provincial legislative authority extends, not to *'Solemnization* of Marriage in the Province' but to *'The Solemnization* of Marriage in the Province'; hence, not to the question *whether* marriages shall be solemnized; but, rather, *supposing* them to require solemnization, how and by whom they should be solemnized. It is doubtless true that the minds of the draftsmen were not directed to producing such a distinction; but it is equally true that the use of the definite article strongly points to a *presupposition* on their part that solemnization was a necessary part of marriage; as their Lordships appear to have been aware, without however investigating the implications: [30]

> '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

---

[25] It was much disputed whether a person by defying his ecclesiatical authorities and obtaining celebration of his marriage by others did not sufficiently indicate at least *pro tanto* his dissociation from his religious community.

[26] [1912] A.C. 880.

[27] *Ibid.*, at p. 887.

[28] *Ibid.*, at p. 886.

[29] *Ibid.*, at p. 887.

[30] *Ibid.*, at p. 887.

> where the contrary doctrine has prevailed. The common law of England and the law of Quebec before confederation are conspicuious examples, which would naturally have been in the minds of those who inserted the words about solemnization into the statute. *Prima 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.'

But if the necessity of a solemnization was merely *presupposed*, then the provincial power has been predicated upon the continuing place of solemnization in the institution of marriage, just as Parliament's power of treaty implementation was (in the Privy Council's view [31]) predicated upon the assumption that treaties would continue to be 'British Empire' treaties; and in the former just as much as in the latter case, the disappearance of the fact upon which the power is predicated carries with it the disappearance of the power; 'it is impossible to strain the section so as to cover the uncontemplated event.' [32] It must be with solemnization as it has been held to be with treaty-implementation: contingency of the power is the legal consequence of using in the definition of a power words importing a certain premise.

Who then controls the jurisdictional fact — the presence or absence of solemnization in the institution of marriage? If this be, as it seems to be, part of the power of defining the conditions which produce a marriage, it would seem that Parliament has the sole power to decide whether solemnization is to be among them. If this be so, and if Parliament should prescribe that henceforth no solemnization is to be required for a valid marriage; or if Parliament, enjoying as it does the power of retrospective legislation on matters within its jurisdiction, should abolish this requirement retrospectively (for all marriages, or any class of them, or for particular marriages) — the province is indeed left with the sole power to prescribe what is a proper solemnization, and to insist that a defective solemnization is absolutely void; but the marriage will be valid because, where no solemnization is necessary, it becomes immaterial that there has in law actually been no solemnization. The province's power, essentially, is to make solemnizations null; whether that makes a marriage null depends on whether — and in what cases — marriages need solemnization; it has power, in the Privy Council's words, 'to enact conditions as to *solemnization* which *may* affect the validity of the contract.'

---

[31] *A.-G. Can.* v. *A.-G. Ont.* [1937] A.C. 326 *(Labour Conventions Case).*
[32] *Ibid.* at p. 350.

A little history can readily dispel that touch of skepticism which formal and closely-reasoned arguments of this sort — savouring as they do of a certain scholasticism if not indeed seeming to smack slightly of sophistry — may engender. The canon law generally applicable throughout Europe until the Reformation regarded (until the decree *Tametsi* (1563) under the Council of Trent) as valid marriages those contracted (without the presence, much less the testimony or benediction, of a priest, or a church ceremony) by simple words of present consent (*verba de praesenti*), or by words of promise for the future followed by sexual intercourse (*verba de futuro subsequente copula*). This was indeed the law of Scotland [33] until July 1st, 1940,[34] though as to England, the House of Lords, by the merest chance, held, on equal division, that it never had been so; a view strongly opposed by such pre-eminent legal historians as Pollock and Maitland.[35] Admittedly, much legislation is likely to appear on

---

[33] See T. B. Smith, Q.C., LL.D., F.B.A., *Scotland: The Development of its Laws and Constitution* (London, 1962), Chapter 10. Where a man and woman 'exchanged consent to marry with genuine matrimonial intent, not in jest nor with ulterior motive, from the time when such consent was exchanged *ipsum matrimonium* was constituted even before the union was consummated. Proof may be made by parole or by writing. (p. 310). By *promissio subsequente copula* (see *Mackie* v. *Mackie* 1917 S.C. 276) taken over from the canon law, if 'parties who had exchanged the promise *de futuro matrimonio* had sexual intercourse with each other, the effect of that sexual intercourse was to interpose a presumption of *present consent at the time of intercourse*' (p. 311); the promise had however to be evidenced (though not constituted) by the man's writing; and it had to be unconditional. The intercourse must be on the faith of the promise, though it will be (rebuttably) so presumed if it follows thereon. A third form of irregular marriage, 'by habit and repute', known to Scots law, was created by consent not expressed but established *rebus ipsis et factis* : 'a man and a woman cohabiting together openly and constantly as if they were husband and wife, and so conducting themselves towards each other for such a length of time in the society or neighbourhood of which they are members as to produce a general belief that they are married persons. Such cohabitation must be for a substantial time — not e.g. ten months...' (p. 313). Dr. Smith gives it, as his opinion, supported by jurisprudence, that the 1939 Act providing that 'No irregular marriage by declaration *de praesenti* or by promise *subsequente copula* contracted after the commencement of this Act shall be valid' did not by implication displace marriage by habit and repute; for, conceding habit and repute to be probative only, he regards them as probative of a tacit consent creative of marriage, and not as giving rise to a presumed declaration *de praesenti* (p. 313-4).

[34] Marriage (Scotland) Act, 1939; 2 & 3 Geo. VI c. 34 *(U.K.)*; Postponement of Enactments (Miscellaneous Provisions) Act, 1939; 3 & 4 Geo. VI c. 2 *(U.K.)*.

[35] *Reg.* v. *Millis*, (1844) 10 Cl. & Fin. 534 (H.L.) Lords Brougham, Denman and Campbell thought a marriage by present consent sufficient to constitute a marriage so as to found a bigamy prosecution for going through a subsequent ceremony; Lord Lyndhurst, L.C., Lord Cottenham, and Lord Abinger *contra*. The

Canadian statute books before Parliament adopts marriage by *sponsalia subsequente copula* as a means of wiping away the tears of ladies wronged by their lovers; but can it be doubted that it is to Parliament, and not to the legislatures, that would fall sole authority to dispense — as the enactment of such a law needs must do — not only with solemnization as it now exists, but with present consent as well? The same is *a fortiori* true of the introduction of *marriage by habit and repute*.[33] Were a provincial legislature to have power to require even in such cases solemnization as a condition precedent to the validity of a marriage (and therefore to make its conclusion impossible by failing to provide machinery for solemnization at the instance of one party), which legislature would it be? The test laid down by Duff C.J.C. in *Kerr* v. *Kerr and A.-G. Ont.*[36] was that the Legislature

---

question put to reverse being defeated, the judgment of the Irish Queen's Bench was affirmed; it was itself equally divided two for and two against conviction, though one of the justices supporting conviction thought the first marriage valid only because celebrated by a Presbyterian minister; of the two opinions for conviction, one was apparently withdrawn *pro forma* to permit an acquittal from which error lay. T. E. James, 'The English Law of Marriage', in Graveson & Crane, eds., *A Century of Family Law* (London, 1957), p. 28, 'it must be concidered as determined by the House of Lords in *R.* v. *Millis* that at common law, as distinct from the ecclesiastical courts, there could never have been a valid marriage in England before the Reformation, unless in early Anglo-Saxon times, without the presence of a priest episcopally ordained, or afterwards, without the presence of a priest or deacon.' The ecclesiastical courts had on application enforced the celebration of a regular and formal marriage between the parties, but until *Reg.* v. *Millis* the parties were regarded as already being married by virtue of the irregular marriage, though without *e.g.* the benefits of dower. The judges advising the House of Lords in that case tendered *per* Tindal, C.J. 'our unanimous opinion, that by the law of England, as it existed at the time of the passing of the Marriage Act, a contract of marriage *per verba de praesenti* was a contract indissoluble between the parties themselves, affording to either of the contracting parties, by application to the Spiritual Court, the power of compelling the solemnization of an actual marriage, but that such a contract never constituted a full and complete marriage in itself, unless made in the presence and with the intervention of a minister in holy orders.' (10 Cl. & Fin. 655). Lord Hardwicke's Act, 26 Geo. II, cap. 33 *(G. Br.)*, 1753, had eliminated this machinery by enacting 'XIII. That in no Case whatsoever shall any Suit or Proceeding be had in any Ecclesiastical Court, in order to compel a Celebration of any Marriage *in facie Ecclesiae*, by reason of any Contract of Matrimony whatsoever, whether *per verba de praesenti* or *per verba de futuro* . . .' in addition to increasing the formalities of regular and formal marriages by enforcing those prescribed by the Book of Common Prayer : 'all other Rules prescribed in the said Rubrick concerning the Publication of Banns, and the Solemnization of Matrimony, and not hereby altered, shall be duly observed.' See Pollock and Maitland, *History of English Law*, 2nd ed. (Cambridge, 1923) II, 368 ff.

[36] [1934] S.C.R. 72, at p. 74. Here 'the consents required are prescribed as elements in the *ceremony*'. (*Loc. cit.*; emphasis added.) At p. 75 : 'The authority of

had dealt 'with the solemnities of the marriage and not with the capacity of the parties' and that a provincially-imposed condition of parental consent precedent to solemnization was good because it applied 'to all marriages celebrated in Ontario, and to no marriages but those celebrated in Ontario.' But in what province is a marriage celebrated which *ex hypothesi* is celebrated nowhere? No one would apparently venture to suggest that a province is entitled to enact that no marriage shall be recognized in the province save only such as are celebrated (or if necessary, re-celebrated) therein. Duff C.J. is suggesting, at most, (p. 75, l. 5-8) that the province may put what conditions it likes on those marriages that *are* solemnized in the **province;** for it would seem that *over none other but such marriages has a province authority,* (and such authority as it has extends only to condition the validity of the *solemnization.*) If even one province, therefore — or Canada as regards the Northwest Territories — removed all formalities, could it not be said that a marriage which was nowhere solemnized could be taken to have complied with the formalities prescribed by a place where no formalities were necessary? But if we must select a constitutionally-imposed place whose laws will be the test of adequate solemnization, by what principle will such a place be selected? Would it be the place where the intercourse took place, being the last of the conditions prescribed by Parliament for a marriage by *sponsalia subsequente copula*? And where indeed is the right place to solemnize a marriage *by habit and repute* where both the *habit* and the *repute* may have extended to a great variety of places? Can it be denied that if Parliament may create such marriages it may likewise prescribe that they shall be complete and ready for solemnization anywhere Parliament may wish — and therefore, nowhere at all, if such be its pleasure? Suppose Parliament, faced like the Roman Senate by a crowd of women weeping on a question of marriage law, nevertheless hardened its heart, and confined its innovations to marriage *per verba de praesenti. Again,* the question arises, what place's laws will be the test of whether there has been adequate solemnization? The place where the contract is expressly domiciled? But if the parties are free to escape the laws of the province where it has been concluded merely by so stipulating, then Parliament in creating such a form of marriage may compel the parties wishing to avail themselves of it to domicile the contract in a place like the Northwest Territories, where it may enact what it pleases as to solemnization. The place where the contract was concluded? But by what right can another province or

the Dominion to impose upon intending spouses an incapacity which is made conditional on the absence of certain nominated consents is not in question.' The aspect doctrine is emphasized at p. 76 as allowing provincial legislation 'in the absence of legislation in the same field by the Dominion'.

place be denied the right to solemnize contracts already concluded elsewhere? Is it always constitutionally-determined *where* a contract of marriage was concluded ? The rules as to negotiations *inter absentes* differ in Quebec from the English common law; and the rules of private international law so far as the contract of marriage is concerned are presumably within federal competence to change; cannot Parliament then domicile the contract of marriage wherever it pleases, and thereby secure control of solemnization? Could Parliament not declare *simpliciter* that A and B are married? Certainly the legislatures cannot, so that Parliament must be able to do so; but admitting this, on what principle could a place then be selected by the Courts as the appropriate one for its solemnization? By what principle even could the Courts look at the past dealings of the parties to select a proper place of solemnization — for the past dealings of the parties could at most evidence Parliament's motives for marrying A and B by statute; it would not establish a situs for the statutory marriage bond.

These illustrations, all based on historical instances, prove if they prove anything, that the federal marriage power, if it is really a power of legislating and not only of tinkering, must include the power to dispense with solemnization; and if to eliminate it prospectively, then to dispense retrospectively, and hence to validate marriages lacking solemnization. It is submitted, indeed, that the *Marriage Reference*, if rigorously confined to the actual and literal decision, is formally reconciliable with these conclusions, since Parliament did not, in the impugned legislation, *dispense with solemnization* as a requisite to marriage in all or some particular cases, but purported instead to *validate provincially-invalid solemnizations*; Viscount Haldane has himself shown us far more remarkable rationales [5] for distinguishing unwelcome precedents.

Upon a cognate matter it may usefully be observed that it is altogether too easily forgotten what preposterous results follow from distinguishing for constitutional purposes the 'status' from the 'incidents' of marriage, a distinction plainly presupposed, for instance, by the Quebec statute [37] which in 1954 purported to deal with the incidents of marriages by removing the condition (italicised below) from Art. 188 of the *Civil Code* which had formerly read:

> 'A wife may demand a separation on the ground of her husband's adultery, *if he keeps his concubine in their common habitation.*'

Confined to a power in regard to status only, Parliament would enjoy only a derisory dictionary-making power, including in its scope

---

[37] 3 & 4 Eliz. II, c. 48.

only the exclusive right to say that 'marriage' subsists between A and B; while the provincial legislatures, constrained no doubt to admit that A is married to B, could proceed to remove one by one all the incidents of that status, and, perhaps under a term of art of its own invention, create as between A and C all the incidents now normally associated with a marriage between A and B. 'Marriage', too, no less than 'Solemnization', appears in the B.N.A. Act, and, no less than the latter, its scope as an institution may be determined with reference to all the incidents flowing from it in 1867. Perhaps, however, the aspect doctrine provides support for a concurrent if subordinate provincial power over some or all of the incidents, considered as 'Property and Civil Rights'; but this doctrine must equally work in favour of Parliament. At least as regards s. 92:12, it seems clear that provincial authority extends over all solemnization occurring *in the province* and *none whatsoever elsewhere*; but it belongs to Parliament to prescribe the role of solemnization in the institution of marriage, and to say when it shall and shall not be necessary to a marriage.

III. A most sharp sauce...

Had the Ontario *Unconscionable Transactions Relief Act*[38] made wide and general provision for the setting aside by the Courts of harsh contracts; had it only incidentally included in their number the contract of loan of money as one amongst many; little question could have arisen as to its validity as a law *in relation to* property and civil rights in the province; for, despite the Privy Council's glossary (*affecting, encroaching, trenching,* and the like) the B.N.A. Act prohibits Parliament and the legislatures respectively from enacting laws *in relation to* matters in the others' sphere, not from making laws *affecting* them. Had such been the statute, the only remedy would have lain with specific federal legislation protecting loans by way of exception. But the statute[39] dealt specifically and solely with the *price of a loan of money,* which, in slightly abbreviated form, is

[38] R.S.O. 1960, c. 410.

[39] It empowered the Court to rewrite contracts of loan where 'the court finds that, having regard to the risk and to all the circumstances, the cost of the loan is excessive and that the transaction is harsh and uncounscionable', the cost being defined to mean the whole cost including 'interest, discount, subscription, premium, dues, bonus, commission, brokerage fees and charges'.

the plain and common English meaning of '91:19 Interest', as Judson J. fairly stated, as held by the Supreme Court in *Reference re Saskatchewan Farm Security Act* [40] (affirmed by the Privy Council in *A.-G. for Saskatchewan* v. *A.-G. for Canada* [41]) where Rand J. stated

> 'Interest is, in general terms, the return or consideration or compensation for the use or retention by one person of a sum of money, belonging to, in a colloquial sense, or owed to, another.'

The Supreme Court of Canada, reversing the Ontario Court of Appeal, nevertheless held [42] in concurring opinions of Judson J. (for himself and Taschereau C.J., Fauteux and Hall JJ.) and Cartwright J.; Martland J.[43] dissenting for himself and Ritchie J.; that the statute was *intra vires*. The opinion of Judson J. appears to have been founded upon two grounds: (i) a narrowing of the constitutional definition of 'interest'; (ii) an application of the aspect doctrine; and though Cartwright J. expressed a general concurrence in Judson J.'s reasons for sustaining the statute, it is the latter ground that appears to form the basis of his own opinion: [44]

> '*The Unconscionable Transactions Relief Act* appears to me to be legislation in relation to Property and Civil Rights in the Province and the Administration of Justice in the Province, rather than legislation in relation to Interest. Is primary purpose and effect are to enlarge the equitable jurisdiction to give relief against harsh and unconscionable bargains which the courts have long exercised; it affects, but only incidentally, the subject-matter of Interest...'

In listing the submissions in appeal and concurring in them *in toto*, Judson J. agreed that *Interest* if affected was so only incidentally, and he proceeded to characterise the statute thus: [45]

> 'In my opinion it is not legislation in relation to interest but legislation relating to annulment or reformation of contract on the grounds set out in the Act, namely, (a) that the cost of the loan is excessive, and (b) that the transaction is harsh and unconscionable. The wording of the statute indicates that it is not the rate or amount of interest which is the concern of the legislation but whether the transaction as a whole is one which it would be

---

[40] [1947] S.C.R. 394, at p. 411.

[41] [1949] A.C. 110.

[42] [1963] S.C.R. 570.

[43] It would appear to be a most desirable refinement to distinguish provincial legislation which is merely *inoperative* so long as competing valid federal legislation is on the books, but which is *intra vires*; from provincial legislation which, being *ultra vires stricto sensu* is utterly void. Cf. Martland J. (i) at p. 582 finding the provincial competence unnecessary to consider in the presence of what he holds to be competing federal legislation; and yet (ii) at p. 583 finding that 'the legislation in question is *ultra vires*'.

[44] [1963] S.C.R. 570 at p. 579.

[45] *Ibid.*, p. 577.

> proper to maintain as having been freely consented to by the debtor. If one looks at it from the point of view of English law it can be classified as an extension of the doctrine of lesion dealt with in articles 1001 to 1012 of the *Civil Code*. The theory of the legislation is that the Court is enabled to relieve a debtor, at least in part, of the obligations of a contract to which in all the circumstances of the case he cannot be said to have given a free and valid consent. The fact that interference with such a contract may involve interference with interest as one of the constituent elements of the contract is incidental. The legislature considered this type of contract as one calling for its interference because of the vulnerability of the contract as having been imposed on one party by extreme economic necessity.'

But on the learned judge's own showing, the contract is set aside for no form of coercion (fraud, violence, etc.) other than the economic necessity which produces a *price for the loan of money* — a rate of *interest*, if the old definition be still valid — which the legislature will not allow because it finds it excessive, but of which control was placed in federal hands as part of a scheme to give Parliament control of capital accumulation. And if the Privy Council, in denying Saskatchewan power to postpone or reduce payment of principal so as to reduce the cost of the loan, in terms declared that they were 'not called on to discuss, and do not pronounce on, a case where a provincial enactment renders null and void the whole contract to repay money with interest,' [46] nevertheless it might be replied as in *Doyle* v. *Falconer* that 'if the elaborate judgment which was then pronounced has in terms left open the question which is raised in the present case, it has stated principles which go far to afford the means of determining that question.' [47]

The decision now determines the provincial authority; if it be read so as to leave untouched the federal authority over interest as previously defined (price of a loan of money), then the Court has in effect presented us with a most extreme application of the aspect doctrine: for a law to reduce the rate of interest (in the wider sense) is at once a law relating to '91:19 *Interest*' and to '92:13 Property and Civil Rights in the Province [excepting *Interest*]'. This is potentially a revolutionary trend. Applied even in a more modest way in favour of Parliament, can anyone deny that trading in stocks and bonds; insurance; labour relations; marketing; manufacturing; instalment sales, are not only 'property and civil rights' but also 'trade and commerce'? Why do my Lords suppose that the British treasury regulates hire-purchase contract terms, or that the American SEC regulates stock trading? Can a Wall Street crash be 'trade and commerce between the states' but a Bay Street panic not even be 'trade and commerce'?

---

[46] [1949] A.C. at p. 126.
[47] (1866) L.R. 1 P.C. 328 at p. 339.

Would the Court sustain desperately-needed federal legislation on the financial markets of Canada, or is that a purely local matter for Ontario, Quebec, and B.C.? Does the knife, in other words, cut both ways?

But Judson J., after stating the earlier definition of interest, proceeds:

> 'This is substantially the definition running through the three editions of Halsbury. However, in the third edition (27 Hals., 3rd ed., p. 7) the text continues : 'Interest accrues *de die in diem* even if payable only at intervals, and is, therefore, apportionable in point of time between persons entitled in succession to the principal.' The day-to-day accrual of interest seems to me to be an essential characteristic. All the other items mentioned in the *Unconscionable Transactions Relief Act* except discount lack this essential characteristic. They are not interest. In most of these unconscionable schemes of lending the vice is the bonus.'[48]

Now, had someone inquired of Judson J. when interest accrues, his Lordship would doubtless have consulted Halsbury and advised his questioner accordingly; but one thing his Lordship would most *certainly not* have done: to stare at his questioner in surprise and ask him, 'Don't you know what interest means? It is something that accrues *de die in diem*. How could anything be interest which did not accrue from day to day?' If such a hypothetical reply seems preposterous, that is precisely because accrual day-to-day *forms no part* of what in common English is *meant* by interest; it is a rule of law *about* interest, not a part of its *definition*; and *most certainly* not part of a *constitutional* definition setting out the power of a Parliament. It may be desirable, however, to keep Judson J.'s *dictum* in the perspective given by the context: his Lordship was seeking to show that bonuses and the like were not of the essence of interest, and that they lay upon ground which would support provincial legislation; not that they were beyond the scope of effective federal legislative power over *interest*, a subject upon which, as his Lordship himself demonstrated, effective legislation cannot be enacted unless these devices can be dealt with at the same time. Still, the *dictum* is for that very reason capable of emasculating the federal power over interest, and is both dangerous and unnecessary. The aspect doctrine would have sufficed, once the Court by ruling that Parliament had not intended to deal with bonuses had thereby enabled itself to reconcile formally the provincial and federal legislation. Still, in the final analysis, the provincial legislation sustained allows the cancellation of contracts providing for interest pure and simple as defined by Judson J., and greatly extends the scope of provincial authority and of the aspect

[48] [1963] S.C.R. 570 at p. 575.

doctrine: striking at bonuses and so forth carries with it the incidental power to strike also at interest rates.

Can Parliament not enact a statutory definition of 'interest' without imperilling its constitutional power by a contraction *pari passu* of the constitutional definition? Can a poor ventilating system in the Supreme Court building render its inhabitants too susceptible to the 'winds of change' blowing in from just across the Ottawa River? Is it safer to defy the bleat of the lamb on Parliament Hill than the roar of the lion on the bluffs of Quebec? Do federal judicial appointments boomerang against Parliament through obsessive fear of accusations of partiality? Will Judson J.'s recipe for sauce for the goose equally apply to brew sauce for the gander?