It was again clearly expressed by Viscount Haldane, L.C., who delivered the judgment of the Judicial Committee of the Privy Council. His words were:

> "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."

Other cases have followed the same line.

However, the Parliament of Canada has never assumed legislative jurisdiction in relation to "Marriage" other than in respect of the validity thereof, and there exists no judgment in which was considered the issue of whether, under the heading "Marriage", Parliament has a jurisdiction going beyond the substantial validity thereof.

While it might be argued from the foregoing that the federal jurisdiction is limited as aforesaid—and undoubtedly it would be so argued—my personal view is that the question is still open. I say this because the courts, traditionally, do not decide questions other than the precise one they are called upon to decide. And they have not yet been called upon to decide the broader issue raised by the present bill.

To illustrate this, may I quote from the introductory words of Chief Justice Duff in the *Adoption Reference* (1938) G.C.R. 398, in which several Ontario statutes dealing with adoption, children's protection and deserted wives were held to be within the legislative competence of the legislature of Ontario.

> "We are not concerned with any 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 'Marriage and Divorce'. Whatever may be the extent of that jurisdiction, we are not concerned with it here and I mention it only to put it aside."

In such circumstances, as I have said before, the formulation of a constitutional opinion becomes an exercise in studied speculation; and, in the words of Oliver Wendell Holmes "law is what the courts will do next".

My conclusion therefore is that, since the present bill does not deal in any way with the validity of a marriage contract, there exists a real doubt as to its constitutionality,—a doubt which could be finally resolved only by the Supreme Court of Canada.

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