THE ATTORNEY GENERAL FOR ONTARIO ..... APPELLANT;

AND

JOHN LEWIS SCOTT .....RESPONDENT;

AND

THE ATTORNEY GENERAL FOR CANADA ..... INTERVENANT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law—Validity of ss. 4 and 5 of the Reciprocal Enforcement of Maintenance Orders Act, R.S.O. 1950, c. 334—Prohibition—Husband and wife—Proceedings for maintenance made elsewhere than in Ontario—Whether enforceable.

The respondent applied for an order prohibiting a judge of the family court from taking any further proceedings under the *Reciprocal Enforcement of Maintenance Orders Act* (R.S.O. 1950, c. 334) in connection with a provisional order made by a magistrate in London, England, against him for the maintenance of his wife and children. Certain sums, stated in English currency, were to be paid weekly by the respondent. It was contended, inter alia, by the respondent, that the *Reciprocal Enforcement of Maintenance Orders Act* was *ultra vires*. The trial judge dismissed the application. The Court of Appeal directed that the order of prohibition be made, holding that the Act was *ultra vires* because the legislature had, in effect, delegated its legislative authority and had exceeded its jurisdiction by allocating the issue to an inferior court.

Held: The appeal should be allowed and the judgment at trial restored.

Per Kerwin C.J., Rand, Kellock and Cartwright JJ.: A province can confer on a non-resident a right to enforce a duty, incident to the marriage status, in the province in accordance with provisions prescribed by the law in England for the relief of a deserted wife.

The legislation is within head 16 of s. 92 of the *B.N.A. Act,* as a local or private matter. No other jurisdiction has any interest in the controversy and it concerns property within the province in a local sense. The action taken in England is only an initiating proceeding to adduce a foundation in evidence. It is unquestionable that a province can act upon evidence taken abroad either before or after

*PRESENT: Kerwin C.J., Taschereau, Rand, Kellock, Estey, Locke, Cartwright, Fauteux and Abbott JJ. Estey J. did not take part in the judgment on account of illness.

1955

A.G. FOR ONTARIO v. SCOTT

proceedings are begun locally. In the converse situation, where the initiating step is taken within the province, there can be no conflict with Part II of the *Canada Evidence Act*.

The arrangement is not a treaty, as there is nothing binding between the parties to it; and it would be extraordinary if a province should be unable within its own boundaries to aid one of its citizens to have such a duty enforced elsewhere.

The legislation is a clear case of adoption and not of delegation. The action of each legislature is distinct and independent of the other. From the standpoint of legislative competency, there is no difference between the adoption of procedure and that of substantive law. No challenge could be made to the complementary English enactment here, and the province should be able to exercise the same power in relation to a subject of such a local and civil rights nature. (*Hodge* v. *The Queen*, 9 A.C. 117).

Duties of this nature are daily enforced in the inferior courts in the province and the residence of the complaining party cannot affect the judicial jurisdiction where the case is brought within the same class of legislative power. It is the same as if the wife had come to the province and there instituted the proceedings. The court is not completing an operative foreign order, it is making an original order of its own. The preliminary step taken elsewhere has no substantive efficacy until by acceptance it is adopted and incorporated in the action of the provincial court.

The family court, having statutory jurisdiction to make maintenance orders, is, therefore, a court to which the reference of the Attorney General may be made.

The modification from one currency to that of this country is not beyond provincial legislative power.

Per Taschereau, Fauteux and Abbott JJ.: Since maintenance orders fall within the jurisdiction of inferior courts, there is no valid reason why such courts could not make a provisional order under s. 4 of the Act or make and enforce an order, under s. 5, based upon proceedings initiated in another state. The maintenance of wives and children is a matter of a merely local or private nature in the province falling within head 16 of s. 92 of the *B.N.A. Act*.

It is clearly competent for any province to determine for the purpose of a civil action brought in such province, what evidence is to be accepted and what defences may be set up. There is not, under s. 5(2) of the Act, delegation of legislative power to another state. It is merely a recognition by the law of the province of rights existing from time to time under the laws of another, in accordance with the principles of private international law. S. 5 is legislation in relation to the administration of justice in the province, including procedure in civil matters in the provincial courts, and as such, within the exclusive legislative competence of the province under head 14 of s. 92 of the *B.N.A. Act*.

Per Locke J.: It is a valid exercise of provincial powers under head 13 of s. 92 of the *B.N.A. Act* to declare that the defences which may be relied upon in proceedings under the *Reciprocal Enforcement of Maintenance Orders Act* shall be those from time to time permissible

under the laws of England. In substance, those laws are adopted and declared to be the law in the province. There is no delegation of the authority of the legislature.

The objection that it is an attempt by the legislature to clothe an inferior provincial court with power to determine the legal rights of residents of the province, in respect of orders pronounced in another territorial jurisdiction, which would therefore be repugnant to s. 96 of the *B.N.A. Act,* cannot be sustained. The order does nothing more than to afford evidence upon which the magistrate may make an order against the husband. Any award made must depend entirely for its validity upon the order made by the magistrate under the Ontario statute.

The legislation does not amount to a treaty. There is no evidence to suggest that an agreement existed between the province and the reciprocating state to legislate in this manner.

APPEAL from the judgment of the Court of Appeal for Ontario (1), reversing the decision of the trial judge on an application for a writ of prohibition and on the validity of ss. 4 and 5 of the *Reciprocal Enforcement of Maintenance Orders Act,* R.S.O. 1950, c. 334.

C. R. Magone, Q.C. for the Attorney General of Ontario.

D. H. W. Henry for the Attorney General of Canada.

B. J. Mackinnon and *J. D. S. Bohme* for the respondent.

The judgment of Kerwin C.J., Rand, Kellock and Cartwright JJ. was delivered by:—

RAND J.:—I am unable to appreciate as fatal to this legislation the considerations which have been urged before us. It is said that the matter is one of international comity, that the legislation effects an international treaty, with both of which only Parliament can deal, that it delegates to a foreign legislature the power to enact provincial law, and that what are involved are civil rights which do not lie within the scope of provincial jurisdiction. Subordinate grounds go to the authority to allocate the issue to an inferior court or to enable such a court to deal with a matter involving the currency of a foreign state; that the magistrate to whom the matter was directed has not been clothed with authority over it; and that in any event there was no jurisdiction over the respondent by reason of non-residence and the absence of any act of wilful neglect in the county in which the proceedings were brought.

(1) [1954] O.R. 676; 4 D.L.R. 546.

1955

A.G. FOR ONTARIO v. SCOTT

Rand J.

Whatever the nature or limits of what is known as "the comity of nations", it ordinarily signifies the respect paid by one state to the laws and to civil rights established by them of another relating to personal or property interests which touch both states.

With this in mind, the principal grounds rest, in my opinion, on a misconception of the true nature of the arrangement. Ontario has territorial jurisdiction over the respondent. His wife, alleging herself to have been deserted and remaining in England, is seeking to compel him to maintain her and their children. The province, recognizing the practical difficulty of enforcing the rights of a wife so placed, has intimated its willingness to exercise its authority over the husband by compelling him to the performance of a duty which both countries recognize as an incident of the marriage status. In carrying this out, the province has adopted provisions which the law of England prescribes for the relief of a deserted wife. The effect is to vest in the wife a right to enforce the duty in Ontario in accordance with the provisions adopted.

That the province can confer such a benefit on a non-resident seems to me to be beyond serious argument. Rights in property and in action in non-residents are created by the law of Ontario in transmissions through death or in the course of business as everyday occurrences. In the former, resort to the foreign law to determine the benefit or the beneficiary is a commonplace. I see no jural distinction between the creation and enforcement of a contract and the recognition and enforcement of a marital duty; the latter in fact arises out of or is attributable to a contract, that of marriage. A civil right within the province does not require that the province, in creating it, should have personal jurisdiction over both parties to it; and in its enforcement, the plaintiff by availing herself of the provincial judicature so far submits herself to the authority of the provincial court; it is the same as if she had come to the province and enforced a right in the circumstances given her. If these considerations were not recognized, by keeping property in a province other than that of his own and his creditor's residence, a debtor could effectually put it beyond the reach of the latter: the province of the situs would be powerless, by way of remedial right, to apply it to his debts. Such

a restriction upon provincial authority under head 13 of s. 92 would seem to contradict the unquestioned acceptance of the scope of that authority since 1867.

A distinction may properly be made between vesting a right and extinguishing it. The former is, in fact, a declaration that within the jurisdiction making it the attributes of ownership of property or of a claim against a person within the jurisdiction, are available to the non-resident. Generally, the right so declared would be recognized and enforced under the principle of comity by other jurisdictions. But a like declaration purporting to extinguish a right based on jurisdiction over the debtor only could not bind the non-resident creditor—in the case of a province, even in its own courts, *Royal Bank of Canada* v. *The King* (1)—outside of that jurisdiction unless otherwise supported by recognized elements furnishing jurisdiction over him or the right. In short, a state, including a province, does not require jurisdiction over a person to enable it to give him a right in personam; but ordinarily, and to be recognized generally, such a jurisdiction is necessary to divest such a right. That is not to say that jurisdiction of this nature is in itself always sufficient to divesting.

That the legislation is within head 16, as a local or private matter, appears to me to be equally clear. No other part of the country nor any other of the several governments has the slightest interest in such a controversy and it concerns ultimately property, actual or potential, within Ontario in a local sense.

Given, then, a right so created by the law of Ontario, the action taken in England is merely an initiating proceeding looking to effective juridical action in Ontario for the purposes of which it is a means of adducing a foundation in evidence. In the administration of justice the province is supreme in determining the procedure by which rights and duties shall be enforced and that it can act upon evidence taken abroad either before or after proceedings are begun locally I consider unquestionable. The form which the action in Ontario may take, as here, in the language of the statute, a confirmation of the provisional order, does not touch the substance indicated.

(1) [1913] A.C. 283.

1955

A.G. FOR ONTARIO v. SCOTT

Rand J.

In the converse situation, the initiating step within the province is simply a local or private matter over which there is plenary jurisdiction, in a setting of cooperative action by two interested states. In that aspect there can be no conflict with Part II of the *Canada Evidence Act*. The latter is a code of provisions of a strictly evidentiary nature concerned with issues raised in existing litigation. The former is more than and different from that: its purpose is to establish the basis for a proceeding elsewhere through the proof of facts within Ontario: an originating proceeding which forms the jurisdictional basis of fact for the supplementary and effective process elsewhere.

The arrangement is said to be, in effect, a treaty to which the province has no authority to become a party. A treaty is an agreement between states, political in nature, even though it may contain provisions of a legislative character which may, by themselves or their subsequent enactment, pass into law. But the essential element is that it produces binding effects between the parties to it. There is nothing binding in the scheme before us. The enactments of the two legislatures are complementary but voluntary; the application of each is dependent on that of the other: each is the condition of the other; but that condition possesses nothing binding to its continuance. The essentials of a treaty are absent; and it would be an extraordinary commentary on what has frequently been referred to as a quasi-sovereign legislative power that a province should be unable within its own boundaries to aid one of its citizens to have such a duty enforced elsewhere. The alternative entrance upon such a field by Parliament needs only to be mentioned to be rejected: and that authority must lie in the one or the other to effect such an arrangement is, in my opinion, indubitable.

Similar observations are pertinent to the contention of delegation. The action of each legislature is wholly discrete and independent of the other, a relation incompatible with delegation; and that it is a case of adoption is equally clear. But it is a circumscribed adoption; there is a single right involved, the private right of maintenance between husband and wife; the right touches a resident of each country; the obligation of support is recognized by both; and the material matters of adoption go to the grounds of

defence. There is no attempt to permit another legislature to enact general, or generally, laws for a province: that would obviously be an abdication. The adoption of rules and procedure from time to time in force in another jurisdiction is exemplified by rule 2 of the Exchequer Court; and the adoption of various provisions of the *Criminal Code* by provincial statutes is seen in R.S.O. 1950, c. 379, s. 3. From the standpoint of legislative competency I see no difference between the adoption of procedure and that of substantive law; in each case legislation is enacted by reference to the legislation as it may from time to time be of another legislature. No challenge could be made to the complementary English enactment here, and if the province cannot exercise the same power in relation to a subject of such a local and civil rights nature, then the oft-quoted words of Lord Fitzgerald in *Hodge* v. *The Queen* (1), that its power is "as plenary and as ample within the limits prescribed by s. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow" would seem to be somewhat rhetorical.

Being within the scope of provincial authority, the tribunal by which the cause is to be adjudged appears to be already determined. Duties of this nature are daily enforced in the inferior courts of Ontario and the residence of the complaining party cannot affect the judicial jurisdiction where the case is brought within the same class of legislative power. And in the result the case is the same as if, under a provincial statute providing for maintenance of wives so placed, the wife here had come to Ontario and instituted proceedings thereunder.

The Chief Justice says:—

> In the view I take of this case it becomes unnecessary to decide whether, when the provisional order in question was transmitted to the Family Court for the County of Simcoe, Magistrate Foster was intended to exercise the jurisdiction that existed in him in his capacity of a judge of the juvenile court or his jurisdiction in his capacity of magistrate, because I am of the opinion that in neither capacity can he lawfully exercise the power of confirmation of provisional maintenance orders made in another Province or in some other country.

In this, with great respect, the Chief Justice seems to have been misled by the expression "provisional maintenance orders". The Ontario court is not completing an operative

(1) (1883) 9 A.C. 117.

1955

A.G. FOR ONTARIO v. SCOTT

Rand J.

foreign order whether in relation to a province or to another country; it is making an original order of its own, the preliminary grounds and condition of which is a step taken elsewhere; that step has no substantive efficacy until by acceptance it is adopted and incorporated in the action of the Ontario court. From the beginning it is intended to be a constituent of the proceedings against the debtor in Ontario from the law of which it will draw the only substantive effectiveness it can ever possess.

It is then urged that the family court judge is not capable of accepting the reference by the Attorney General. But the definition of "court" in the statute includes "any authority having statutory jurisdiction to make maintenance orders". Admittedly the family court has that jurisdiction, and it is, therefore, a court to which the reference may be made. The exercise of its authority over the respondent will be subject to the conditions of ordinary jurisdiction over a defendant, and that as the Chief Justice of the High Court held, will depend upon evidence. Finally, it is said that the provision in the order stating the maintenance in terms of sterling currency is beyond the authority of an inferior court to confirm; but as pointed out by Chief Justice McRuer under s-s. (3) of s. 5 the confirmation may be made with such modifications "as to the court may seem just". The modification from one currency to that of this country is simply adopting a measure to determine the amount which the law of Ontario will obligate the husband to pay for maintenance. I cannot agree that a reasonable basis of that sort can be objected to as beyond provincial legislative power.

I would, therefore, allow the appeal and affirm the dismissal of the application. There will be no costs in the Court of Appeal. The costs in this Court will be according to the terms of the Order of the Court of Appeal giving leave to appeal to this Court which this Court adopted in its Order granting leave to appeal. There will be no costs to or against the intervenant, the Attorney General of Canada.

The judgment of Taschereau, Fauteux and Abbott JJ. was delivered by:—

ABBOTT J.:—The principal question involved in this appeal is the constitutional validity of the *Reciprocal Enforcement of Maintenance Orders Act,* R.S.O. 1950, c. 334.

The learned Chief Justice of the High Court, by a judgment dated March 4, 1954, dismissed the application of respondent for an Order of Prohibition to prohibit His Worship, Magistrate Gordon R. Foster, Judge of the Family Court for the County of Simcoe, from taking further proceedings in connection with a Provisional Order and Show Cause Summons under the said Act. Respondent appealed to the Court of Appeal (1), which unanimously held the Act to be *ultra vires,* allowed the appeal and granted the Prohibition Order. Pickup C.J.O. for the full Court held that the Act is *ultra vires* for two principal reasons—firstly, by providing that in the proceedings in Ontario any defence may be raised that might have been raised if the defendant had been a party in the proceedings in England, the Legislature has, in effect, delegated legislative authority to other provinces and states; secondly, the Legislature has purported to confer on a tribunal other than a court mentioned in s. 96 of the *B.N.A. Act,* power to determine whether or not a resident of Ontario is liable to maintain a non-resident wife or children by reason of an Order made by a tribunal outside the province and has thereby exceeded its jurisdiction.

The relevant sections of the impugned Act are as follows:—

4. (1) Where an application is made to a court in Ontario for a maintenance order against any person, and it is proved that that person is resident in a reciprocating state, the court may, in the absence of that person and without service of notice on him, if after hearing the evidence it is satisfied of the justice of the application, make any such order as it might have made if a summons had been duly served on that person and he had failed to appear at the hearing, but in such case the order shall be provisional only, and shall have no effect unless and until confirmed by a competent court in the reciprocating state.

5. (1) Where a maintenance order has been made by a court in a reciprocating state and the order is provisional only and has no effect unless and until confirmed by a court in Ontario, and a certified copy of the order, together with the depositions of witnesses and a statement

(1) [1954] O.R. 676; 4 D.L.R. 546.

1955

A.G. FOR ONTARIO v. SCOTT

Abbott J.

of the grounds on which the order might have been opposed is received by the Attorney-General and it appears to him that the person against whom the order was made is resident in Ontario, the Attorney-General may send the documents to the proper officer of the Supreme Court if the court by which the order was made was a court of superior jurisdiction or such court as is determined by the Attorney-General, if the court by which the order was made was not a court of superior jurisdiction, and upon receipt of the documents the court shall issue a summons calling upon the person against whom the order was made to show cause why the order should not be confirmed, and cause it to be served upon such person.

(2) At the hearing it shall be open to the person on whom the summons was served to raise any defence that he might have raised in the original proceedings had he been a party thereto but no other defence; and the statement from the court that made the provisional order stating the grounds on which the making of the order might have been opposed if the person against whom the order was made had been a party to the proceedings shall be conclusive evidence that those grounds are grounds on which objection may be taken.

In my opinion ss. 2 and 3 of the Act are clearly severable from ss. 4 and 5 and need not be considered for the purposes of this appeal.

Dealing first with the finding of the Court of Appeal that the Legislature has exceeded its jurisdiction in purporting to confer upon a tribunal other than a Court mentioned in s. 96 of the *B.N.A. Act,* power to determine the liability of a resident of Ontario to maintain a non-resident wife or children. Maintenance Orders have been held by this Court to be matters falling within the jurisdiction of inferior tribunals, see *Reference Re Adoption Act* (1). It was not suggested in argument before us that a judge of the Family Court would not have been competent to make a Maintenance Order under *The Deserted Wives' and Children's Maintenance Act,* R.S.O. 1950, c. 102, where all the parties resided within the province. This being so, I can think of no valid reason why that Court could not make a Provisional Order such as that contemplated in s. 4 of the Act impugned. Similarly, with the greatest respect, I see no reason why that Court is not equally competent to make and enforce an order under s. 5, based upon proceedings initiated in another province or in a foreign country.

The purpose of s. 4 is to enable a deserted wife or child in Ontario to take preliminary steps within the province to obtain maintenance from the husband or father residing

(1) [1938] S.C.R. 398.

outside the province. Conversely s. 5 is aimed at providing means of enforcement against a husband resident in the province, of an obligation to maintain a wife or children resident elsewhere.

In fact no rights are conferred and no issues settled, by the Provisional Order made under s. 4. Such order is merely a preliminary step taken in the province with a view to obtaining a Maintenance Order against the husband or father of deserted wives and children who reside in the province, and failure to compel the person responsible for such maintenance to provide it, might well result in the burden being thrown upon the local community. As Duff C.J. said in the *Adoption Act Reference* (*supra*) at p. 403:—"The responsibility of the state for the care of people in distress (including neglected children and deserted wives) . . . rests upon the province" and in my view the maintenance of such persons is a matter of a merely local or private nature in the province falling within head 16 of s. 92 of the *B.N.A. Act*.

So far as s. 4 of the Reciprocal Act is concerned, I am in respectful agreement with the following view expressed by the learned Chief Justice of Ontario in the Court below:—

> Civil rights outside of the Province are not affected by it (the Provisional Order made under s. 4) but by the confirmation order (if any) made in the reciprocating State. I am unable to see any valid legal reason why the Province of Ontario cannot, in relation to a subject matter within its legislative jurisdiction, make a reciprocal arrangement with another Province or a foreign State in relation to such subject matter. It is not, in my opinion, the exercise of any treaty-making authority vested in the Parliament of Canada. To hold otherwise would, I think, be to stultify the exercise within Ontario of the power which the Province undoubtedly has to provide for maintenance of wives and children who are resident within the Province. One means of doing this is by reciprocal arrangement with other States, such as appears in the statute. I would, therefore, not give effect to the contention of the appellant that the statute in question is *ultra vires* of the Legislature of the Province in that it deals with civil rights outside the Province, or deals with matters of international comity.

As to s. 5, it is clearly competent to any province to determine for the purpose of a civil action brought in such province, what evidence is to be accepted and what defences may be set up to such an action. With the greatest respect for the learned judges in the Court below who have expressed the contrary view, the provision contained in s. 5(2) that "it shall be open to the person on whom the

1955

A.G. FOR ONTARIO v. SCOTT

Abbott J.

summons was served to raise any defence that he might have raised in the original proceedings had he been a party thereto but no other defence" is not in my opinion a delegation of legislative power to another province or state. It is merely a recognition by the law of the province of rights existing from time to time under the laws of another province or state, in accordance with the well recognized principles of private international law. Section 5 is in my opinion legislation in relation to the administration of justice in the province, including procedure in civil matters in the Provincial Courts and as such, within the exclusive legislative competence of the province under head 14 of s. 92.

The other questions raised by respondent were satisfactorily disposed of in my opinion by the Courts below.

I would allow the appeal and restore the judgment of the learned Chief Justice of the High Court. There should be no costs on the application or in the Court of Appeal. The costs in this Court should be as stipulated in the Order of the Court of Appeal granting leave.

LOCKE J.:—On December 31, 1951, Elizabeth Scott, then a resident of London, England, applied before a magistrate in the Lambeth Metropolitan Magistrates Court in the County of London for a maintenance order under s. 3 of the *Maintenance Orders Facilities for Enforcement Act 1920* (Imp.), on the ground that the defendant, her husband John Lewis Scott, had wilfully neglected to provide reasonable maintenance for her and their two infant children.

Evidence given before the magistrate by Mrs. Scott showed that she had married John Lewis Scott in Scotland, that thereafter, following the birth of two children, they had come to Canada and lived here until December 1949 when after entering into a separation agreement she had returned to England, and, further, that Scott was at the time of the application a soldier in the Canadian Army stationed at Malton, Ont.

Upon this application, the magistrate made an order awarding custody of the children to the wife and directing that the defendant pay certain sums weekly, stated in English currency, to the Chief Clerk of the Lambeth Metropolitan Magistrates Court, for the use of the wife and the

maintenance of the children. The order signed by the magistrate declared that it was provisional only and was to have no effect unless and until confirmed by a competent court in Canada.

On August 1, 1952, a certified copy of the order and of the deposition made by the wife before the magistrate in London and the latter's statement of the grounds on which the order might have been opposed in the court in England was forwarded by the Department of the Attorney General to the Family Court for the County of Simcoe, under the provisions of s. 5 of the *Reciprocal Enforcement of Maintenance Orders Act* (c. 334, R.S.O. 1950). On August 6, 1952, a summons was issued by a justice of the peace for the County of Simcoe, reciting the terms of the provisional order made in England and directing Scott to appear before the judge of the Family Court for that county on August 21, 1952, to show cause why the order should not be confirmed.

Scott was served with this summons in the County of Simcoe though, according to an affidavit filed by him later upon the application for prohibition, he was not at that time resident in that county. On the matter coming before the judge of the Family Court, he decided that he had jurisdiction in the matter but adjourned the hearing, having apparently been informed that prohibition proceedings were contemplated.

On September 18, 1953, Scott launched an application for an order prohibiting the judge of the Family Court from taking any further proceedings in connection with the provisional order and, before the hearing of this application, gave notice of the grounds which would be urged in support of it, including the ground that the *Reciprocal Enforcement of Maintenance Orders Act* was *ultra vires* of the Legislature. This application was dismissed by the learned Chief Justice of the High Court, but the appeal (1) taken from his order by Scott was allowed by the unanimous judgment of the Court of Appeal delivered by the learned Chief Justice of Ontario, the Court directing that the prohibition order sought by the appellant be made.

(1) [1954] O.R. 676; 4 D.L.R. 546.

1955

A.G. FOR ONTARIO v. SCOTT

Locke J.

The Imperial statute under which the proceedings were initiated in England was first enacted as c. 33, 10-11 Geo. V and provides by s. 3(1):—

> Where an application is made to a court of summary jurisdiction in England or Ireland for a maintenance order against any person, and it is proved that that person is resident in a part of His Majesty's dominions outside the United Kingdom to which this Act extends, the court may, in the absence of that person, if after hearing the evidence it is satisfied of the justice of the application, make any such order as it might have made if a summons had been duly served on that person and he had failed to appear at the hearing, but in such case the order shall be provisional only, and shall have no effect unless and until confirmed by a competent court in such part of His Majesty's dominions as aforesaid.

The Ontario Act was first enacted in that province as c. 53 of the Statute of 1948. The statute is patterned upon the English Act and expressed in terms which are in many respects identical. The purpose of both statutes is clearly to provide the machinery for registering maintenance orders which are binding upon persons resident and subject to the jurisdiction of a reciprocating state, without the necessity of initiating proceedings anew in that state, and to provide a means whereby proceedings may be initiated for the purpose of taking evidence which may be used in support of an application for maintenance against a person who is subject to the jurisdiction of a reciprocating state and not within the jurisdiction of the court in which such proceedings are taken.

S. 2 of the Ontario Act is to the same effect as s. 1 of the English Act and provides that where a maintenance order has been made against any person by a court in a reciprocating state, that order may, in a manner specified, be registered in the appropriate court in Ontario and proceedings taken under it as if it had been originally obtained in the latter court. The section, while silent on the point, clearly contemplates that the order for maintenance so registered shall have been made by a court having jurisdiction over the person against whom the award is made. This point was so determined in *Re Kenny* (1) by the Court of Appeal. No question as to the power of the Legislature to enact s. 2 has been argued before us and I express no opinion upon the point.

S. 4(1) of the Act empowers the court to which the application is made to make a provisional order of the same

(1) [1951] O.R. 153.

nature as that referred to in s. 3(1) of the English Act. The application may be dealt with *ex parte,* the order made may be such as might have been made if the summons had been duly served upon the person against whom the application is directed and is to be provisional only and without effect until confirmed by a competent court in a reciprocating state.

S. 5 of the Ontario Act and s. 4 of the English Act prescribe the procedure to be followed when an application to "confirm" an order is made to the court in Ontario and England respectively.

As distinguished from orders which may be registered under the provisions of s. 2 of the Ontario statute made by a court having jurisdiction to make an effective award against a person, ss. 3(1) of the English Act and 4(1) of the Ontario Act appear to me to contemplate proceedings when, owing to the husband being a resident of a reciprocating state and thus not within the territorial jurisdiction of the court to which the application is made, an order which might be registered under the terms of s. 2 cannot be made.

The use of the word "confirmed", both in the English and Ontario statutes, seems to be unfortunate. To speak of confirming an order which of itself has no binding effect seems to me to be a misuse of language and it is, indeed, in my opinion, the use of this expression which has invited the attack upon the legislation. In effect, the evidence in the present matter given before the magistrate in London, the transcript of which was forwarded by him with the provisional order, is made evidence in the proceedings in Ontario. The provisional order for maintenance made for the wife and children is an indication of what the magistrate in England considers appropriate in their circumstances. In the proceedings in Ontario, the husband may, by virtue of s-s. 2 of s. 5, raise any defence that he might have raised in the proceedings in England and the magistrate to whom the application is made may "confirm" the order, with such modifications as might be considered just, meaning that he may make such order as he may think proper upon the evidence. The language employed in s-s. 3 of s. 5 again suggests that some legal effect is given

1955

A.G. FOR ONTARIO v. SCOTT

Locke J.

to the order made in England, but this clearly cannot be so. The order made must derive its legal force and effect entirely from the applicable Ontario statute.

The first objection to the validity of the statute is directed to s-s. 2 of s. 5 which limits the available defences to those that might have been raised in the original proceedings in England. The defences permitted under the law of England, as of the date the *Reciprocal Enforcement of Maintenance Orders Act* came into force in Ontario, may have been extended or limited by legislation passed thereafter in England, and this, it is contended, amounts to a delegation of the authority of the legislature of its power to deal with the civil rights of residents of Ontario. That this cannot be done is made clear by the judgment of this Court in *Attorney General of Nova Scotia* v. *Attorney General of Canada* (1). I have come to the conclusion that this objection should not prevail. It is, in my opinion, a valid exercise of provincial powers under head 13 of s. 92 of the British North America Act to declare that the defences which may be relied upon in proceedings of this nature shall be those from time to time permissible under the laws of England, those laws in substance being adopted and declared to be the law in the province. The provisions of the *Summary Conviction Act of Ontario* which incorporate Part XV and certain other specified sections of the *Criminal Code,* as amended and reenacted from time to time, appears to me to well illustrate such legislation by adoption, if it may properly be so described, and to be valid.

Mr. Gordon R. Foster, to whom the application in the present matter was made, was a police magistrate having jurisdiction in all municipalities of Ontario, a judge of the Juvenile Court in the County of Simcoe and judge of the Family Court in that county. The various appointments to these offices were made by the province under the powers vested in it by head 14 of s. 92. That such appointments were within provincial power cannot be questioned since the decision of this Court in *Re The Adoption Act* (2).

The opinion of the Court of Appeal that the jurisdiction sought to be vested in the court by the *Reciprocal Enforcement of Maintenance Orders Act* was beyond provincial

(1) [1951] S.C.R. 31.

(2) [1938] S.C.R. 398, 419.

powers was based upon the ground that it was an attempt by the Legislature to clothe an existing inferior court or some new provincial court with power to determine the legal rights of residents of the province, in respect of orders pronounced in another territorial jurisdiction, and that this was repugnant to the provisions of s. 96 of the *British North America Act*.

With great respect, I am unable to agree with this conclusion. I think the question as to whether courts such as these might decide whether the so called order made in England is enforceable against the husband does not arise in the present matter. The order, with the certified copy of the depositions of the witnesses heard by the magistrate in England, afford evidence upon which the magistrate may make an order against the husband and does nothing more. Any award made must depend entirely for its validity upon the order made by the magistrate under the Ontario statute. It is true that there will be questions of law to be determined when the application is heard as to the proper interpretation of s-s. 1 of s. 3 of the English statute. Such questions, I assume, will include that as to whether the court by which the order was made in London was of the nature referred to in that subsection, whether the order made was such as might have been made if a summons had been duly served on the person against whom the application was directed, as to the grounds of defence available at the time in England and as to the proper construction of portions of s. 5 of the Ontario Act. The important duties imposed upon the provincial judicial appointees charged with the administration of these Ontario statutes require them continually to determine questions of this nature which, of necessity, must be decided to enable them to discharge their functions, and I cannot think that the questions that may arise in this proceeding are in any essential respect different. For these reasons, I think this attack upon the legislation fails.

A further objection to the validity of the statute was that the adoption of this statute and of similar legislation by other reciprocal states indicates that an agreement had been made between the province and such states to legislate in this manner, and so was an entry by the province into matters of international comity and amounted in substance

1955

A.G. FOR ONTARIO v. SCOTT

Locke J.

to a treaty. The short answer to this contention is that there is no evidence to suggest that any such agreement existed, and that the legislation may be repealed at any time by the legislature which enacted it. No agreement to the contrary by the province, even if it could be suggested that any such agreement had been made, would have any legal effect.

I would allow this appeal. The respondent should be allowed his costs to the extent provided in the order of the Court of Appeal of September 14, 1954, and there should be no other order as to costs.

Appeal allowed; costs as per terms.

Solicitor for the A.G. of Ontario: *C. R. Magone.*

Solicitor for the A.G. of Canada: *F. P. Varcoe.*

Solicitors for the respondent: *Wright & McTaggart.*

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*PRESENT: Kerwin C.J., Taschereau, Rand, Kellock, Estey, Locke and Abbott JJ. Estey J. did not take part in the judgment on account of illness.