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THE LANCASTER BILL

FULL TEXT OF THE OPINION OF MR. JUSTICE ANGLIN OF THE SUPREME COURT

We are pleased to be enabled to give in this week's issue, a portion, and will continue next week, the opinion handed down by that learned jurist, Mr. Justice Anglin, one of the Supreme Court Judges, regarding the Lancaster Bill and certain questions

Lancaster Bill and certain questions concerning marriage: I have aiready stated my concurrence in the reasons assigned by Mr. Justice Davies for answering the first question submitted in the negative. I am, how-ever, unable to agree in his reasons and conclusions in regard to question No. 2 have reached the conclusion that we should answer the second question without making any such representation. In deterence to their views 1 proceed to express my opinion upon it. Being charged to define and declare the Civil Law of the Province of Queber and must therefore express my own views upon it. Since the majority of the Judges of this

upon this question to the best of our ability, it is, in my opinion, Since the majority of the Judges of this Court are of the opinion that the Domin-ion Parliament does not possess juris-diction to legislate in respect of the subject matter of Question No. 2, it is difficult to perceive how an answer to it can be useful either to Parliament or to the Governor General in Council. It concerns the interpretation of a provin-cial law dealing with a matter within the exclusive jurisdiction of the provin-cial legislatures. I find it almost im-noasible to believe that it was expected our duty as judicial officers of a Canadian Civil Tribunal to consider and to give effect to the ecclesias-tical law, whether of the Catholic or of any other church, so far, but so far only, any other church, so far, but so far only, as it is found to be incorporated in the Common (Civil) Law or as the legisla-ture has seen fit to recognize and adopt it and to give civil efficacy to it. We are in nowise concerned with the policy, the propriety or the impropriety, the desirability, or the undesirability, of whatever course the legislature has in this regard seen fit to pursue in the ex-ercise of its discretion, which, within that in the event of this Court answer-ting questions Nos. 1 and 3 in the nega-tive it should proceed to answer this second question which would thus have

ercise of its discretion, which, within the ambit of the jarisdiction committed to it by the Imperial Parliament is, for all judges of civil courts in this country, ecome purely academic. I think we might well have acted upon the suggestion presented by the Deputy of the Minister of Justice, when, towards the close of the argument, he

"If your Lordships conclude therefore here is jurisdiction, I submit that that there is jurisdiction, I submit that on no consideration which has been or can be suggested should your Lordships, fail to advise upon every point that has been placed before you. On the other hand, if it be determined that there is no jurisdiction to enact the Bills differ-ent situation is before your Lordships. ent situation is before your Lordships. "If it appear on the reading of this submission that there is in effect one in-

state it as fully as is necessary for the disposition of the questions submitted. The Civil Code of Lower Canada be-came law in 1896 the clauses having regard to what might follow from the different views which the The Civil Code of Lower Canada be-came law in 1866—the year preceding Confederation. The Legislature which enacted it had complete jurisdiction over the subject of marriage in the then Province of Canada. The Fifth Title of the Civil Code deals with Marriage. The first chapter of that Title treats: "Of the complifies and conditions Court might entertain, it is quite open and proper for the Court no doubt to submit that in view of the opinions which are handed in upon certain parts of the interrogation it becomes unneces-sary, in the view of the court, to answer the rest. And if the Government upon that submission, entertain a different view, I presume the Government would communicate that to the Court for further consideration.

ther consideration." "The Court, in its superior knowledge of the constitution and the working of the laws, may upon the consideration of these questions see reasons instead of answering categorically to submit points for the consideration of the Government with recruit to the matter. That is the with regard to the matter. That is the situation here. I submit that the matter is in your Lordships hands here as one interrogation arising out of a sit-uation created in vew of the public agitation and the introduction of this

applicable, invalidates marriage (vide Arts. 148 155 C.C.) The last article of the first chapter, No. 127, reads as follows : "127. The other impediments recog-nized according to the different relig-ious persuasions, as resulting from re-lationship or affinity or from other causes, remain subject to the rules hitherto followed in the different churches and religious communities. Mr. Justice Duff : If the substance of No. 1 and No. 3 is answered in the negative-assuming that the substantial question which is to be found in these two questions is answered in the nega

"Mr. Newcombe : If that be the purpose of your Lordship's question I con-cede immediately that it is a case in cede immediately that it is a case in which it would be proper for your Lord-ships if you so consider to submit an in-quiry to the Government or to submit any suggestion which your Lordships within the limitation of the Lord Chan-

Inserve interve enjoyed it. Inserve as "relationship" and "affinity" exhaust the genus to which they belong, it is obvious that the "other causes" referred to in Art. 127 cellor's judgment may deem proper." Moreover, Counsel representing the cannot be restricted to impediments ejusdem generis with consanguinity and Moreover, Counsel representing the Province of Quebec have stated to us the view of the Government of that Province (the legislation of which can alone be affected) that, while in the event of the reply to either of the 1st affinity. That would be to deny effect to the words "other cau alone be affected) that, while in the event of the reply to either of the last or the 3rd questions being in whole or in part in the affirmative, this second ingicate persuasions of another kind "re-cognized according to, the different re-ligious persuasions"—presumably of the THE CATHOLIC RECORD

ently proper that before proceeding to deal with the second question we should respectfully represent to the Governor General in Council the undesirability in our opinion of our answering it sizce the view of the majority of the judges of this court is that the Parliament of Canada is entirely without jurisdiction to legislate in the direction suggested; and that we should proceed to reply to that question only upon being officially informed that it is the wish and the in-tention of the Governor General in Council that it should be answered not-withstanding the negative reply made emnized. Upon that assumption it is argued that this cannot be one of the "other impediments" referred to in an article which is found in a chapter devoted to impediments and conditions that affect the capacity of the parties to the marrisge; that the "other impedi-ments" covered by article 127 must, under the rule noscurtur a socis, be of that character. While this contention would have much force if the assumpthat character. While this contention would have much force if the assump-tion on which it is based were unim-peachable, it will be observed that the Tridentine Decree purports not merely to prescribe "the presence of the parish priest or of the priest who has his per-mission or that of the Ordinary" as a condition of the validity of the marri-are but that it nurports to affect dir. withstanding the negative reply made to the other questions propounded. But a majority of my learned brothers

condition of the validity of the marri-age, but that it purports to affect dir-cetly the capacity of the parties them-selves by declaring them to be "omnino inhabiles" — wholly incapable of thus contracting marriage. It professes to create a veritable inhabilitatio person-arum. Art. 127 O. O. deals with "im-pediments recognized according to the pediments recognized according to the different religious persuasions"—" em-pechements admis d'spres les differentes pechements admis d'apres les differentes croyances religieuses." In order to give full effect to these words, it seems to me incontrovertible that we must for the purposes of Art. 127 regard any imthe purposes of Art. 127 regard any im-pediment defined by a religious body as possessing the character which that body declares it to have and as produc-ing the effects which that body ascribes to it.

When it is declared by the Catholic When it is declared by the Catholic Church that Catholics are incapable of contracting marriage except in the presence of the parish priest or of the priest who has his permission or that of the Ordinary, the expressed intention of the Church is to attach a proceeding to the the expressed intention of the Church is to attach a personal incapacity to the parties. If the impediment thus created is to be accepted as it is "recog-nized by the religious persussion" and as "subject to the rules of the church," it follows that it is properly included under Art. 127 C. C. as an im-pediment which affects the capacity of Catholics to contract mariage. which have been admitted, and are printed in the Joint Appendix. Except in so far as it is admitted, that law would require to be proved as any other matter of fact. I necessarily proceed upon the assumption that the admitted documents state it as fully as in necessary for the Catholics to contract marriage. Declaration,

Catholics to contract marriage. By the Benedictine Declaration, originally published in 1741, for "those places subject to the sway of the Allied Powers in Belgium" and the town of Maestricht, and subsequently extended to the Church of Canada and Quebec, as appears by the replies given by the Holy Council of the Propaganda under Clement XIII, in the year 1764, to the Vicars of the Diocese of Quebec, and published in 1865 by Mgr. Baillargeon, Administrator of that Diocese, it is

The first chapter of that Title treats: "Of the qualities and conditions necessary for contracting marriage (Des qualities et conditions requises pour pouvoir contracter marriage); the second 'Of the formalities relating to . . . are contracted without the form established by the Council of Trent, by Catholics with heretics, wherever Catholic man marry a heretic woman or a Catholic woman marry a heretic man the Solemnization of Marriage;' the third 'Of Opposition to Marriage;' the fourth 'Of actions for annulling mar-. . . if perchance a marriage of this kind he actually contracted there where-

in the Tridentine form has not been o God avert) should happen to be con-tracted, His Holiness declares that such number of articles enumerating various impediments which render persons in-capable of validly contracting marriage marriage if no other canonical impedi-ents occur is to be deemed valid, and ent the non-observance of which, when applicable, invalidates marriage (vide

that neither one of the persons in any way can, under pretext of the said form not having been observed, enter upon a new marriage while the other person is still alive." Marriage between a Catholic and a non-Catholic was, therefore, exempted by the Benedictine Declaration from the operation of the Decree of the Council of Trent and the impediment which would otherwise have affected at least the Catholic party to such a

least the Catholic party to such a marriage was thus removed. Such, according to the documents submitted to us, was the law of the Catholic Church on this subject at the time when the Civil Code of Lower Canada was enacted. It was conceded Canada was enacted. It was concered at bar by Counsel instructed by the Dominion Government to support an affirmative answer to the second question that the presence of the word "hither-to" in Article 127 procludes the inclusion within it of impediments created or revived by any subsequent laws or decrees of any religious body and that, the

fused to hear parties who sought to have their marriages avoided on the pretext that they had been celebrated by an in-competent priest. The explanation of the judgments in these cases is not, he adds, that the marriages celebrated by an incompetent priest can ever be valid, or that the vice which attaches to it can be purged by any lapse of time, but that having regard to the circumstances of the cases the applicants were unworthy of being heard and that it should be presumed that the priest who had cele-brated the marriage had received the permission of the curé. He further says in No. 363 that :

permission of the curé. He further says in No. 363 that: "The celebration of marriage in the face of the church by the proper curé is not a matter of pure form; it is an obli-gation which our laws impose on parties who wish to contract marriage from which the parties subject to it cannot withdraw themselves." The intention having been to repro-duce the existing law, we find in this text of Pothier the explanation of the purpose and extent of the discretion which the concluding words of Art. 156 reserved to the Courts. No doubt is thereby cast on the absolute nullity of the marriage not solemnized before a the marriage not solemnized before a competent officer, which is declared in the same terms and may be asserted by

the same terms and may be asserted by the same class of persons as is provided in the case of the nullity of incestuous marriages. (Vide Art. 152). But, although the impediment to the marriage of Catholics otherwise than in accordance with its requirements created by the Tridentine Decree should, be-cause the Decree so defines its operation be deemed to affect the capacity of Catholics to contract marriage for the purpose of its inclusion within Art. 127 C. C., it nevertheless has to do directly with the solemnization of marriage, and the right to impose or to remove it as a condition of the civil validity of mar-riage rests exclusively with the provinriage reats exclusively with the provin-cial legislatures for the reasons stated by Mr. Justice Davies in dealing with the first question.

To summarize:

To summarize: According to the law of the Catholic Church, the marriage of two Catholics otherwise than as prescribed by the Tridentine Decree is void. The impedi-ment of the Church law is recognized and adopted by Art. 127 of the Civil Code of Lower Canada, and provision is expressly made for judicially establish-ing such nullity (Art. 156) By reason of the exempting clauses of the Benedic-tine Declaration the marriage of a Catholic with a non-Catholic is not sub-isect to this condition under the civil ject to this condition under the civil

law. A careful analysis of other provisions of the Civil Code in the light of the history of the Civil Law of Lower Canada leads to the same conclusion in-dependently of any recognition or adoption of the law of the Catholic Church in regard to marriage. This aspect of the question is fully con-sidered by Mr. Justice Jette in Laramee V Evans 25 L. C. Jurist. 261, and by v. Evans, 25 L. C. Jurist, 261, and by Mr. Justice Lemieux, sitting in the Court of Review, in Durocher v. Degre,

Contr of Review in Durocher V. Degre, Q. B., 20 S. C. 456, 471. I shall not do more than outline my views upon it. By Art. 40 of the Ordinance of Blois (1570) provision was made for the publication of banns, the public celebration of marriage in the presence of your witnesses and the registration of the same-the whole subject to the penaltie

bane-the whole subject to the penalties decreed by the Church Councils. By art, 12 of the Edict of Henry IV. (1606) it was ordained that marriages not entered into and celebrated in the Church and with the theory of the theory Church and with the form and solemn-ity required by Art. 40 of the Ordin-ance of Blois be declared void by the

ance of Blois be declared void by the ecclesiastical judges. By the declaration of Louis XIII. (1639,) which directed that the Ordin-ance of Blois should be strictly ob-served and interpreted if it was or-dained that proclamation of banns should be made by the curé of each of the certracting parties and that at the the contracting parties and that at the celebration of the marriage four trustworthy witnesses should assist, besides or revived by any subsequent laws or decrees of any religious body and that, in the absence of other recognition by the legislature, the recent Papal Decree known as Ne Temere does not affect the civil validity of marriages affect the civil validity of marriages ceive, and enjoy their accustomed dues and rights with respect to such permarriage except between their true and ordinary parishioners without the writ-ten permission of the curés of the

sion was made for the keeping of regis-ters in all parish churches and for their form and the entries to be made there-While there has been some contro

versy as to the effect of the Capitulation of the Cities of Quebec and Montreal and of the Treaty of Paris and Montreal and of the Treaty of Paris (1763) upon the foregoing laws, the great weight of anthority supports the view that they remained in force after the Cession of Causda to Great Britain. See Stuart v. Bowman (1831) 2 L. C. Rep. 369; Wilcox v. Wilcox (1857) S. L. C. Jur., 1, 7, 27. The Anglican Church was not intro-duced into Canada as an established church. The exclusive authority of Catholic parish priests to celebrate

Catholic parish priests to celebrate marriage would, lowever, be held not to extend to the new Protestant inhabit-ants of Canada and the right of clergyants of Canada and the right of clergy-men of the Anglican church to solemnize marriage between them would be deemed to have been introduced with-out express legislation as a result of the acquisition of the country by Great Britain. In my opinion, the Anglican clergy after the Conquest also shared with the Catholic priests the right under the civil law to solemnize the marriages of Protestants with Catholics, although the validity of such marriages if not solemnized before the Catholic Church dates only from 1754. This seems to me to be the necessary result of the Church dates only from 1754. This seems to me to be the necessary result of the situation as recognized by their Lord-ships of the Privy Council in Brown vs. The Curé, etc., of Montreal (The Gui-bord Case) L. R. 6 P. C., 157, at pp. 109.7, ad of the dorthing enumained p. 206-7 and of the doctrine enunciated in Long vs. The Bishop of Cape Town, 1 Moore, P. C., (N. S.) 411, at p. 461 : "The Church of England in places

where there is no church established by law is in the same situation with any other religious body - in no better, but

in no worse, position." While British settlers in British Colonies and in conquered and ceded territory are themselves entitled to the benefit of their own marriage laws, and

are unaff.cted in this respect by the laws of the country (Lautour v. Tees-dale 8 Taunton, 830), the latter, nevertheless, as part of the private law (Saltheless, as part of the private law (Sal-mond on Jurisprudence) D. 484; Holiand on Jurisprudence, p. 168, govern the inhabitants until altered by the com-petent jarisdiction of the new Sover-eignty. Halleck on International Law

eignty. Halleck on International Law (4th. ed.) Vol. 2. p. 516; Biackstone (Lewis ed. 1902) Vol. 1. pp. 107 8. The Royal Proclamation of 1763 and the instructions given to the Governors between 1763 and 1774 are invoked in support of the contention that during this period the English Common Law was in force in Canada. I am unable to accept this view. (See Chief Justice Hey's Report 1 L C. Jurist, Appendix.) But whether it be or be not well founded, by the Quebec Act, passed by the Im-perial Parliament in 1774, it is expressly

enacted (S, 4) that the :--"Proclamation (of the 7th October, 1763) so far as the same relates to the 165) so far as the same fender to the Com-mission under the authority whereof the Government of the said province is at present administered and all and every the Ordinance and Ordinances made by the Governor-in Council of Quebec for the time being valative to the divil

the time being relative to the civil government and the administration of ustice in the said province—be and the same are hereby revoked, annulled and made void from and after the first

day of May, 1775." Secs. 5 and 6 of the Quebec Act are as follows: '5. And for the more perfect secur-

5. And for the more perfect security and ease of the minds of the inhabitants of the said Province, it is hereby declared that His Majesty's subjects professing the religion of the Church of Rome, of and in the said Province of Quebec, may have and hold the free exercise of the religion of the Church of Rome subject to the King's supremacy, declared and established by an Act made in the first year of the reign of Queen Elizabeth over all the dominions and contries which then did, or there. and countries which then did, or there-after should belong to the Imperial Crown of this Realm; and that the Clergy of the said Church may hold, re-

evidence in all courts of justice, in each of which the said rector, curate, vices or other priest or minister, doing the parochial or clerical duty of such parish or such Protestant church or congregation, shall be held to enregis-ter regularly and successively all bap-tisms, marriages and burials so soon as the same shall have been by them per-formed." "Sec. 10 declares that certain registers

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of the Protestant congregation Christ Church, Montreal, shall "have the same force and effect to all

intents and purposes as if the same had been kept according to the rules and forms prescribed by the law of the provin

Sec, II contains a similar provision in Sec, 11 contains a similar provision in regard to other defective registers; and a. 15 of the same statute is as follows: "15. And be it further enacted by the authority aforessid, that so much of the twentieth title of an Ordinance passed by his most Christian Majesty in the month of April, in the year one thousand and six hundred and sixty-seven, and of a declaration of his most Christian Majesty of the ninth of April, one thousand seven hundred and hirty-six, which the registers of baptisms, mar-riages and burials are to be numbered, authenticated or paraphe, kept and deposited and the penalties thereby imposed on persons refusing or neglect-ing to conform to the provisions of said Ordinance and declaration, are hereby

Ordinance and declaration, are hereby repealed so far as relates to the said registers only." In view of these statutory provisions

it would seem incontrovertible that the French law as it existed at the time of the Conquest had continued in force in regard to the keeping of marriage regist-ers. Chief Justice Sewell, in *ex parte* pratt. Stuart's Reports, p. 90, decided

in 1816, says : "The British Statute, 14 Geo. 111, c. "The British Statute, 14 Geo. 111, c. 83, commonly called the Quebec Act, declared the law of Canada, as it stood at the Conquest, to be the rule of deci-sion in all matters of controversy and civil rights."

He adds at p. 96 that :

"The right of keeping a register of baptisms, marriages and sepultures, with the power of rendering the entries thus made actes authentique. made actes authentiques or records which by the twentieth title of the Edic of 1667 was at the Conquest vested in the then Parish Priests of Canada was, by law, considered to be so vested in them not by reason of their spiritual or ecclesiastical character but because them not by reason of their spiritual of ecclesiastical character but because they were by law the acknowledged public officers of the temporal govern-ment. Under the Ordinance of 1667, which was the law antecedent to the Statute 35 George III., Chap. 4, the keeping of registers was entrusted to the curés of the Catholic Church and to

the cures of the Catholic Church and to their successors in office and to such only; and the curés were vested with this authority as priests in Holy Orders recognized to be such by law and as pub-lic officers in their respective stations. The late provincial statute (1795) does not obscrete the obscrete or countider.

The late provincial statute (1.55) does not change the character or qualifica-tions of the persons to whom the keep-ing of registers is now entrusted. It extends the power of keeping registers to Protestant ministers but still requires that all persons keeping registers whether Catholics or Protestants shall be priests in Holy Orders recognized to be such by law and to be competent officers in their respective stations . . In conformity to this general declaration and to the Ordinance of 1667, the fourth section of the Statute also especially enacts 'that every marriage shall be signed in both registers by the clergyman celebrating the marriage

clergyman celebrating the marriage who must necessarily be a priest in Holy Orders recognized to be such by law, since by the law of Canada a marriage can only be celebrated by such a char acter." The learned Chief Justice, of whom

Mr. Justice Lemienx rightly observed

that he : " has left a great name in the juris prudence contemporaneous with the events which followed the Quebec Act," clearly considered that in Canada, from the time of the Conquest, Catholic priests and clergymen of the Church of

of the foregoing provisions, there can be no reasonable doubt that that law in of the foregoing provisions, there can be no reasonable doubt that that law in Lower Canada has been since the Con-quest, as is declared by Chief Justice Sewell, the Civil Law which was in force at the time of the Conquest. In Citi-zens Insurance Co. v. Parsons, 7 A. C., 96, Sir Montague Smith in delivering the judgment of the Privy Council, at pp. 110 I said :-"The law which governs civil rights in Quebec is in the main the French law as it existed at the time of the Cession of Consda and not the Euglish law which prevails in the other prov-inces

"It is to be observed that the same "It is to be observed that the same words civil rights are employed in the Act of 14 George III, c, 83, which made provision for the Government of the Province of Quebec. Sect. 8 of that Act enacted that His Majesty's Canadian subjects within the province of Quebec should enjoy their property, usages, and other civil rights as they had before done, and that in all matters of controversy relative to property and civil rights resort should be had to the laws of Canada, and be determined sgreeably to the said laws. In this atstute the words 'property' and 'civil rights' are plainly used in their largest sense."

TO BE CONTINUED

DANNY RAGAN'S PENANCE

Danny Ragan was a mule driver in the Cedar Hill colliery. He was not quite eighteen, but he was tall and broad-shouldered, and had the strength of a giant. Danny came from a family of miners. His father had been killed in an explosion of mine damp, and two of his younger brothers were breaker boys, so mining was the only thing he

boys, so mining was the only thing he knew anything about. He was accused of being homely and he never denied the charge. But beauty is largely a matter of taste—and that is very elusive. If you had the poetic instinct you would have sworn that Danny's big dreamy eyes were two patches of blue sky snatched from the vault above. If you were musical you would have said that his laugh was the most heavenly thing in the world, and most heavenly thing in the world, and if you were artistic you would have seen that his mere smile made his honest, freckled face look like a burst of sunshine.

He was not a man of letters. Writing He was not a man of letters. Writing was a sort of tight rope performance not to be attempted by him often, and then only in fear and trembling. He could read, slowly and painfully, and with many puckerings of the lip, and much knitting of the evelorows. He knew nothing of the higher mathe-matics, but it was a shrewd man who could grit the hotter of him is a matter

could get the better of him in a matter of dollars and cents. Danny, it is almost needless to say, had little of this world's goods, but he had asomething infinitely more valuable, and that was a deep, abiding faith. His religion was his life. It was in the blood. He did not talk about it—it was

blood. He did not talk about it—it was too sacred for that—and he did not dis-play it unduly, but unconsciously it colored all of his actions. Danny might have been hard put to express precisely the feeling that was engendered in his heart by this lively faith. But he was always conscious that it was there and he knew just how it influenced him. It was his infallible remedy, to be used always in times of remedy, to be used always in times of need. Its effect was like a cooling lotion applied to a burn, or as a drop o water to parched lips. Danny, it must be confessed, did not

cut much of a figure in the community. He was liked by women, children and animals, and tolerated by supercilious boobies who happened to wear better boobles who happened to wear better clothes than he, or who loftily aired opinions which they borrowed from neighbors or read in the newspapers. They did not think much of driver.

Danny lost caste very much when he declined an invitation to join the local militia. He said, with a comical twist priests and clergymen of the Church of England were recognized by law as idea of using his fellowmen for targets. They told him that it was necessary for

Charge. One day something happened at the Cedar Hill colliery. Which is only another way of saying that there was an explosion of coal gas, and the roof of the chambers caved in, and half a dozen men were imprisoned under the debris.

men were imprisoned under the debris.

Danny happened to be on the surface of the earth that day. His half blind

nestion might properly be ana reply should not be given to it if the other questions should be answered wholly in the negative.

They insisted that an expression of opinion by this court upon the law of Quebec, whatever answer should be given to the second question, especially if it should not be unanimous, and if the Privy Council should as seems not ble, decline to deal with this

part of the reference, must have a dis-turbing effect, inasmuch as it would cast doubt upon the status of many married persons in that province and upon the rights of a still larger number of persons

rights of a still larger number of persons in regard to property. They have also called our attention to the fact that there is at present pending in the Superior Court at Montreal in Review a case inter parts in which the very

a case inter partes in which the very point covered by clause (a) of the second question is presented for judic-ial determination. They further stated that no case has ever come before the conts of the Province of Quebec in which the validity of such marriages as are dealt with by clause (b) of the second question has been challenged.

In delivering the judgment of the Privy Council in the recent case of the Attorney General for the Province of Attorney General for the Province of Ontario, et al. v. the Attorney G aeral for the Dominion of Canada, known as the Companies' Reference, the Lord Chancellor after alluding to the refusal by Lord Herschell when delivering the opinion of the Judicial Committee in the Fisheries Case (1898, A. C. 700-717) to answer one of the questions there put "upon the ground that so doing might prejudice particular interests of individuals" and referring to the questions propounded in the Companies Case as :

"a series of searching questions very difficult to answer exhaustively and accurately without so many qualifications and reservations as to make the answers of little value," added that :--

"the Supreme Court itself can how ever either point out in its answer these or other considerations of a like kind or can make the necessary representations to the Governor General in Council whom it is right so to treat any question that may be put."

Upon carefully weighing all these con-iderations, it seemed to me to be emin-

parties. Contining th particular subject matter before us, our attention has been directed to a decree of the Council of Trent which, subject to a modification to be presently

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I desire to call attention to the fact

that we have no evidence before us of the law of the Catholic Church bearing

upon the questions submitted, other than what is furnished by the documents

In the first chapter are grouped a

nd stating several conditions prece

churches and religious communities. "The right likewise of granting dis

pensations from such impediments, ap-pertains, as heretofore, to those who have hitherto enjoyed it."

subject to a modification to be presently noted, admittedly was in force in, and was recognized as binding by, the Cath-olic Church in Lower Canada in 1866. That decree contains the following paragraph :

"Qui aliter quam praesente parocho vel alio sacerdote de ipsius parochi seu ordinarii licentia, et duobus vel tribu testibus matrimonium contrahendum omnino inhabiles reddit, et hujusomod prour cos praesenti debreto irritos facit et anuliat." contractus irritos et nullos esse discerni

In the translation furnished to us in the Joint Appendix this passage is thus rendered :

"With regard to those who marry otherwise than in the presence of the parish priest, or of the priest who has his permission or that of the Ordinary, his permission or that of the Ordinary, and in the presence of two or three wit-nesses; the Holy Council renders such persons wholly incapable of contracting marriage in that way, and declares the marriage in that way, and declares the marriages thus contracted null and void as, by the present decree, it dissolves and annuls them."

Under this decree, where it is in force and unmodified, it is perfectly clear that according to the law of the Catholic Church the marriage of a Cath olic contracted otherwise than in accordance with its requirements is in-valid. The impediment thus created is known as clandestinity.

Taken by itself, Article 127 would clearly have effect of giving recognition to this impediment as effecting the civil validity of marriages between Catholics in the province—and to do so it is in my opinion beyond doubt within its purpose. Apart from the contention that by other faculative statutory provis-ions every clergyman or minister of religion authorized to keep a marriage register is empowered to solemnize mar-riage between any man and woman what-ever their religion, with which I shall presently deal, the only objection made at bar to the construction which I have put on Art. 127 is based upon its collo-cation. It is asserted that the impedi-ment created by the Tridentine Decree concerns merely the qualification of the pose. Apart from the contention that

concerns merely the qualification of the person before whom marriage is to be sol-

affect the civil validity of marriages contracted in that province. Although its meaning would perhaps have been clearer had the word "hitherto" pre-ceded the word "recognized" I think that Article 127 fairly read may be given the construction which Mr. given the construction which Mr. Mignault put upon it and which he stated has been universally taken to be correct.

By Art. 156 C. C. it is provided that : "156. Every marriage which has not

been contracted openly, nor solemnized before a competent officer, may be con-tested by the parties themselves and by who have an existing and all tho actual interest, saving the right of the court to decide according to the cir-

Having regard to the terms of the Act providing for the codification of the Laws of Lower Canada, which dirthe Laws of Lower Canada, which dir-ects the Commissioners in every case to express the existing law and where they should think proper to suggest an amend-ment to indicate the same as a suggesment to indicate the same as a sugges-tion, and to the report of the codifiers which, upon a question as to the pur-pose of such a provision as that con-tained in Art 156, must, in view of their instructions, be entitled to very great weight. Symes v. Cavillier, L. R. 5 A = 0.138 158 there can be as doubt that

A.C., 138, 158, there can be no doubt that this article was intended to express the existing law as to the consequence of clandestinity in the solemnization of marriage. As a guide to its interpreta-tion, we are referred by the codifiers to Pothier on Marriage, Nos. 361, 363 and 451. The authority of Pothier as an exponent of the Civil Law of France, which prevailed in Lower Canada prior to 1866, as I shall presently have occa-sion to show, is so conclusive that other reference seems unnecessary. A.C., 138, 158, there can be no doubt that reference seems unnecessary.

In No. 361, Pothier declares that the In No. 301, Pointer declares that the penalty of parties who have had their marriage celebrated by an incompetent priest is the nullity of their marriage. In No. 363, he adds that the nullity of In No. 305, he and that the huntry of, marriages celebrated by an incompetent priest is not merely relative but is abso-lute and can be cured only by a new celebration of marriage by the curé of celebration of marriage by the curé of the parties or with his permission or that of the bishop. He refers to certain cases, in which after public and long con-tinued cohabitation, the courts have re-

arties or of the diocesan bishop; and t was further ordained that a good faithful register should be kept of the marriages as well as of the publication of banns, or of dispensations and per-missions which should have been granted. Pothier in his Treatise on Magniage as a

Marriage says :

" It is necessary for the validity of a marriage not only that it shall be celebrated in the face of the Church but ebrated in the face of the Church but also that the priest who has celebrated it shall be competent (No. 354.) The priest competent for the celebration of marriages is the curé of the party. The curé of the parties is the curé of the place

where they have their ordinary resi-dence No. (355.) Every other priest who has not the permission either of the bishop or of the curic of the parties is incompetent to celebrate it. This is what results from the declaration of 1630 mich, after having ordianed that 1639 which, after having ordained that the curé must receive the consent the parties adds : 'All priests are the consent of bidden to marry other persons than their true parishioners without the written permission of the curés of the parties or of the bishop. (No. 360) The presence of the curé required by our laws for the validity of marriages is not purely a passive presence. It is an act and a ministration of the curé, who

must receive the consent of the parties and give the nuptial benediction. That results from the terms of the De tion of 1639 where it is said that the curé will receive the comment of the parties and will join them in marriage enacts :

following the form practised in the Church. (No. 350) See the opinion of Mr. Justice Willes advising the House of Lords in Beamish vs. Beamish, 2 House of Lords C. pp. 317-324. Enceted before the establishment of the

Enacted before the establishment of the Superior Council in Canada in 1663, the Ordinance of Blois, the edict of Henry IV. and the declaration of Louis XIII. were each proprio vigore in force in Quebec prior to and at the time of the

By subsequent ordinances of the French Kings, notably that of April, 1667, and of April 1736, further provi-

sons only as shall profess the said refigion." "6. And be it further enacted by

the Authority aforesaid, that all His Majesty's Canadian subjects within the Province of Qaebec, the religious or-Province of Quebec, the religious or-ders and communities only excepted, may also hold and enjoy their property and possessions, together with all cus-toms and usages relative thereto, and

all others their civil rights, in as large, ample, and beneficial manner as if the said Proclamation, Commissions, Ordinances and other Acts and Instructions ances and other Acts and Instructions had not been made, and as may consist with their allegiance to His Majesty, and subjection to the Crown and Par liament of Great Britain, and that in all matters of controversy relative to property and civil rights, resort shall be had to the laws of Canada as the rule for the decision of the same; and all causes that shall hereafter be instituted in any of the courts of justice to be appointed within and for the said Province by His Majesty, his heirs and successors, shall with respect to such successors, shall with respect to such property and rights be determined agreeably to the said laws and customs of Canada until they shall be varied or altered by any Ordinance that shall from time to time be passed in the said Province by the Governor, Lieutenant-Generation or Commandering this

all matters of controversy relative to property and civil rights"—the respec-tive rights of the Catholic clergy and Govornor or Commander-in-Chief for the time being, by and with the advice and consent of the Legislative Council laity inter se as they existed at the time of Cession in regard to Marriage were of the same, to be appointed in manner hereinafter mentioned preserved. No new provisions had been made for The French law, so far as it could be

the keeping of the registers of baptisms, deaths and marriages in Canada be-tween the date of the cession and the year 1795, when the Statute 35 George applied, governed the keeping of regis-ters by the Anglican clergymen, as the Act of 1795 establishes. The Crimical Law of England was by

III, c. 4 (L C.) was passed. In sec. 1 it the Quebec Act expressly declared to be the law of the Province. Commer-cial and Maritime laws of England were "That from and after the first day of

January, which will be in the year sub-sequent to the passing of this Act, in each parish church of the Roman Cathsubsequently specially introduced. But in all matters of "civil rights" the law of Canada as it stood at the Conquest was declared to be and remained "the rule of decision." Whether marriage in Quebec should be regarded in the civil lic communion, and also in each of the olic communion, and also in each of the Protestant churches or congregations within this Province, there shall be kept by the rector, curate, vicar, or other priest or minister doing the parochial or clerical duty thereof, two registers of the same tenor, each of which shall be reputed authentic, and shall be equally considered as legal courts as a civil contract, or, as would seem to be the better opinion, should be deemed a religious contract producing

civil effects, it is for all civil purposes governed by the civil law, and, in view

keep registers of marriage, the former for Catholics and the latter for Protestevery man to be prepared to protect his life and property, and his retort was ants, and that the Quebec Act was de-claratory of this right, which was further that he could get ready in a j ffy if the emergency arose. Some of them even intimated that Danny was a coward, but recognized by the Provincial Act of he only smiled in a mournful way shook his head and did not resent When we find that down to 1866, when

the Civil Code was enacted, there is no trace of any other civil authority for the solemnization of marriage by Catholic priests and that their right to solemnize marriage and to keep registers of civil status prior to that time has never been questioned, and when we find that right recognized in the Civil Code as something unquestionably existing, the conclusion seems to be inevi-table that, as a result of the reservation in the articles of capitulation of their in the articles of capitation that the rights and privileges, and the free exer-cise of their religion to the inhabitants of Quebec and Mostreal, the assurance in s. 5 of the Quebec Act to the clergy of the Catholic Church that they should "hold receive and enjoy their accustomed dues and rights with respect to such persons only as shall profess the said (Catholic) religion," the provision by s. 8 that His Majesty's Canadian subjects within the Province of Quebec should "hold and enjoy all their civil rights," and the continuation of "the laws of Canada as the rule for the decision of

mule was having a holiday and it stood there, looking over the horizon with all of the wonder and amszement of a newborn babe first opening its eyes on this wonderful world of ours. Danny was standing there with his big arm around the shaggy neck of the beast, patting it affectionately, and talking to it as though the poor thing were his long lost

brother. He heard the dull roar from the

bowels of the earth, and hastened to the entrance of the mine, where a score of men and some women were standing white lipped terror.

"What's the matter?" he asked. Danny always did ask foolish questions. "An explosion !" answered a tremu

lous one. "Sure that's nothing," said Danny.

"Explosions are as common here as big wind in the old country." "But the men," came the response, in an agitated voice. "Six men are down there." Danny straightened up to his full

height. He glanced at the circle of pale faces. One or two of the crowd slunk in the background.

"Why don't some of you go to the resoue?" he demanded.

There was silence for a moment. Presently one man, a little bolder than the others, spoke:

"It's too dangerous. One gas explo-

sion follows another." "Where's the car?" inquired Danny, in a voice that had the ring of author-

"The car's there all right," replied one of the inevitable small boys, push-ing himself into the forefront, "but Bill