

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 concerning marriage.

entirely 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 since 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 intention of the Governor General in Council that it should be answered notwithstanding the negative reply made to the other questions propounded.

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 marriage; that the "other impediments" covered by article 127 must, under the rule *insuperantur a sociis*, be of that character. While this contention would have much force if the assumption on which it is based were unimpeachable, 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 permission or that of the Ordinary" as a condition of the validity of the marriage, but that it purports to affect directly the capacity of the parties themselves by declaring them to be "omnino inhabiles"—wholly incapable of thus contracting marriage in the absence of a competent officer.

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 personal incapacity to the parties. If the impediment thus created is to be accepted as a "recognition" by the religious persuasion, it follows that it is properly included under Art. 127 C. C. as an impediment which affects the capacity of 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 Maastricht, 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 1835 by Mgr. Ballaragon, Administrator of that Diocese, it is provided that:— "In regard to those marriages which are contracted without the form established by the Council of Trent, by Catholics with heretics, wherever a Catholic man marry a heretic woman or a Catholic woman marry a heretic man, the marriage is null and void, and the children of such a marriage are illegitimate."

While there has been some controversy as to the effect of the Articles of Capitulation of the Cities of Quebec and Montreal and of the Treaty of Paris (1763) upon the foregoing laws, the great weight of authority supports the view that they remained in force after the Cession of Canada to Great Britain. See *Stuart v. Bowman* (1831) 2 L. C. Rep. 369; *Wilcox v. Wilcox* (1857) S. L. C. Jur., 1, 7, 27.

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 agreeably to the said laws. In this statute the words "property" and "civil rights" are plainly used in their largest sense.