IN THE MATTER OF THE AUTHORITY OF THE PARLIAMENT OF CANADA TO ENACT A PROPOSED MEASURE AMENDING "THE MARRIAGE ACT."

1912
*May 27-31
*June 17.

REFERENCE BY THE GOVERNOR-GENERAL IN COUNCIL.

Constitutional law—"Marriage and Divorce"—"Solemnization of Marriage"—Jurisdiction of Parliament—Jurisdiction of legislature—Federal validating Act—Religious belief—Cannonical decrees—Civil rights—"B. N. A. Act" (1867), *ss.* 91 *and* 92—*Arts.* 127 *et seq. C.C.*

The parliament of Canada has no authority to enact a bill in the following form:—

1. The "Marriage Act," chapter 105 of the Revised Statutes, 1906, is amended by adding thereto the following section:—

"3. Every ceremony or form of marriage heretofore or hereafter performed by any person authorized to perform any ceremony of marriage by the laws of the place where it is performed, and duly performed according to such laws, shall everywhere within Canada be deemed to be a valid marriage, notwithstanding any differences in the religious faith of the persons so married and without regard to the religion of the person performing the ceremony.

"(2) The rights and duties, as married people of the respective persons married as aforesaid, and of the children of such marriage, shall be absolute and complete, and no law or canonical decree or custom of or in any province of Canada shall have any force or effect to invalidate or qualify any such marriage or any of the rights of the said persons or their children in any manner whatsoever"(**).

Per Idington J.—The retrospective part would be good as part of a scheme for concurrent legislation by Parliament and legislatures confirming past marriages which, probably, neither effectively

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*PRESENT: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

(**) Affirmed by Privy Council, 29 July, 1912.

can do. The prospective part, so far as possible to make it an effective prohibition of religious tests, may be good, but doubtful, and the probable purpose can be reached by a better bill.

Per Davies, Idington and Duff JJ.—The law of the Province of Quebec does not render null and void, unless contracted before a Roman Catholic priest, a marriage in such province between two Roman Catholics that would otherwise be binding. Anglin J. contra. Fitzpatrick C.J. expressing no opinion.

The law of Quebec does not render void, unless contracted before a Roman Catholic priest, a marriage otherwise valid where one party only is a Roman Catholic.

The Parliament of Canada has no authority to enact that a marriage between Roman Catholics, or a "mixed marriage," not contracted before a Roman Catholic priest and whether heretofore or hereafter solemnized shall be valid and binding(*).

Per Idington J.—Parliament has power to declare valid such a marriage heretofore solemnized to be concurred in by the legislature of the province concerned, and the like power as to a marriage hereafter to be solemnized if and when the province fails to provide adequate means of solemnization.

REFERENCE by the Governor-General in Council of questions respecting the marriage laws of Canada for hearing and consideration pursuant to section 60 of the "Supreme Court Act."

The questions so submitted are as follows:—

P. C. 424.

A REPORT OF THE COMMITTEE OF THE PRIVY COUNCIL, APPROVED BY HIS ROYAL HIGHNESS THE GOVERNOR-GENERAL ON THE 22ND FEBRUARY, 1912.

The Committee of the Privy Council, on the recommendation of the Minister of Justice, advise that, pursuant to section 60 of the "Supreme Court Act," the following questions be referred to the Supreme Court of Canada for hearing and consideration, namely:—

1. (*a*) Has the Parliament of Canada authority to enact in whole or in part, Bill No. 3 of the First Session of the Twelfth Parliament of Canada, intituled, "An Act to amend the 'Marriage Act'"?

(*) Affirmed by Privy Council, 29 July, 1912.

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The bill provides as follows:—

"1. The 'Marriage Act,' chapter 105 of the Revised Statutes, 1906, is amended by adding thereto the following section:—

"'3. Every ceremony or form of marriage heretofore or hereafter performed by any person authorized to perform any ceremony of marriage by the laws of the place where it is performed, and duly performed according to such laws, shall everywhere within Canada be deemed to be a valid marriage, notwithstanding any differences in the religious faith of the persons so married and without regard to the religion of the person performing the ceremony.

"'(2) The rights and duties, as married people of the respective persons married as aforesaid, and of the children of such marriage, shall be absolute and complete, and no law or canonical decree or custom of or in any province in Canada shall have any force or effect to invalidate or qualify any such marriage or any of the rights of the said persons or their children in any manner whatsoever.'"

(*b*) If the provisions of the said bill are not all within the authority of the Parliament of Canada to enact, which, if any, of the provisions are within such authority?

2. Does the law of the Province of Quebec render null and void, unless contracted before a Roman Catholic priest, a marriage that would otherwise be legally binding, which takes place in such province,

(*a*) between persons who are both Roman Catholics, or,

(*b*) between persons one of whom, only, is a Roman Catholic ?

3. If either (*a*) or (*b*) of the last preceding question is answered in the affirmative, or both of them are answered in the affirmative, has the Parliament of Canada authority to enact that all such marriages whether,

(*a*) heretofore solemnized, or,

(*b*) hereafter to be solemnized,

shall be legal and binding ?

Counsel on behalf of the promotors of the bill: *Wallace Nesbitt K.C., Eugène Lafleur K.C., Christopher C. Robinson.*

Counsel on behalf of those denying the jurisdiction of Parliament to enact the bill: *P. B. Mignault K.C., I. F. Hellmuth K.C.*

Representing the Attorney-General of Canada: *E. L. Newcombe K.C.,* Deputy Minister of Justice.

Counsel for the Province of Quebec: *R. C. Smith K.C., Aimé Geoffrion K.C.*

Counsel for the Province of Ontario: *Edward Bayley K.C.,* Solicitor to the Attorney-General of Ontario.

THE CHIEF JUSTICE.—I am requested by Mr. Justice Brodeur to say that he does not intend to take part in the hearing of this reference owing to

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the fact that he was a member of the Government when, speaking for the Government, the then Minister of Justice, Sir Allen Aylesworth, said the Dominion Parliament was not competent to pass such legislation. Mr. Justice Brodeur feels that he is to some extent responsible for that opinion and, consequently, he thinks he should not take part in this hearing.

Newcombe K.C.—I appear for the Attorney-General of Canada to present and explain to your Lordships the question which has been referred, the circumstances of the reference, and the dispositions which the Government has made for the argument of the case before your Lordships. As your Lordships are aware, the bill which is the subject-matter of the first question referred, was introduced in the House of Commons during the early part of the recent session and, when it became a subject of debate, the Government, owing to the very great importance of the subject and the interests affected by the measure, and having regard, moreover, to the somewhat doubtful constitutionality of the bill, considered it expedient in the public interest to obtain judicial advice upon the power of Parliament to give effect to the proposed enactments, such as they are, before determining its policy upon the merits. In fact, I may say it would be premature, in view of the differences which were expressed upon constitutional grounds, for Parliament to consider and determine its action upon the bill in the absence of better assurance of its enacting authority than the occasion seemed to produce. Consequently, the Government adopted the policy of referring the bill to the court with the question stated so that the views of the various interests might

be fully submitted and argued. The Government permitted the promoters of the bill to name the counsel who should appear before this court to uphold the jurisdiction of Parliament to enact. Counsel were named accordingly and Mr. Nesbitt and Mr. Lafleur represent the promoters. They have filed a factum which your Lordships have before you. At the same time the Government named counsel to submit the reasons which seemed to exclude the proposed legislation from Dominion powers and my learned friends Mr. Mignault and Mr. Hellmuth are arguing that view. Then, each Attorney-General of each province was notified so as to give each province an opportunity of appearing and presenting such arguments as it might deem wise. The provinces have acknowledged the notice. We have communications from the Province of Prince Edward Island and from the Yukon Territory that they do not intend to appear upon the hearing. What course the other provinces are taking will develop, I suppose. As it will be necessary to read these questions in the argument as the case proceeds, perhaps your Lordships do not require to hear them read now as a mere formal matter of submission. Therefore, with these observations, I propose with your Lordships' permission to leave the matter in the hands of the court to be discussed under the arrangement which the Government have made for the argument.

R. C. Smith K.C.—When we last had the honour of appearing before your Lordships I stated that on behalf of the Attorney-General of the Province of Quebec we should enter a respectful objection to the jurisdiction of this court, upon the ground of the doubtful

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constitutionality of the Act referring such questions. The Judicial Committee of the Privy Council on the 16th of this month rendered a decision in the case which was then pending (1), and I suppose I must say frankly that, with regard to the absolute question of jurisdiction, we must accept it as disposing of the question of jurisdiction and upholding that such a reference is constitutional. On behalf of the Attorney-General of Quebec, however, I think it proper to direct your Lordships' attention, especially to a few observations of the Lord Chancellor in rendering that decision and I do so especially with reference to question No. 2. I may say that we think question No. 2 is actually involved in question No. 1. We therefore do not propose to raise any further objection to the jurisdiction of this court, considering it finally decided by their Lordships of the Privy Council. It is specially with reference to question No. 2 that I desire respectfully to invite your Lordships' attention to some of the observations that fell from the lips of the Lord Chancellor. The second question reads as follows:—

"2. Does the law of the Province of Quebec render null and void, unless contracted before a Roman Catholic priest, a marriage that would otherwise be legally binding, which takes place in such province:

"(*a*) between persons who are both Roman Catholics, or,

"(*b*) between persons one of whom only is a Roman Catholic ?"

(1) *In re References by the Governor-General in Council* (43 Can. S.C.R. 536; [1912] A.C. 571).

The Attorney-General of the Province of Quebec respectfully objects to the submission of that question and respectfully asks your Lordships either not to answer it, or before answering it to make representations to the Government as suggested by the Lord Chancellor(1). Their Lordships of the Judicial Committee first set out that the real point raised in this important case — that is the "Companies Act" — is whether or not an Act of the Dominion Parliament authorizing questions either of law or of fact to be put to the Supreme Court, and requiring the judges of that court to answer them on the request of the Governor-General in Council is a valid enactment within the powers of that Parliament. Of course, my Lords, the question in that case was not really one between the legislative jurisdiction of the provinces and that of the Dominion, but it raised the broader question whether or not any power whatever existed to ask such questions. Their Lordships determined that the full ambit of legislative power has been conferred by the British North America Act, that is to say, that the legislative power covering every species of matter or subject concerning the internal Government of Canada had been committed. I may say to your Lordships that that is perhaps the first judicial decision which has in so plain terms acknowledged the absolute legislative independence of the countries. Then, after referring to the various questions upon which appeals have been taken to their Lordships, the Lord Chancellor goes on to say:—

"In all cases the appeal was entertained; in some cases the answers of the Supreme Court were modified by their Lordships; and in one case Lord Hers-

(1) [1912] A.C., at p. 589.

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chell, delivering the opinion of the Board, declined to answer some of the questions upon the ground that so doing might prejudice particular interests of individuals."

There we have an express authority for this court declining to answer this question if private interests be involved in that question. The Lord Chancellor further on says:—

"The Supreme Court itself can, however, 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 when it thinks right so to treat any question that may be put."

The decision of His Lordship concludes:—

"It is sufficient to point out the mischief and inconvenience which might arise from an indiscriminate and injudicious use of the Act, and leave it to the consideration of those who alone are lawfully and constitutionally entitled to decide upon such a matter"(1).

His Lordship, as I take it, refers with approval, inasmuch as no disapproval is expressed, of the decision of Lord Herschell(2), to which I ask your Lordships' attention, and, he further lays down the principle that the Supreme Court has full jurisdiction to make any representations to the Government requesting the question submitted.

The first case to which the Lord Chancellor is referring is the case of *Attorney-General for Canada* v. *Attorneys-General for Ontario, Quebec and Nova Scotia*(2). This is the "River and Lake Improvement"

(1) [1912] A.C., at p. 589. (2) [1898] A.C. 700, at p. 717.

case, where a number of questions were submitted with respect to an Act passed by the Province of Ontario (Revised Statutes, Ontario, 1887, ch. 24, sec. 47), with reference to the power of the Province of Ontario to deal with the beds of rivers and lakes. I need not trouble your Lordships by referring to all the questions submitted, but the 17th question submitted was this (page 704) :—

"Had riparian proprietors, before confederation, the exclusive right of fishing in navigable non-tidal lakes, rivers, streams and waters, the beds of which has been granted to them by the Crown?"

At page 717, Lord Herschell, rendering the decision of the Board, dealt with that question in these words:—

"Their Lordships must decline to answer the last question submitted as to the rights of riparian proprietors. These proprietors are not parties to this litigation or represented before their Lordships, and accordingly their Lordships do not think it proper in determining the respective rights and jurisdictions of the Dominion and provincial legislatures to express an opinion upon the extent of the right possessed by riparian proprietors."

There, we have an absolute refusal to answer that question because it involves private rights and rights of persons who are not represented in the litigation, nor represented in any manner whatsoever before the tribunal. There was the subsequent case of *Attorney-General for Ontario* v. *Hamilton Street Railway Co.*(1). This was an appeal from the judgment of the Court of Appeal for Ontario rendered on a reference by the Government of Ontario to that court

(1) [1903] A.C. 524.

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under a provincial statute which is similar in character to the section of the "Supreme Court Act" in question.

I shall raise two principal grounds of objection, (1), that this is a question which prëeminently affects private rights and private interests, the interests of persons who are not represented here; and (2), that in order to determine whether or not the Dominion Parliament would have any legislative power to deal with the subject-matter at all, it being a pre-confederation law, the first question would have to be determined as to whether it related to marriage or whether it related to solemnization of marriage. If it related to solemnization of marriage the Dominion Parliament would have no power whatever to deal with it so that I shall in the second place ask that that question should be deferred until the main question is determined, or otherwise, it is putting a purely hypothetical question before the court when it is not at all clear that if the state of the law required any amendment the Dominion Parliament would be competent to deal with it at all.

THE CHIEF JUSTICE.—You say it does not go to our jurisdiction; if it goes only to our discretion you might postpone your argument on that point.

Mr. Smith.—As long as we have an opportunity of pointing that out I have no objection, if that is the view of your Lordships.

THE CHIEF JUSTICE.—Now that you have drawn attention to the difficulty, Mr. Smith, we will take a note of it and expect you to discuss it at a later stage

of the proceedings. Will you proceed with the argument, Mr. Nesbitt.

Nesbitt K.C. (after reading questions submitted). —Your Lordships will observe that in one point of view, the proposed bill which I have just read is capable of being predicated on the ground that the provincial legislation requires the marriage ceremony to be performed by some officer, and, that if performed before such an officer, no matter who the parties may be who seek the services of that officer, the marriage is valid. Question 3 will probably involve the broader question: that the Dominion has within its jurisdiction, the whole subject of marriage as such which would include the contract of marriage, and, that, under the term "solemnization" the evidence of that marriage and the machinery by which that marriage is evidenced is the power of the province, and that the extent of its power is not to affect the actual contract of marriage but solely to impose such penalties for the non-observation by the parties of the provincial legislation, as the province may see fit. As for instance, although the parties would be validly married, unless they have entered into that marriage with such form or solemnity that the province may require before its own particular officer, I suppose that the province could say that the wife should be deprived of dower, or that there should be no right of succession, or that the parties contracting the marriage should be subject to fine or the like. That is so, in order to enforce the provincial legislation in reference to the forms that ought to be observed to evidence the contract after the Dominion has said who may make such a contract. Then, as to the second

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part of the question, namely, as to the rights and duties of married persons, that part of the bill may still be treated as valid even if the first part should be held as infringing upon provincial legislation, as it affects simply the status of the parties and their children, such as their right of citizenship as legitimate persons and the like, which cannot be said to fall in any way within "solemnization." Referring again to the first part of the bill, if the contention of my learned friends on the other side is to be adopted, that clandestinity is an impediment, then we may argue that the first part of the bill is *ultra vires* as removing that impediment.

If clandestinity, as to a Roman Catholic's marriage before any person except a priest, is an impediment under the Roman Catholic doctrine on that point, and if that should be held to be an impediment, clearly the Dominion has the right to legislate with respect to that impediment, and the first part of the bill would be, to that extent, a repeal of article 127 of the Civil Code. That would be our submission. Now, to come to questions No. 1 and No. 3, treating them for the moment together, the right of the Dominion is, of course, set out in section 91, sub-section 26, of the British North America Act, and by section 91 the exclusive power is vested in the Dominion on all matters embraced within the sub-heads and that is so "notwithstanding anything in section 92." Notwithstanding anything in section 92 the widest legislative power is vested in the Dominion in relation to sub-head 26 in section 91, namely "Marriage and Divorce." All that is left in the province is, under sub-section 12 of section 92 "the Solemnization of Marriage in the Province" and our submission is that everything must turn upon

what is meant by the term "solemnization" when read in conjunction with the fact that under section 91, sub-section 26, the whole subject of "Marriage and Divorce" is vested in the Dominion. Our contention is that the line of division is the line between the contract of marrage and the accompanying formalities by way of solemnization; that the Dominion has sole power over the first while the provincial jurisdiction extends only to the second; that the provinces may require, for purposes of publicity and evidence, such formalities accompanying or subsequent to the contract as they may see fit, and may enforce their requirements by penalties upon the solemnizing official, and upon the parties, but that they cannot make compliance with these requirements a condition of the validity of the marriage contract, nor dissolve, nor annul, nor empower any provincial court to dissolve or annul, any contract of marriage otherwise valid, merely because the provincial requirements have not been complied with; and that, therefore, the Dominion has power to pass the bill referred for the purpose of protecting the contract of marriage against any such invalidating provincial legislation.

There is nothing new in the two distinctions involved in this contention, those, namely, (1) between the contract on the one hand and the solemnization on the other, and (2) between the nature of these requirements as on the one hand essential to the validity of the contract and on the other as merely evidentiary, so that, in the one case, non-compliance renders the marriage void, and, in the other, merely exposes those concerned to penalties without affecting the validity of the contract. On the contrary, both

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these distinctions are to be found throughout the whole history of the subject. Under the canon law, until the Council of Trent, a mere contract *per verba de præsenti* constituted a valid and binding marriage — it was *ipsum matrimonium* — and this was also the law of Scotland, and, according to the better opinion of England until the time of the "Marriage Act" of 1753.

Perhaps I had better briefly refer to one or two of the authorities on that subject. The first is the case of *Dalrymple* v. *Dalrymple* (1), at page 62 (commencing at the words "Marriage being a contract" down to *"appellavit"*) ; that is the leading case up to that date. Then I refer to *Beamish* v. *Beamish* (2). I cite it in the first place because it contains nearly all the learning on the subject, and I also wish to shew what the view of the House of Lords was as to the case to which I shall next refer. I refer especially to page 334.

Then at page 336, the chief ground of this decision (*The Queen* v. *Millis*) (3) was the ordinance of a Saxon King, in the year A.D. 940, requiring that at nuptials there shall be a "mass priest who shall by God's blessing bind their union."

Accordingly, following that, it was held by the House of Lords, in the judgment of an equally divided court, 3 against 3, that by reason of that Saxon ordinance, there was, so to speak, express legislation which made the ceremonial a part of the contract of marriage, and avoided the contract without that ceremonial.

(1) 2 Hagg. Cons. R. 54. (2) 9 H.L. Cas. 274.
(3) 10 Cl. & F. 534.

That brings me then to the case of *The Queen* v. *Millis*(1). What I have read from *Beamish* v. *Beamish* (2) was to make good the point that the law of Europe and the law of Scotland was as stated in the passages which I have read to you from *Dalrymple* v. *Dalrymple*(3). The *Millis Case*(1) turned entirely upon the point that by the act of one of the Anglo-Saxon Kings, in A.D. 940, the ceremony was made part of the contract, and the whole contract, therefore, was null unless the ceremony was performed. Then, in the case of *The Queen* v. *Millis*(1) I pass to the judgment of Lord Brougham to which I desire to draw your Lordships' attention at pages 701, 702, 718, and 723.

Will your Lordships note Howard's History of Matrimonial Institutions, vol. 1, pp. 295, 314, 339, 376. Now, following that, let me just point this out: That in the colonies, as shewn by an article in 5 Law Quarterly Review 44, at page 57, to which I will also give your Lordships the reference, Sir Howard Elphinstone, a very great authority on such a subject, points out that the case of *The Queen* v. *Millis*(1) was not supposed to be applicable to the colonies; indeed, it was held in two cases, one in Upper Canada and one in Lower Canada, prior to the "British North America Act," to be inapplicable. The first case is *Breakey* v. *Breakey*(4), and the other is the celebrated judgment of Mr. Justice Monk in *Connolly* v. *Woolrich*(5), at page 224, where it is again stated to be inappli-

(1) 10 Cl. & F. 534.
(2) 9 H.L. Cas. 274.
(3) 2 Hagg. Cons. R. 54.
(4) 2 U.C.Q.B. 349.
(5) 11 L.C. Jur. 197.

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cable to the colonies. I cite these cases for a statement of the law, but it is better put by Sir Howard Elphinstone in this article in 5 Law Quarterly Review where the decisions shewing *The Queen* v. *Millis* (1) to be inapplicable are also collected.

My contention in a word is just this: that you have to read the word "marriage" with the word "divorce" as I understood His Lordship Mr. Justice Idington to point out; the two are interrelated. I ask my friends on the other side where, in the language "solemnization of marriage in the province," do you find any possible authority to declare invalidity; to declare that, as part of the contract of marriage over which the Dominion has complete jurisdiction, the province might interpose something the absence of which would render null and void that which the Dominion has exclusive authority to legislate upon? The province may, as I say, insist upon any form of ceremony it may see fit.

The province may say it is against public policy to have no solemnization at all and it may prevent certain of the results of such a marriage, and it may impose penalties upon persons who see fit to take advantage of their rights under Dominion legislation to contract a relationship which is indissoluble but which relationship the province declares, as a matter of public policy, should be evidenced.

My submission to the court is that the subject of marriage, those who may marry, at what age, who may not marry, the regulation as to the degrees of consanguinity with which persons may marry, the persons to contract and their capacities to contract, are undoubtedly within Dominion jurisdiction.

(1) 10 Cl. & F. 534.

Solemnization of marriage does not, in the natural sense of the word extend to such matters as capacity. Some attention has to be paid to that language because if the Dominion can enact a general law for the whole Dominion declaring what shall constitute a marriage, surely there cannot be an invalidity in that respect in any province; you cannot be obliged to carry a surveyor's rule with you, to see which province you are in.

As to the civil effect of the contract — rights to property, for instance, succession, dower and the like, — I should imagine that the province, not under the head of "solemnization of marriage" but under the head of "property and civil rights" might impose such penalties as would make people careful. They have the right to impose conditions with respect to the subsequent relations that will exist between husband and wife as to the property; as, for instance, in reference to community of property in the Province of Quebec.

"Property and civil rights," enables the province, possibly, to legislate upon anything that may flow from the contract of marriage — the rights of the parties as to property, the rights as to succession, the right of dower and the like.

The meaning of "marriage," in the "British North America Act," may, perhaps, be said to be ambiguous, but it must mean, as used in that Act, the contract alone, that is, as opposed to the solemnization. The meaning of the words "solemnization in the province" is what you have to consider. The words "in the province" indicate that the provinces have no jurisdiction over the contract, since if they legislate upon that their legislation becomes, from the nature of the

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case, effective all over the Dominion. The object of the framers of the "British North America Act" must have been to have uniform legislation upon the essentials of the contract. The result of a contrary construction would be to give the provinces all the power and the Dominion really none. Complete jurisdiction over the contract is essential to effective Dominion legislation. The legislation in question is not an infringement upon the power of provincial "solemnization" properly understood. Nor can the province say that power to nullify the contract is necessary to the exercise of their jurisdiction over the solemnization. I contend that the effect of *The Queen* v. *Millis* (1), and all the authorities is, that unless you find express legislation dealing with the subject of the contract of marriage, which makes some use of the evidentiary machinery of solemnization essential to its validity, the contract is perfectly valid. You must have that requirement imposed as it was held to have been by the English legislation. There is nothing of the kind upon the subject here except legislation by the provinces attempting to legislate under the guise of solemnization. I say that such provincial legislation cannot nullify a contract which the Dominion declares, or has the right to say — and that is the third question — is a valid marriage. The provinces cannot say that power to nullify the contract is necessary to the exercise of their jurisdiction over the solemnization. I contend that the doctrine of necessarily implied powers has no application to the provinces which have not the benefit of the words "notwithstanding anything in this Act," nor of the last paragraph of section

(1) 10 Cl. & F. 534.

91. I am free to admit that has never been expressly decided by the Judicial Committee. The best observations on that your Lordships will find in Lefroy's Legislative Power in Canada, at page 454. I repeat that the doctrine of necessarily implied powers has no application to the provinces, which have not the benefit of the words, "notwithstanding anything in this Act." Your Lordships will remember that it has been held in various cases where Dominion legislation was concerned that where there is a subject expressly given to the Dominion, like railways, powers properly incidental to that subject are also given; that doctrine has no application to any of the sub-heads of section 92. If I am right about that, then you get a narrower construction of "solemnization," and any power claimed must be found expressly within these words, not by reading in implied powers such as are read in under the sub-heads of section 91 because section 92 has not the language, "notwithstanding anything in this Act." This must be so, *a fortiori,* in this case where the entire remainder of the subject is assigned to the Dominion. In any case, I say that the whole history of the matter, as discussed above, shews that such a power is not necessarily implied.

I contend, moreover, that the annulment of the contract of marriage is an infringement of the exclusive jurisdiction of the Dominion over divorce. Attention has to be drawn to that. When you come to deal with the provincial authority how could a province declare, under the guise of solemnization of marriage, that a contract of marriage, which the Dominion has said may be made, is not a marriage at all.

I follow that up by saying this: strictly speaking, annulment and divorce are different, the one

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meaning to declare a marriage void *ab initio*, the other to dissolve an existing marriage, but the word "divorce" is here used apparently as meaning every means of getting rid of the marriage tie. And, even when a provincial court annuls the marriage, it does dissolve an existing *de facto* marriage, which would otherwise remain good and would become unassailable on the death of either party. You will find that running through it all. There is a very good definition in Murray's Dictionary of the meaning of the word "divorce;" it gives it the wider meaning. You cannot give a restricted meaning to the word "divorce" because, as is to be inferred from what was said by the Lord Chancellor, whom I quoted this morning, the Dominion Parliament is given the most sweeping power, the absolute power on the subject of divorce, and, therefore, you have to give the widest meaning to the word "divorce." It results from the judgment of Lord Brougham which I read this morning that every conceivable legislative power is vested under the "British North America Act" under these two words. The whole subject of divorce, in its widest possible aspect, is, therefore, in the Dominion, and would include both annulment and divorce for cause.

This is a point I want to drive home. If the marriage tie is declared to exist and the provinces declare it is non-existent, then they are stepping within the jurisdiction of the Dominion. The provinces cannot interpose and legislate upon the contract at all without having the effect of an annulment; they cannot interfere with the contract.

To declare that the marriage does or does not exist must come under the all-embracing word

"divorce" which covers the whole question of the validity of a marriage, *de jure* or *de facto*. I quote from Bishop on Marriage and Divorce, vol. II. sec. 786:— "A suit to declare a marriage null is held to be within the term of divorce suit," etc. That is the meaning in which I say the word is used in the "British North America Act." I refer to Murray's Dictionary, sec. V. "Divorce," "Legal dissolution of marriage by the courts * * * evidence accepted by the courts." It is in the first sense that it must be taken in this Act, because the Dominion is given the sole jurisdiction relating to the whole subject-matter of divorce and I submit that it must be given the widest possible meaning. I submit that it covers all three of the jurisdictions, vested by the English Act now in the divorce courts, whether it is separation from bed and board, a decree of nullity, or a regular divorce in the common strict meaning of the word.

MR. JUSTICE IDINGTON.—I cannot understand how we can escape any one of them under the statute and especially the first and third questions. The other question might have been left out until question No. 1 and question No. 3 were determined.

Mr. Nesbitt.—Will your Lordships let me examine the language of the first section of the bill a little more closely? (The learned counsel reads the section.)

To bring it to a concrete case, the evil that was supposed to have arisen was a limitation of the express language of article 129 of the Civil Code, which stated that marriage might be performed — I am paraphrasing it — by any one of several officers;

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which, it was supposed, gave the right to any citizen, not falling within the prohibited decrees, to appear before these parties and have the ceremony performed. The bill pre-supposes the right of the province to declare that marriage shall be performed by certain officers, at certain hours, and so on, and the evidences that are to be observed about the marriage.

The bill hits squarely at article 127 C.C. in this, that it says, that no matter who is married before any person, when the provincial law declares to be the proper officer to marry, if they comply with all the provisions of the provincial law, then notwithstanding any difference in their religious faith, that contract shall be good.

If your Lordships answer question 2 in the affirmative, as I said to your Lordships early in the discussion, in all probability that will be the end of the whole matter because there will be nothing more to discuss. Now, my Lords, if the provinces have no power to nullify, the Dominion must have the power to confirm. Apart from the question of power to nullify the contract, the Dominion has admittedly exclusive jurisdiction over the capacity of the parties. Differentiation between persons of different religions as to the manner of solemnization affects their capacity and is beyond provincial powers.

The real object of question 3 seems to be to ascertain whether or not, if the bill referred does not accomplish the desired object, it can be accomplished by some other legislation. If the contention as to the first question be correct, then plainly it stands, so that the two questions run into one another so far as the argument is concerned. Or, if the distinction between the contract and its solemnization be incor-

rect, the Dominion can still pass the legislation under (1) power over divorce, (2) power to define marriage.

I submit, therefore, that question 3 must be answered in the affirmative because, even if the bill referred does not accomplish the alteration of that law, it could be done by the Dominion by a proper enactment.

I desire only to add, my Lords, a few words in reference to the meaning that is to be given to the word "marriage" in section 91. My submission is, that as it is used in conjunction with the words "and divorce" the same wide meaning that is given to the word "marriage" must necessarily be given to the word "divorce" subject to the qualification that nothing is carved out of divorce while the solemnization of the marriage tie is carved out of the word "marriage."

Now, in reference to one or two observations, which fell from the court, as to the doctrine of civil rights. Just as in the case of banks and banking, just as with railways, and so forth, whenever the doctrine of civil rights has impinged upon the wide jurisdiction given to the Dominion Parliament in section 91 "civil rights" has had to give way.

You have the whole subject of marriage, you have that whole field of legislation given expressly to the Dominion, and over-riding civil rights or anything that may interfere with it. All that is incidental, all that is ancillary to it, all that is impliedly necessary to create the tie of marriage, is vested in the federal jurisdiction, subject only to whatever may be said to be carved out of it in the solemnization or evidence of that marriage which is vested in the provinces, and nothing else. Therefore, if I have been understood in the argument this morning, to admit that the pro-

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vinces, under the doctrine of civil rights, can take away from any legislation which the Dominion may see fit to pass in this respect, I have been misunderstood. If the doctrine of civil rights impinges upon whatever is impliedly necessary in the opinion of the Federal Parliament fully to carry out the object of their legislation relative to marriage, then the doctrine of civil rights must give way.

Lafleur K.C.—May it please your Lordships, I intend to ask your Lordships' attention to the second question on this reference which is:—

"2. Does the law of the Province of Quebec render null and void unless contracted before a Roman Catholic priest, a marriage that would otherwise be legally binding, which takes place in such province,

"(*a*) between persons who are both Roman Catholics, or

"(*b*) between persons one of whom, only, is a Roman Catholic ?"

I do not know whether I should preface my remarks by pointing out to your Lordships the utility of answering this question. I understand my learned friends on the other side no longer contest that you have the power and the duty, subject to the exercise of your proper discretion, to answer question No. 2, but they do submit that you should exercise your discretion or decline to answer that question in its present form, because they say — at least I understand they are going to say — it may affect the rights of private parties. It is just as important for Parliament in the exercise of its right of legislation to know what the law of the province is upon this subject as

it is that it should know the extent of the field of legislation that is open to it. Parliament in legislating upon the subject of marriage will necessarily inquire, first, as to the ambit of its own powers, and in the second place as to what grievances, if any, exist, which it is proposed to redress by the promoters of the bill. Now, it is of the first importance, therefore — when you get over the first difficulty, when you ascertain that Parliament has legislative authority over the subject-matter — to ascertain whether the law of the province is in such a condition as in the opinion of Parliament requires redress or relief. As my learned friend, Mr. Nesbitt, put it this morning, if this question is answered in our sense, if it is held that these marriages are valid and binding, then *cadit quaestio.* Therefore, it seems to me, it is just as important for Parliament to know what the law of the Province of Quebec is on that subject as it is for Parliament to know the extent of its own powers to legislate over the subject-matter.

As to interference with the rights of private parties who may not be represented here, I suppose that is an objection that may be made to almost any sort of reference of this kind. It is impossible for your Lordships to decide any general question of this nature without in some way affecting private rights, but not judicially affecting them, because your pronouncements upon this, as upon all other matters referred to you in the same way, are merely opinions. Your functions are advisory, and, therefore, you do not preclude the parties — although, of course, it would be absurd for me to contend that your opinions would not be regarded by the courts as important on the subject. I think your Lordships

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have even said that you would not be bound by your own opinion given on a reference.

It is a little bit perplexing to know what view is ultimately going to be taken on the subject. Take, for example, the "Insurance Reference" which was before your Lordships for adjudication; that was referred by the Government in consequence of a judicial decision in the Province of Quebec upon a prosecution under the "Federal Insurance Act." If your Lordships are to hold that because there is a pending case you should not answer a question then the "Insurance Reference" should not be heard at all. And, in the present instance, if because there is a case pending in court, that of Hébert(1), in which the second question on this reference is to be decided, your Lordships do not give an opinion on that question, then, of course, I do not know how far it would be useful for me to go on with the argument. I do not know whether your Lordships intend to decide that before hearing us on question 2, but I submit that it is almost impossible to answer upon any reference at all without the possibility of your affecting private rights prejudicially or otherwise. I submit that the last amendment to the statute requires the court to answer the question.

I think I have said all I need say for the present upon the discretion which your Lordships should exercise. It seems to me that on a large question of this kind it is of vast importance to the people throughout the whole Dominion that an answer should be elicited in this inquiry. It is quite obvious that any number of marriages may be affected in the same way as this Hébert marriage, and the fact that this case has come before the courts does not mean that there

(1) *Hébert* v. *Cloutre* (Q.R. 41 S.C. 249).

are not dozens, and perhaps hundreds, of cases in which the status of the parties if not attacked to-day may be attacked next year, or ten years hence. It is impossible to consider any question of this kind without necessarily affecting private rights.

The question which is submitted to your Lordships depends, in my humble opinion, upon the construction of a number of articles of the Civil Code of the Province of Quebec. I should like to say at the outset that, while I anticipate a very elaborate historical argument will be made by my learned friend Mr. Mignault on the other side, and I understand he relies upon the judgment of Sir Louis Jetté in *Laramée* v. *Evans*(1), which was based on what I may call the historical argument, it seems to me that all that is entirely beside the question. The question of the law as it stood before the Code it is not necessary for us to consider, because, in my humble opinion, the Code is perfectly clear upon the subject. I need hardly do more than refer to a couple of cases which are well known to your Lordships where the principle of construction was clearly laid down in such cases. There is the case of the *Bank of England* v. *Vagliano Brothers*(2), at page 144, in which Lord Herschell, speaking of the very elaborate argument which had been presented as to the state of the law before the "Bills of Exchange Act," said:—

"I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any consideration derived from the previous state of the law, and not to start with enquiring how the law previously stood, and then, assuming that it was probably

(1) 25 L.C. Jur. 261. (2) [1891] A.C. 107.

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intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

If the statute, intended to embody in the Code a particular branch of the law, is to be proved in this fashion, it appears to me that its utility will be almost entirely destroyed and the very object with which it was enacted will be frustrated."

He goes on to say that he is far from saying that resort may never be had to the previous state of the law, but that, on the contrary, it is justifiable to refer to it when the provisions of the actual law are of doubtful import or when words are used which had previously acquired some technical meaning. But in this case that seems to me immaterial because we have an enactment which, in my opinion, is clear and free from any ambiguity, and if that is so any examination of the anterior state of the law is only misleading.

It seems to me that article 129 of the Civil Code has stated the law so clearly that no possible reference to the previous state of the law is useful or necessary. Let me first read article 128, which says that marriage must be solemnized openly by a competent officer recognized by law, and also article 129.

Article 128 says:—

"128. Marriage must be solemnized openly by a competent officer recognized by law.

"129. All priests, rectors, ministers, and other officers, authorized by law to keep registers of acts of civil status, are competent to solemnize marriage.

"But none of the officers thus authorized can be compelled to solemnize a marriage to which any impediment exists according to the doctrine and belief of his religion and the discipline of the church to which he belongs."

Wherein is there any ambiguity in the first paragraph of that article? The language is perfectly general. The authority to celebrate marriage is conferred upon rectors, ministers, and other officers authorized by law to keep registers of acts of civil status, and they are the persons who are competent to solemnize marriage. Is not the only thing to be ascertained, who are the persons who are authorized to keep registers of civil status, in order to answer the question who are competent persons to celebrate marriage. Is there any indication at all that the functions of these officers of civil status are to be in any way restricted? Is it not obvious, on the contrary, that the second paragraph of that article, which says they are not compellable, shews that they may receive applications from all kinds of people, belonging to all kinds of faiths, and that this provision was made for the protection and ease of their own conscience. But, does not that imply the idea that they are not exclusively concerned with marriages of their own parishioners, and that their authority and jurisdiction is general. Otherwise, what would be the use of making them non-compellable? If their functions were restricted to their own flocks, if, as is contended, the priest or the minister has to marry those of his own congregation, and if article 127 C.C. makes the rules of that religious community binding upon the members of that community, then it would be no use saying that the minister or priest is not compellable, because, manifestly, he could not be compelled to celebrate what would be an invalid marriage between persons who would be governed by the rule of their own church, which would be his church. Does not the second part

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of that article, on its face, shew that the jurisdiction of these officers of civil status was general and not restricted ?

Another thing to which I would like to call your Lordships' attention is that the article does not contemplate that this jurisdiction or that these functions shall be exercised solely by ministers of religion. It says, all priests, rectors, ministers, and other officers authorized by law to keep registers; it contemplates the possibility of other persons than priests or ministers being authorized by statute to keep registers.

There is one provision in the Code in regard to the keeping of acts of religious profession, articles 70 *et seq.* of the Code. In every religious community in which profession is made by solemn and perpetual vows, registers are kept, and my adversaries argue from that that it is not every one who can keep registers of civil status who are competent to celebrate marriage. But, manifestly, what article 129 means is that these persons can celebrate marriage, who are authorized to keep registers of civil status generally, not merely persons who may be authorized to keep registers of deaths or of religious profession. It means those who have the general power to keep registers of civil status—that is, as to all acts of civil status—and these persons are competent to celebrate marriage. And, if the Province of Quebec to-day empowers an individual, not a clergyman, to keep registers of civil status, that person is a competent person for the celebration of marriage. Whatever may be the case as to births and deaths, as to marriage the Code expressly provides that a person, other than an officer of civil status in the domicile of the party, can be the celebrant. Take article 63:—

"63. The marriage is solemnized at the place of the domicile of one or other of the parties. If solemnized elsewhere, the person officiating is obliged to verify and ascertain the identity of the parties."

Is not that plainly saying that the person solemnizing or celebrating the marriage need not be the functionary to officiate in the parish or domicile of these parties? The only obligation imposed on an outsider who celebrates a marriage is the verification of the identity of the parties, and, of course, all these solemnities are provided in order to prevent clandestinity. The banns themselves are simply protection taken to enable the officiating clergyman to ascertain that there are no impediments. The whole object of this provision is to prevent clandestinity, but the jurisdiction is manifestly not restricted to the officer who is in the place inhabited by the parties, either by one of the parties or by both, because an outsider may marry them, although he must make sure that there are no impediments existing. As your Lordships will see, if he does not publish the banns, he must see that the banns have been published elsewhere. It is even provided that, when the parties have not been for a certain period in the jurisdiction, the officer must ascertain whether the banns have been published in the foreign jurisdiction, and if they have not, then he must assure himself of the non-existence of any impediment. Articles 131 and 132 deal with that:—

"131. If the actual domicile of the parties to be married has not been established by a residence of six months at least, the publications must also be made at the place of their last domicile in Lower Canada.

"132. If their last domicile be out of Lower Canada and the publications have not been made there,

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the officer who solemnizes the marriage is bound to ascertain that there is no legal impediment between the parties."

In the case of dissenting Protestant congregations the banns are published by the minister who performs the marriage, and he may or may not be the minister who is the minister of the parties. They have never regarded the jurisdiction as being restricted and they have never considered that there was any incompetency on the part of any of the functionaries who are created by article 129 of the Code. Therefore, that question has not arisen in the case of marriages of Protestants. I may add that it has never arisen in the case of a marriage between a Protestant and a Catholic. No doubt has ever been cast, so far as I know, in any judicial proceeding upon the validity of marriages between Protestants and Catholics, whether celebrated by a priest of the Roman Catholic faith or by a Protestant minister. I do not think any suggestion has been made of the invalidity of these marriages. Now, if you take the wording of article 129, what reason is there for making any restriction in the case of one of these functionaries and not in the case of the other one? And if you say that each of these is subject to the same restriction — because that cannot depend upon the practice of the different congregations; it cannot depend upon what they are in the habit of doing or of the opinion they have as to the law of the land — if there are any restrictions as to the jurisdiction of any one of these, they must be derived from law. I submit that you cannot say there are restrictions as to some of these functionaries which do not exist as to the others. If you were to restrict the power of these officers of civil status to

the persons who are in their congregation under their spiritual charge, where would any authority be given to any one to marry non-Christians or the numerous immigrants who come to our shores and settle in our cities, and who are not organized into congregations? If that interpretation were given to it, then these people would be absolutely without any provision for their lawful marriage. You cannot say that a Protestant minister has any greater authority to celebrate such a marriage than a Roman Catholic priest has. If you once get beyond the flock or the congregation of the clergyman or the priest, then where are you going to stop with the jurisdiction. You cannot stop, there is no halting place at all, unless you consider that by a previous article (127) there exists an impediment in the case of people professing the Roman Catholic faith. I will contend later on that there is no such impediment, that such an impediment would not import nullity in any event, and that it is a misapplication of article 127 to say that it could have any influence at all upon the competency of the public officers who are created by article 129.

Before I leave the construction of article 129, I desire to ask your Lordships' attention to an argument that is advanced by my adversaries in their factum. I am considering now article 129 *per se* without any assistance from article 127. In their factum, my learned adversaries say that article 129 is far from clear and that it is subject to notable limitations, and they say, in the first place, that under article 70, which I have mentioned a moment ago, certain religious communities are authorized to keep registers of civil status, and yet these communities are not authorized to celebrate marriage. I point out that these communities are not authorized

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to keep registers of civil status; they are authorized to keep a certain kind of register of a certain kind of religious status; that is, solemn and perpetual vows taken in their community. But, that is not authority to keep registers of civil status, and so I contend that does not qualify the article at all.

Then my adversaries say that another important limitation of article 129 will be admitted. They say:

"Another most important limitation of article 129 will also be admitted. Are priests, rectors and ministers competent to solemnize marriage whether they are authorized or not to keep registers of civil status, a construction which the general terms, if construed literally, of article 129 would justify, or can marriage be solemnized only by such priests, rectors, or ministers who are authorized to keep registers of acts of civil status."

I do not think you can give that restriction to the article. Do the words "authorized to keep registers of civil status" apply to the priests, rectors and so forth, or only to the other officers ? It does not matter from my point, whether you adopt one construction or the other. There is a curious article of the Code, which is referred to by my learned adversaries in their factum, and that is article 53(*b*), which would seem to imply that there may be persons — although I have never seen them and I do not know who they are — who, without keeping registers of civil status may celebrate marriages. The article says:—

"53. (*b*) Every person authorized to celebrate marriages, or to preside at burials, who is not authorized to keep registers of civil status, shall immediately prepare, in accordance with the provisions of the Civil Code, an act of every marriage which he celebrates, etc."

My learned friend, Mr. Mignault, thinks this was intended for a congregation of Jews in Quebec. I have not been able to discover what that particular congregation was that this article is intended to assist, but it is a peculiar disposition of the law.

23 Vict. ch. 11 refers to Quakers, and it requires them to keep registers. I do not think 53(*b*) can refer to the Quakers, because before that article was passed this legislation as to Quakers was in force and they had the necessary authority and duty of keeping registers of civil status.

It may well be that the proper construction of article 129 is that priests and rectors and ministers, even if they do not keep registers of civil status, may celebrate marriage, and that, in addition, other officers who are authorized by law to keep registers of civil status may also celebrate marriage. That is not, however, what I should think to be the natural construction of that article. I should have said — independently of the provisions of article 53(*b*) and whatever provisions may be made for the unorganized districts — that this article meant on the face of it that priests, rectors, and other officers, all of whom are authorized to keep registers of civil status, are competent to celebrate marriage. I think that is the plain meaning of that article. Article 53(*b*) I cannot explain in any way.

That statute is authority to keep registers of civil status, and it is conferred upon a person because he has a congregation, and it is within the discretion of the legislature to give to some congregations or the heads of some congregations the right to keep registers of civil status. That all points to the construction of the article, as I have been reading it, that it is only

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those persons who keep registers of civil status who can celebrate marriage. Sometimes the authority is to individuals by name and sometimes it is the head of the congregation. They are statutes to afford relief to certain religious congregations. I shall deal with that when I am giving the history of the law, and I intend to notice it although I submit it is not necessary for the construction of the article. Still, I cannot neglect it, because my learned friends base an argument upon it. You will see that by these statutes which preceded the Code (with, I think, one or two exceptions), they did not in terms confer authority to celebrate marriage, but simply authority to keep registers of civil status.

My contention is that the civil law has nothing to do with the internal government of these religious communities. The civil law creates these persons officers to register acts of civil status. It is often said that we have no civil marriage in this country. What I understand by civil marriage, in the sense in which it is ordinarily used, is that the officiating person is not a clergyman or a priest, but is a public functionary like a mayor, or a registrar, or a justice of the peace, but the religious character of the person who registers the act of civil status does not change the character of the act. It is a civil act altogether; it is an act of the representative of the State, who, by the authority of the State, gives authenticity to his records. But, whatever may be the religious character of these officers of civil status, when they are officiating as officers of civil status they are not acting in a religious capacity at all. They may accompany their celebration of marriage with any religious ceremony they may choose, but they are still *pro hac vice* purely officers of civil status.

That is my argument as to the jurisdiction and authority conferred on these persons by article 129. I submit there is nothing there which suggests the idea that they must necessarily be of clerical character. What is the meaning of these words, "and other officers authorized to keep registers"? The only requirement is that they be authorized to keep registers, and it is quite competent for the State to empower by proper authority a justice of the peace, or a registrar, or any one else of similar character, to keep these registers of civil status and to celebrate marriage.

Another limitation which is referred to by my learned friends is one which I have noticed already. They say that another limitation is that the priests, rectors, and ministers can only solemnize marriages in the place where they are authorized to keep registers of civil status. I submit that is not so. You have article 63, which clearly shews that the celebration may be made by a clergyman who is not at the domicile of the parties.

They say:—

"By article 63, under the general rule, marriage is solemnized at the place of the domicile of one or other of the parties. This rule is no less a general rule, because the article asks that, if the marriage be solemnized elsewhere, the person officiating is obliged to verify and ascertain the identity of the parties, so that the latter provision can only refer to exceptional cases, such as those of vagrants or of persons domiciled outside of the province; otherwise, it would have been useless to say that the marriage was solemnized at the place of the domicile of one or other of the parties. Therefore, since the general rule requires the solemnization of the marriage at the place of the

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domicile of one or other of the parties, it follows that priests, rectors, and ministers, authorized to keep elsewhere registers of acts of civil status, are not competent to solemnize the marriage, either at the place of the domicile of one or other of the parties, for they are not there authorized to keep registers of civil status, nor in the place where they do keep these registers, for the parties are not there domiciled."

It is the general rule, but not the invariable rule, that marriage shall take place at the domicile. The cause of an exception may be the desire of the parties to be married elsewhere as often happens. There is nothing which prevents them from exercising their liberty in that regard. The law has laid down the rule as to publication of banns and formalities and the assumption is that the general rule is that the domicile of the bride is generally the place where the marriage is celebrated. But it has also provided for a case where the parties do not choose to follow the general rule, and it says then what it is incumbent on the officiating clergyman to do in order to prevent clandestinity.

The publication of banns is an entirely different thing; the publication is made in their own church or else the parties get a license; they get a license if they wish to exercise their freedom to be married before some person they select. The minister gets the license of the Lieutenant-Governor to celebrate that marriage and the license is granted on proper security shewing there is no impediment. In the Catholic Church, they may be dispensed by the bishop from publishing the banns. The license does not apply to the parties, it applies to the officiating minister and he can get a license from the Lieutenant-

Governor, and when the parties present him with one he is licensed upon receiving that document to celebrate the marriage between the two people. The license is to the minister, not to the parties. There is no such thing as licensing the parties. It dispenses with the publication of the banns by the officiating clergyman, whoever he may be, but there is no restriction as to the clergyman who may celebrate the marriage, provided he has a license. The only difference is that with regard to Catholic priests they cannot get a license, they have to get a dispensation from their ecclesiastical head, and as to Protestant ministers they must get a license, but there is no permission given to the parties, it is to the functionary of the State to dispense with certain formalities which would otherwise be required.

There is another objection which is made by my learned adversaries. They say that our interpretation of article 129 cannot be sustained because the Code of Procedure, in articles 1107 *et seq.*, provides for an opposition to marriage and requires that the opposition should be served upon the functionary called upon to solemnize the marriage. They say, further, that article 61 of the Civil Code requires that the disallowance of the opposition be notified to the officer charged with the solemnization of the marriage. They ask if it is contemplated that the opposition to a marriage should be served on perhaps two or three hundred clergymen in Montreal, for example, in order to prevent a marriage from taking place. My submission is that the expression "called upon to celebrate a marriage," or, "charged with the celebration of a marriage" means a

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clergyman or a priest who is selected by the parties to celebrate a marriage. It does not mean an officer who is competent, because there may be more than one. Even on their own theory there must be two, if the parties reside in different parishes. And, in the case of Protestants where there is no such thing as an impediment on the ground of clandestinity, and when they may select any one of two or three hundred persons to cement the union, they say it would be impossible that all these functionaries could be served with the opposition or notified of the difficulties that existed. What the article means by "charged with the celebration of a marriage" or "called upon to celebrate a marriage" is the clergyman who is selected by the parties to celebrate their marriage, and there must be only one, and that one is the one who is to receive the opposition.

Now then, my Lords, another objection which is made is that, in the Province of Quebec, marriage is essentially a religious ceremony. They say there is no such a thing in the Province of Quebec as a civil marriage, as the term is generally understood, and as they say would result from the wide construction sought to be placed on article 129.

Now, is it true that in the Province of Quebec marriage is essentially a religious ceremony? A religious ceremony, in connection with a mixed marriage, for example. I have always understood there was no religious ceremony performed there but that the priest merely acted as a witness and that there was no ceremony at all. There cannot be any religious ceremony, when non-believers or Mahommedans, or Hindus, are married in the Province of Quebec; there is no religious ceremony in their case. There is an authenti-

cation of their marriage by the priest or officer of civil status, but it is wrong, I submit, to say that a Quebec marriage is necessarily and essentially a religious ceremony. It generally is accompanied, no doubt, by a religious ceremony, but my submission is that the only part of the ceremony which concerns the law is the authentication of that marriage by the officer of civil status who generally happens to be, who always happens to be now, a clergyman of some church. But, in exercising this function, he is exercising purely a civil function. I would submit that the creation of the officers of civil status to celebrate marriages is merely the exercise of authority by the State to enable these officers of civil status to exercise a purely civil function. The fact that they happen to be ministers of religion in addition to that does not alter the case at all. The words "celebration of marriage" found in our law are used by the European codes where the only legal marriage is celebrated before a public officer, who is not a priest or a minister of religion. You go before the mayor and he celebrates a marriage. The parties afterwards, if they so desire, may repair to their own church and get what is called the nuptial benediction, but that is entirely distinct from the ceremony of marriage. The ceremony of marriage is celebrated by a public officer, and I say that here you have both done by the same officer.

Then, of course, all the decrees recognized the possibility of a valid marriage where a priest could not be obtained, so that it is not essential that there should be a ceremony. There may be, resulting from the religious belief of the parties, a ceremony in their sense of the word, but so far as the law is concerned

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there is no ceremony. There is nothing there but the consent of the parties and their agreeing to be husband and wife, before a person, who is recognized by the law, as capable of exercising that function. All these decrees provide that, while it is desirable that a priest should celebrate the marriages of Catholics, it is not absolutely essential, because if a priest cannot be procured that does not prevent the celebration of a valid marriage. I, therefore, submit that you cannot say that a "ceremony" is of the essence of a marriage. It is imposed upon the parties as a religious duty in most churches, but that is a religious obligation only, it is not one which is required by the law of the country. In the last decree, the *Ne Temere* decree itself, you will find that article VIII. says:—

"VIII. Should it happen that in any district a parish priest, or the ordinary of the place, or a priest delegated by either of them, before whom marriage can be celebrated, is not to be had, and that this condition of affairs has lasted for a month, marriage may be validly and licitly entered upon by the formal declaration of consent of the contracting parties in the presence of two witnesses."

It is submitted in this connection that article 65 of the Code, which provides what is to be set forth in the act of marriage, does not in any way refer to the religious belief of the parties; but simply states the day on which the marriage was solemnized, the names, quality, occupation and domicile of the parties, and so forth, whether married after publication of banns, or dispensation, or license; whether it was with the consent of the parents, and whether there has been any opposition. That excludes the idea of anything but a purely civil ceremony, so far as the legality of the marriage is concerned.

I will have occasion, in referring to the previous legislation, when I come to that part of the case, to shew your Lordships that in all the statutes which are enabling, or authorizing or relieving ministers of congregations there is no restrictive language of any kind, there is no limitation to their jurisdiction ever imposed by any of the previous statutes; they are generally authorized to keep registers of civil status, and whenever they are authorized to celebrate marriages, in a few cases in which express authorization is given to celebrate marriages, there is no restriction in any of the statutes which I have been able to find.

The Act of 1795 expressly authorized and required the Catholic Church and the Anglican Church — that is the construction put on the Act — to keep registers of civil status. The other denominations began to complain that they were not entitled to keep registers of civil status. The Church of Scotland complained, and the Methodist Church complained, and the Baptist Church, and so on, and they all had extended to them the right which was given by the statute of 1795, to the Catholic Church and to the Anglican Church, of keeping registers of civil status. Now if it were so that the Jews could only celebrate marriages between Jews, and the Quakers between Quakers, and the Presbyterians between Presbyterians, and the Methodists between Methodists, then there would be no officer competent for the celebration of marriages between unbelievers, or Buddhists, or even the people of the Orthodox Greek Church, or in the case of these numerous immigrants who are coming to our shores every day. I do not think anybody has ever disputed the validity of the marriages of these persons. My learned friends on the other side would

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have to go to the length of arguing that there is no officer of civil status to celebrate the marriage of these people, if they restrict the power of each functionary to the members of his own congregation. There is no greater reason for doing that in one case more than in the other, apart from the provisions of article 127 which have been discussed, and apart from the two statutes which restrict the powers of the Quakers and of the Jews. If you are going to restrict any of these functionaries, you must restrict them all in the same way. There is no halting place, and you must come to the conclusion that a large proportion of our present population in the large cities is under the absolute disability or incapacity of getting lawfully married at all.

Now, my Lords, I come to the consideration of article 127. It is contended, on the part of my adversaries (and it has been held in the cases which have been decided in accordance with that view) that whatever may be the jurisdiction of the functionaries enumerated in article 129 — other than those of the Roman Catholic religion, in the case of Catholics at least, by reason of article 127 — there is an impediment which prevents Catholics from being validly married by any other than their parish priest or a priest delegated by the parish priest or by the bishop. I am dealing with the meaning of the word "impediment" in article 127. May I point out incidentally, that, if it be true that what is called clandestinity is an impediment in the proper sense of the term, the bill can hardly be said to be *ultra vires* of the Parliament, because, in so far as impediments to marriage are concerned, the legislative jurisdiction of Parliament clearly extends to all matters of that kind. It

extends on the subject of marriage to the capacity to contract marriage, to the impediments to marriage, and to all that goes to constitute a valid marriage, except the solemnization. Now, if it is true that what is called clandestinity is an impediment in the proper sense of the term, then the object of the bill is really to affect and amend article 127, by declaring that no matter what the religion of the parties or of the officiating clergyman may be, that will not prevent the validity of a marriage, otherwise regular, under the provisions of the law of the province. Now, is it not clear that that bill has for its object the removal of that impediment and the modification of article 127 if that article creates any such impediment as is contended? I would submit that it does not create such an impediment, because I think it is a misuse of the word "impediment" to apply it to the competency of the officer who is about to celebrate the marriage. It seems to me that the only proper meaning of the word impediment, and more particularly its meaning in article 127, must be an impediment of the same nature as those enumerated in the chapter. The whole chapter in which that article is found is called: "Of the qualities and conditions necessary for contracting marriage." These are the qualities and conditions in the parties themselves, and the next chapter deals with the competency of the officer for the celebration of that marriage. I submit that it is a subversion of all correct ideas, to say that the incompetency of a civil officer constitutes an impediment to marriage. If it is an impediment to marriage in the sense of article 129, I do not see how my learned friends on the other side can escape from

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the conclusion that the bill is *intra vires* of Parliament because Parliament can unquestionably repeal article 127. It can remove all these impediments, it can say what shall be the natural impediments to a marriage, and upon the theory that it is an impediment, called the impediment of clandestinity, then the object of that bill is to remove that impediment and it does accomplish that purpose if you consider clandestinity to be in the nature of an impediment. I do not want to elaborate this. I refer your Lordships to the *considérants* of the judgment of Mr. Justice Charbonneau in *Hébert* v. *Clouâtre*(1), where your Lordships will find the whole subject discussed with great lucidity and force. I do not think I could add anything to what Mr. Justice Charbonneau says.

The judgment of Mr. Justice Jetté in *Laramée* v. *Evans*(2) is one of the most interesting on the whole subject because it reproduces what may be called the historical argument, and I desire to say a word about that point without anticipating too much what may be advanced on that head by my adversaries. But I do understand the proposition as laid down by Mr. Justice Jetté to be somewhat like this: He says at the time of the conquest there was in England an exclusive jurisdiction on behalf of the Anglican clergy, and there was in France the same exclusive jurisdiction on the part of the Roman Catholic priesthood, to celebrate marriage; they were each exclusive, they recognized no other authority for celebration of marriage. Now, at the time of the capitulation there was nothing said in the articles of capitulation which could affect that situation, nor indeed, I submit, is

(1) Q.R. 41 S.C. 249. (2) 25 L.C. Jur. 261.

there anything in the "Quebec Act" of 1774 or in the "Constitutional Act" of 1791, and it was not until the statutes began to be passed with reference to the keeping of registers of civil status that we find the subject is dealt with at all, and Mr. Justice Jetté puts this question — he says: "What was the effect of the conquest upon this state of things?" he says you had a jurisdiction claimed by the Anglican clergymen on the one hand and an exclusive jurisdiction claimed by the Roman Catholic clergy on the other, and his presumption is that by the very force of things each claimed exclusive jurisdiction as to its own congregation. Now I am quite unable to follow that line of argument. It may be the fault of my logic, but it seems to me that if there was going to be any result produced by the juxtaposition of these two conflicting powers it would mean that they would have concurrent powers as to the celebration of all marriages, or else there came about the predominance of one over the other. If we take the view of Chief Justice Sewell in the case of *Ex parte Spratt*(1) that this was a function of the State which came from the Crown, we can hardly escape the conclusion that the right to celebrate marriages and to give authenticity to registers derived from the Crown became vested in the clergy of the conquering nation at the time of cession. We find this opinion expressed by him in this case of *Ex parte Spratt*(1) at page 95.

It was held in that case that a dissenter was not included in the terms of the Act of 1795 and it was further held that the exercise of this office depended upon the Crown. If that is good law — and the auth-

(1) Stu. K.B. 90.

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orities he cited are very strong on that point — then the effect of the conquest was to confer to the Anglican Church the sole authority for the celebration of marriages. It is clearly suggested, and even held expressly in that case, that the source of authority must be from the Crown. However, what I am submitting is that the deduction drawn by Mr. Justice Jetté in *Laramée* v. *Evans*(1) is not a proper deduction if you consider the legal effect of the conquest. I submit that as a matter of logic and inference you can not come to the conclusion that Mr. Justice Jetté does, that each church preserves its rights and functions and jurisdiction but only within its own sphere. If you admitted they were both exclusive of everything else, how could you come to the conclusion that they were restricted to their own parish or their own flock after the conquest? I cannot follow that reasoning at all. Therefore, my submission is that that historical argument does not advance you one bit.

The Anglican parochial organization was established almost immediately after the treaty.

In 1795, shortly after the conquest, an Act was passed for the keeping of registers of civil status by ministers of that church. The curious thing is that these marriages were not confined to the Roman Catholic church nor to the Anglican church for we find that justices of the peace were celebrating marriages then, and without the slightest apparent authority. I have never been able to find authority for the celebration of marriages by justices of the peace at that time, or since for that matter. I am

(1) 25 L.C. Jur. 261.

told, I do not know that it is true, that the United Empire Loyalists who came back to this country after a sojourn of some length in the United States had got accustomed to marriages before justices of the peace and that they imagined, wrongly imagined I should think, that our justices of the peace had the same power and jurisdiction and that that accounted for the celebration of these marriages by justices of the peace.

The Act 44 Geo. III. ch. 2 provided that all marriages solemnized since the 30th of September, 1779, by any minister of the Church of Scotland or by any person reputed to be a minister of the Church of Scotland, or by any Protestant dissenting minister, or by any person reputed to be a Protestant dissenting minister, or by any justice of the peace, shall be held to be valid in law, and 1 Geo. IV. ch. 19 validated similar marriages in Gaspé.

My Lords, the only additional reference I desire to make to the law before the Code is to two or three of the statutes relating to marriages celebrated by dissenters.

My submission is that these statutes, which conferred the power to keep registers of civil status by necessary implication confer the power to marry. None of these persons who were permitted to keep registers of civil status were authorized to celebrate marriages but these Acts have always been construed as authority to celebrate marriages in consequence of their being authorized to keep marriage registers.

There seems to be nothing before the Code which directly conferred competence on officers of civil status to celebrate marriages, with one exception. I may be wrong as to that, and perhaps my learned

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friends have discovered some other statute, but I have only discovered one and that is the one referring to the ministers of the Church of Scotland. It uses language different from the language of the other statutes which merely authorized the keeping of registers of civil status and it is the only instance I find as to the dissenting ministers.

This is the authority that is given:—

"Be it therefore further enacted by the authority aforesaid, that all marriages which have heretofore been or shall hereafter be celebrated by ministers or clergymen of, or in communion with the Church of Scotland, have been and shall be held to be legal and valid to all intents and purposes whatsoever, anything in the said Acts or in any other Act to the contrary notwithstanding" (1).

The inference from that is that it was taken for granted that the Anglicans and the Catholics could celebrate marriages, and it seems to have been taken for granted also that justices of the peace could celebrate marriages. It does not shew that there was any lawful authority for doing that but it shews that that was the state of the practice. Now, it is quite possible that in so far as the celebration of marriage by the priest or by an Anglican clergyman is concerned it resulted necessarily from the effect of the cession. That is quite possible, but what I say is that there is no legislative authority at any time given to them, before the Code, either to Anglicans or to Roman Catholic priests. At all events I cannot find any, although, perhaps, my learned friends may have

(1) 7 Geo. IV. ch. 2 (L.C.).

discovered something that has escaped my notice. This is the only statute which, before the Code, appears to confer power to celebrate marriage.

It has been suggested that the "Hardwicke Act" was introduced into Canada and persisted in notwithstanding the "Quebec Act." It seems to me that, so far as the law of marriage was concerned, the introduction of the French law — the law of Canada, — by the terms of the cession and the "Quebec Act," would *pro tanto* repeal any provisions of "Lord Hardwicke's Act" that were applicable otherwise to the colonies. Your Lordships will remember that the free exercise of the Catholic religion was always subject to the King's supremacy. You have to read all these things together. It makes up a very perplexing situation and all I can say is that the inhabitants of Lower Canada at the time took it for granted that the Anglican clergymen could celebrate marriages and that portions of the Catholic clergy could celebrate marriages, and they even seemed to believe that justices of the peace could do the same. That being the case, the first Act that was passed relating to marriages of Catholics and Protestants was the Act of 1795.

As to the common law right of justices to celebrate marriages, how could it persist, and how could the jurisdiction of the justices of the peace continue after the "Quebec Act," which introduced the law of France into the Province of Quebec. The only limitation I would suggest would be this: That if you regard the authority to celebrate marriages as Chief Justice Sewell regarded it, as a function which derives its authority from the State, then, of course, the effect of the cession would be to abolish all the authorities that emanated from the French Government,

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and the source of all authority in that respect would then be in the King of England, and that would require new commissions, new instructions, and new authorities. I have always thought that this Act of 1795 was intended to confer the power to celebrate marriage because it is impliedly contained in the power to keep registers of marriages and to enter therein all marriages celebrated by the clergymen. If that is not so, how could you construe the subsequent legislation in regard to the dissenters, which, with the single exception of the one relating to the clergy of the Church of Scotland, did not confer power to celebrate marriages at all but simply conferred power to keep registers, and put them all under the general Act of 1795. Is it not clear that the meaning of the legislature at that time must have been to confer upon those dissenters (who certainly did not have any power to celebrate marriages by any tradition or any antecedent authority) the power to celebrate marriages by giving them the authority to keep registers of civil status? That would be my construction of that statute, or otherwise you would have to come to the conclusion that, until the Code, all these dissenters for whom all this special legislation was passed really could not celebrate marriage at all; they could keep registers, but they must have some other authority outside the statutes to celebrate marriages. That seems to be inconceivable and it seems to me we must construe that legislation as by necessary implication conferring the power to marry.

I wish to refer to two more statutes which are mentioned by my learned friends on the other side. One of them, 9 & 10 Geo. IV. ch. 75 (L.C.), relates to the Jews. My learned friends were not quite right

in their statement about this, because, while it is true there is a restriction, it does not appear to me, under the words of the Act, to be a restriction as to their power to celebrate marriage. The Act, (sec. 7,) says: Every Jewish minister is to keep "a register in duplicate of all marriages and burials performed by him, and of all births which he may be required to record in such register by any person professing the Jewish religion." It is manifest that the Jews did not celebrate baptism, but they did celebrate marriages and they did officiate at burials, and their power does not seem to be restricted as to marriage or as to burials. But it is restricted as to the case of births which are presented to them to be recorded. I do not know whether that was really the intention of the legislation, possibly they expressed themselves badly, because I do know that in England the acts relating to Jews restricted their power to marriages within their own congregation. I say that this Act has not, in terms done it. The only other statute of this kind to which I will refer, is that respecting the Quakers, 23 Vict. ch. 11 (Can.). The restriction in this Act is not quite so extensive as my learned friends on the other side contend, but it does say:—

"1. All marriages heretofore solemnized in Lower Canada according to the rites, usages and customs of the Religious Society of Friends, commonly called Quakers, and all marriages hereafter to be solemnized in Lower Canada, between persons professing the Faith of the said Religious Society of Friends, commonly called Quakers, or of whom one may belong to that denomination, shall be held, and are hereby declared to be valid to all intents and purposes whatsoever."

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I say this special legislation was due to the fact that the Quakers did not appear to have any ministers over their congregation. They are a society who are very much impressed with the personal equality of all members of the congregation, and they refuse to elect or to recognize any one at their head, and consequently it was in the nature of things that a separate legislative provision should be made for the Society of Friends. With these exceptions, and to the extent of these exceptions, all the legislation appears to be directed to authorizing dissenting congregations to keep registers of civil status, but never in terms, except in the one case of the Church of Scotland, authorizing them to marry.

There is just one other observation I wish to make before I leave this part of my subject, and that is that it is a very doubtful question whether article 127, if it be relied on, creates a nullity of marriages celebrated in contraversion of the terms of that article. It may be — and I suggest this is a very reasonable construction of the language of that article — that, while it recognizes the religious impediments established in the different communities of Christians, it merely leaves the contravening parties to the penalties which may be imposed by their respective churches. The article simply says that the other impediments recognized according to the different religious persuasions, as resulting from relationship or affinity or from other causes, remains subject to the rules hitherto followed in the different churches and religious communities; the right likewise to grant dispensation from such impediments, appertains, as heretofore, to those who had hitherto enjoyed them. If you compare that article with article 152 which

enumerates the nullities resulting from a violation of the articles of the Code, you will find that any marriage contracted in contravention of articles 124, 125, 126, may be contested either by the parties themselves or by any of those having an interest therein. But, nowhere in the Code is it said that a marriage celebrated in contravention of article 127 of the Code can be set aside. No nullity is pronounced by the Code as to that, and you cannot infer it from the language of 127 which simply says that the impediments recognized in the different religious communities remain subject to the rules which have hitherto prevailed. Nowhere do you find any article in the Code annulling such marriages. If that be the case, then all the force of the argument derived from the application of article 127, as establishing an impediment to clandestinity, disappears. That is a part of the argument, which I have already had the honour to submit, that it is not an impediment within the meaning of article 127.

Now, my Lords, I pass on to the second branch of the question which I shall deal with very briefly, because a great deal of what has been said on sub-question (*a*) applies to sub-question (*b*) necessarily, these two overlap.

Now, this question says:—

"2. Does the law of the Province of Quebec render null and void, unless contracted before a Roman Catholic priest, a marriage that would otherwise be legally binding, which takes place in such province;

"(*b*) between two persons, one of whom, only, is a Roman Catholic."

My submission is briefly this: by the terms of article 129 all priests, rectors, ministers and other

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officers authorized by law to keep registers of civil status are competent to solemnize marriage. The construction which is put on this article by my adversaries is that the jurisdiction of each of these enumerated officers of civil status is restricted to a certain class of persons. As I understand them, they contend that a Roman Catholic priest is authorized to celebrate marriages between Roman Catholics, and that Protestant ministers are authorized to celebrate marriages between Protestants, and that that results from the cession and from the delimitation of powers which necessarily resulted. I understand that to be the contention of my adversaries. It is the theory which is propounded by Mr. Justice Jetté in *Laramée* v. *Evans*(1). He says that at the time of the cession there were these two mutually exclusive jurisdictions and that the result of their juxtaposition, without any legislation at all on the subject, was necessarily to render them competent each within its own sphere.

The question is: what is the limit of the jurisdiction of these functionaries; and is there any limitation? Of course, if you impose limitation in one case, there is no reason for not imposing it in the other. How could you say that, in the case of all these enabling acts, these various persons who are authorized to keep registers of civil status, and in the case of ministers of the Church of Scotland, who are authorized to celebrate marriages — how could you say there is any restriction ? The Act giving power to the ministers of the Church of Scotland says that all marriages celebrated by them shall be valid hereafter. That is not qualified by any restriction of any kind.

(1) 25 L.C. Jur. 261.

It is not to be supposed that the ministers of the Church of Scotland were given any authority less than that which was vested in the clergymen of the Anglican Church; it could not have been supposed that greater authority was given to them. My submission is, that there is no restriction, but my friends on the other side say there is some necessary restriction upon all these functionaries to celebrate marriage within their own parishes and among persons of their own flock. They do not admit in their factum but they will probably admit in their argument that that extends further than their own flock, and these functionaries have the authority to marry, providing one of the parties applying to be married is of their flock.

Now, where is the law for making that distinction? How can you find such a distinction in any of the legislation before the Code; where can you find it in the Code? The whole historical argument, as I understand it, goes to this: that the jurisdiction of each of these functionaries is exclusive and restricted, but where do you find any suggestion as to that in any law upon the subject. And the necessary result of that theory would be, it seems to me, that in order to celebrate a mixed marriage, as it is commonly called, it would require the presence of two officiating clergymen and by the very nature of things each would be without jurisdiction in the parish of the other. Suppose, the two parties, the Roman Catholic and the Protestant, belonged to different parishes, — what would happen? We will take, for simplicity's sake, the case of an Anglican where there is a parochial division, living in one parish, and a Catholic living in another parish, — how are you going to get concurrent

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action on the part of the clergyman and the priest? The clergyman has no jurisdiction in the parish of the priest and, *vice versa,* the priest has no jurisdiction in the domicile of the other. It seems to be a *reductio ad absurdum* to say that two ministers could by joint operation validly effect one marriage. Where do you find any authority for saying that the priest has any authority to marry beyond his own flock; or that the Anglican minister has any authority to go outside his own congregation; unless you adopt the perfectly plain and natural meaning of article 129 that there is no restriction whatsoever. To go a step further, how can you celebrate a marriage between a Christian and a Chinaman; by what possible combination of officers of civil status can you validly effect such a marriage; how could you validly effect a marriage between two unbelievers who have no parish and belong to no religious community; how could you marry two Chinese or Hindus or Turks; and we have all of these people in our midst. If you say that there is a restriction there according to the historical argument that is made, which confines the power of each to his own congregation, you are disfranchising, so to speak, this large part of our population, because you will see that there is no officer of civil status competent to marry them. I am only using this argument to shew the improbability of our codifiers having, at the end of article 129, intended to create any such ridiculous restriction as that, which would make it impossible for a large proportion of our population in the large cities to get married at all.

Now, I submit it is contrary to reason and to common sense to adopt such a construction of article 129. In so far as the construction of that article is

concerned, even if the commissioners supposed that they were reproducing the disabilities of the old law, the question is not what they intended to do but what they have done by that language. I submit that they have in the clearest manner established the power to celebrate marriage without any of the restrictions which may have existed prior to the Code. I cannot find any law which gives the authority for the celebration of a mixed marriage, either by a Catholic priest or by a Protestant minister, unless you adopt my construction of the Code, and of all the previous statutes, that the power to celebrate marriage is not restricted to any particular community of Christians or of citizens, and that any persons authorized to marry can marry generally, unless, as in the case of the Quakers, there is a restriction, and that exception proves the rule, and it was a necessary restriction in the case of the Quakers because they do not have any minister, and people would not go to them to get married unless they were members of the Society of Friends and joined the congregation. Marriage was celebrated among the Quakers by the consorts getting up in the middle of the congregation and saying they took each other for man and wife, and there was no priest or minister involved in it. There was no official of any kind, and as soon as they were put under the operation of the Act of 1795 they had to have a registry officer and keep a register of civil status. But there was no one who performed the marriage. That officer attended as a member of the congregation, and, as I say, there was this restriction necessary in the case of the Quakers because of the peculiar constitution of their religious society. I wish to give your Lordships one more reference upon the construction

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of the Code, and I wish to refer to the *Canadian Pacific Railway Co.* v. *Robinson*(1). And I wish to add the case of *The Bank of England* v. *Vagliano Bros.* (2). This is an English case, decided in the Privy Council. I refer to the judgment of Lord Macnaghten, in *Norendra Nath Sicar* v. *Kamalbasini Dasi*(3), at p. 26. It re-affirmed the rule which was laid down by Lord Herschell in *The Bank of England* v. *Vagliano Bros.*(2), and applied it to the "Indian Succession Act"; it entirely approves of the principle that was laid down in that case.

In regard to mixed marriages, as the Chief Justice has pointed out, the question has not been raised in any judicial proceeding, and I am not aware it is a matter of doubt in our province, and so there is no grievance or anything of that kind that requires to be redressed. I am bound to say that. But I do consider that the argument upon that question is of the highest value in assisting you to interpret article 129, because I think, when you reflect over the question of a mixed marriage, you must come to the conclusion, my Lords, that it is the *reductio ad absurdum* of the historical argument. It seems to me to lead to consequences which are repugnant to reason and to a proper interpretation of article 129. As to its being a question of moment in our province, it is not so far as I know.

Mignault K.C.—My Lords, I do not think, especially at this late stage, that there can be any doubt as to the construction which should be put on the Civil Code of Lower Canada, and more especially as to the

(1) 19 Can. S.C.R. 292; (1892) A.C. 481.

(2) [1891] A.C. 107.

(3) 23 Indian Appeals 18.

canons of construction which apply. The question has come up in its general form through some remarks made by my learned friend, Mr. Lafleur, both in his factum and in his argument. I conceive that it is beyond question that the Civil Code is mainly declaratory of the law as it existed in 1866.

If your Lordships will look at the sections of the Act; the instructions given by the legislature to the codifying commissioners was, in every case, to express the existing law, and where they thought proper to suggest an amendment it should be indicated as an amendment suggested. My main purpose in referring to this is to state that our Civil Code is mainly declaratory of the existing law. It is not a new law; it is not a law like the "Bills of Exchange Act" in England, which, in some ways, may have been a codification, but I think was not so in many respects. I am speaking with all due deference, because I am not as familiar with that as I am with our own laws. But I take it that in the case of the "Bills of Exchange Act" there were many, — what I may call reforms, — which were effected by the new legislation. I think that is beyond question. I think that certainly my learned friends will not disagree with me that, mainly, the Civil Code of the Province of Quebec is declaratory of the existing law. It is in no wise — or if it is I humbly confess that I have not grasped its meaning — an ordinary statute; it is a body of laws; it is a concise expression of the entire system comprising the whole law of the province as mainly derived from the Coutume de Paris and from several of the old ordinances with the additions which came

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from certain customs. So that our Civil Code, when construed, must be considered in the light of a declaratory law.

We have the reports of the codifiers to guide us. My learned friend in his factum objects to the use of these reports and he cites certain judicial opinions where it has been suggested that it was not proper to refer to reports. There have been Royal Commissions and these Royal Commissions recommended a change in the law and judges have sometimes, and I think in some instances very properly, refused to be controlled by the report of the commissioners in construing a law. But between our case and those cases, I submit, there is no parity whatever. Our courts have been in the habit, rightly or wrongly, and I think rightly, of referring to the reports of the codifiers, and their Lordships of the Privy Council have also referred to them in the case of *Symes* v. *Cuvillier*(1). In that case they referred to them on the question as to the old law and they said that the reports of the codifiers were entitled to the very greatest weight, the greatest respect, but were not to be considered as judicial utterances. But, for purposes of comparison, and that is my point, they have always been considered by our courts as throwing light on the meaning of the articles of the Code. They have been incidentally cited in such cases; they have been cited by your Lordships, they have been cited by every court, and on this point specially is it necessary to refer to them because I will shew to your Lordships that article 129 is not clear, as has been stated, by my learned friend; that there are very serious limitations, and

(1) 5 App. Cas. 138, at p. 158.

that, considering the whole subject, it raises questions of construction in which certainly your Lordships can be aided by reference to the codifiers' reports. We have certain rules which have plainly been applied in the construction of our Code as well as in the construction of the French Code. As the Chief Justice has pointed out, Laurent has always been a source of authority as to the meaning of the law in France. These reports have always been referred to before our courts, and I am not aware that the practice of referring to these interpretations has ever been considered as worthy of reprobation. I may say, further, that we have distinct rules in our Code covering construction, which are mainly taken from the French Code. I refer to the familiar rule laid down by article 1020 of the Civil Code which refers to the construction of contracts but which equally applies to the construction of any statute. Article 1020 says:—

"1020. However general the terms may be in which a contract is expressed, they extend only to the things concerning which it appears that the parties intended to contract."

I say that rule applies to the construction of a statute and I find laid down in Beal on Legal Interpretation, 2nd edition, 1908, page 311, under the title of Restriction of Language, the following utterance of Lord Herschell:—

"It cannot, I think, be denied that for the purpose of construing any enactment it is right to look not only at the provision immediately under construction, but at any that is found in connection with it, which may throw light upon it, and afford an indication that general words employed in it were not in-

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tended to be applied without some limitation." *Cox* v. *Hakes*(1).

My learned friend, Mr. Lafleur, to some extent has, so to say, isolated article 129, his argument being that there is no restriction whatever in the terms of article 129, and consequently, that it is to be given the widest application. I propose to consider article 129 — I think I am right in doing so — in connection with all the provisions of the law covering both marriages and the case of registers of civil status, the two subjects being branches of the one general subject. Article 129 is in the following terms; and paragraph 1, which I will consider now, reads:—

"129. All priests, rectors, ministers and other officers authorized by law to keep registers of acts of civil status are competent to solemnize marriage."

My learned friend says there can be no doubt about the meaning of this, that it is a general provision to which is to be given the widest possible effect. I have to contest that doctrine in regard to article 129; I think it cannot be given general effect according to its terms. I have to suggest, first, one limitation as to which, to my mind, there can be no doubt, and that is in respect to the words: "and other officers authorized by law to keep registers of civil status." My submission is that these general words must be restricted so as to extend merely to officers of the same category as priests, rectors, and ministers. Otherwise, I submit, that superiors of religious communities would have the right, according to the contention of my learned friend, to solemnize marriage. Mr. Lafleur says that all superiors of religious communities are

(1) 15 App. Cas. 506, at p. 529.

not authorized to keep registers of civil status, but that is not what article 129 says. Article 129, if you give it general effect, says, "all officers authorized by law to keep registers of acts of civil status," and that according to its general meaning would mean any act of civil status. Consequently, if you give general effect to article 129 it is undoubted that superiors of religious communities are authorized to keep acts of civil status; acts of religious profession, which are acts of civil status. Consequently, here is one indication that the terms of article 129 cannot be followed and so we must begin to look at it with that notable restriction.

Now, there is a second restriction to the general meaning of article 129 and it is a most important one. Are priests, rectors and ministers competent to solemnize marriage whether or not they are authorized to keep registers of civil status? If general effect be given to article 129 the affirmative might be predicated. I submit that it is evident, by all the provisions of this law, that here again we must restrict article 129 to priests, rectors, and ministers who are authorized to keep registers of civil status. This being granted, then there is the further limitation that priests, rectors and ministers are competent to solemnize marriage only in those places where they are authorized to keep registers of civil status, because elsewhere they have not that authority, and, consequently, priests, rectors and ministers can only solemnize marriage where they are authorized to keep registers of civil status. Then we come to article 63 of the Code.

I desire to point out to your Lordships that the canons of construction which my learned friend, Mr.

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Lafleur, would apply to the interpretation of article 129 cannot apply because they omit material provisions which require to be applied in the construction of this particular law. We have article 53*b* and my learned friend, Mr. Lafleur, practically admitted that he could not say what officers it applied to. Now, I say, that by article 63 and as a general rule marriage must be solemnized at the place of domicile of one or other of the parties, but here is an article which requires construction. This law is not so clear as has been stated. Article 63 says:—

"63. The marriage is solemnized at the place of the domicile of one or other of the parties. If solemnized elsewhere, the person officiating is obliged to verify and ascertain the identity of the parties."

My learned friend, Mr. Lafleur, says that marriage can be celebrated anywhere, and consequently the first part of article 63 is useless. I say that the first part of article 63 lays down the general rule, and that the reference to marriage being celebrated elsewhere in the second part of the paragraph refers to exceptional cases. But it is evident that, between us, article 63 must be construed and consequently we have an indication which I submit to your Lordships as having, in my humble opinion, very great force. Therefore, this article requires construction, and I will shew your Lordships that article 129 requires construction, when combined, as it must be combined, with another article of the Code. Article 63 indicates that, as a general rule, marriage must — I use the word must — be solemnized at the place of domicile of one or other of the parties. I have been at some pains to verify this, and I have referred to the authorities cited by the codifiers, but have derived no light from that.

Article 63 says that the marriage is solemnized at the domicile of one or other of the parties, but according to the old law, as laid down by Pothier, the marriage should be celebrated where the bride lives, but with the permission of the parish priest of the domicile of the bride the marriage could be celebrated at the domicile of the husband. That is what was laid down. But, under article 63, the marriage could be solemnized in the place of the domicile of either party.

The second part of the article says:—

"If solemnized elsewhere the person officiating is obliged to verify and ascertain the identity of the parties."

I think we can help ourselves in construing that portion of article 63 by reference to article 132 which uses practically the same phraseology. Article 132 of the Civil Code says:—

"132. If their last domicile be out of Lower Canada, and the publications have not been made there, the officer who, in that case, solemnizes the marriage is bound to ascertain that there is no legal impediment between the parties."

Your Lordships will notice that the language of the two is very similar. In article 63 it is stated that if solemnized elsewhere the person officiating is obliged to verify and ascertain the identity of the parties, and in article 132 it is said that the officer who solemnizes the marriage is bound to ascertain if there is no legal impediment between the parties. I would take the case mentioned in article 132 as being one of the exceptional cases to which the latter part of article 63 refers. There is another case in point. Under canon law, it was a vexed question as to where vagrants, who had no domicile at all, could be mar-

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ried. It was conceded that they could marry, but the question arose as to whether they should go to the parish priest of their domicile of origin and there be married. The decision of the canonists was, and it was laid down authoritatively by the commission of cardinals entrusted with the construction of the decrees of the Council of Trent, that they could marry anywhere, but before marrying them the priest was bound to ask the permission of the ordinary, that is to say, of the bishop, and also to make an inquiry in order to discover whether there was any impediment between the parties. I would refer your Lordships, on this question of the marriage of vagrants, to Esmein, Le Marriage en Droit Canonique. I submit to your Lordships that this case of vagrants is one of the things to which the exception in article 63 would apply. I know of no other case and I would say that outside of these exceptional cases, unless you deprive of any effect the first part of article 63, marriage must be celebrated at the place of residence of one of the parties.

With regard to Roman Catholics, "place of residence" undoubtedly it is the parish; with regard to other religions I am possibly not sufficiently informed to state. Article 63 was considered by this court and by the Privy Council in the case of *Wadsworth* v. *MacMullen*(1) and as I understand the decision it was stated that article 63 referred to residence and not necessarily to domicile.

I am not prepared to say with regard to other religious congregations, but I believe in the case of the Anglican Church there is a parochial organization. I am not aware whether a parochial organization,

(1) 14 App. Cas. 631.

that is to say, a distinct territory, exists for the ministers of other religions, but in the statutes which we have printed, there is some reference to a "circuit."

There is article 133 which reads:—

"133. If the parties, or either of them, be, in so far as regards this marriage, under the authority of others, the banns must also be published at the place of domicile of those under whose power such parties are."

The point I am making, and from which I have somewhat wandered, is, that article 63 lays down the general rule and that in consequence of this rule article 129 must receive no limitation, and as it would only apply to the priest, rector or the minister of the domicile of the parties, no other could, without the permission of the parish priest or rector of the parties, solemnize marriage either at the domicile of the parties, because they are not there authorized to keep registers of civil status, or elsewhere, because, as a rule the marriage must be solemnized at the domicile of the parties. Consequently, I say we have no limitation to the terms of article 129. There is another article of the Code, which I think your Lordships should consider in connection with the construction of article 129. I refer to the second paragraph of article 44. Article 129, as we know, authorizes priests, rectors, ministers and other officers, authorized by law to keep registers of acts of civil status as competent to solemnize marriage, and the second paragraph of article 44 says:—

"In the case of Roman Catholic churches, private chapels or missions, they are kept by any priest authorized by competent ecclesiastical authority to celebrate marriages or administer baptism and perform the rites of burial."

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On the one hand, according to article 129, priests who are authorized by law to keep registers of acts of civil status are competent to solemnize marriage; on the other hand, by the second paragraph of article 44, Roman Catholic priests who are authorized by competent ecclesiastical authority to celebrate marriage are authorized to keep registers. The juxtaposition of the two articles shews this: that because priests are authorized by competent ecclesiastical authority to solemnize marriage, they are by the civil law authorized to keep registers, and because they are authorized to keep registers according to article 129 they are declared competent to solemnize marriage. I submit to your Lordships that these two articles must be considered together, and it is perfectly obvious, that in view of these articles the wide construction claimed for article 129 is impossible with regard to Roman Catholic priests. My learned friend states in his factum that there is no distinction between Roman Catholics and non-Catholics in article 129, whereas he concedes a sharp distinction between Roman Catholics and other religions under articles 42, 43, and 44. But I take it, my Lords, that so far as Roman Catholics are concerned, articles 129 and 44 must be read together. I am referring to what my learned friend says in his factum. He says:—

"Articles 128 and 129 are in sharp contrast in this respect to articles 44, 49, 53*a*, 59*a*, which refer expressly to the Roman Catholic church and distinguish between its priests or members and those of other religions."

My point is that, so far as the Roman Catholics are concerned, articles 128 and 129 and 44 must be read together, because article 129 says that all priests

who are authorized by law to keep registers of acts of civil status are competent to celebrate marriage and, when we inquire who are the priests who are authorized by law to keep registers of acts of civil status, we find the answer in the second paragraph of article 44, that they are those priests who are authorized by the competent religious authorities to solemnize marriage. Consequently, I submit that the title of the priest is the authorization given him by the bishop. I am referring to nothing else now than the provisions of the Civil Code, and it is because he is authorized by the bishop to solemnize marriage that he is authorized by the law to keep registers, and it is because he is authorized to keep registers that he is declared competent to solemnize marriage. It is not claimed to give him the power, it is said he is competent to solemnize marriage, and, consequently, I say that the title of the priest is the authorization of the competent ecclesiastical authority, so that in the final analysis, according to these articles of the Civil Code, the priest derives his authority, his right to solemnize marriage, from the authorization of the bishop. If there is any other construction that could be placed on the construction of these articles of the Code, I would be happy to hear it from my learned friend. I see no escaping from my contention and I would submit that it was done deliberately. There was never a doubt, I am speaking perfectly frankly, before the decision in *Delpit* v. *Côté* (1), that Roman Catholics could only be married before their own parish priest. My learned friend has referred to the case of *Burn* v. *Fontaine* (2), but

(1) Q.R. 20 S.C. 338.

(2) 15 L.C. Jur. 144; 3 R.L. 516; 4 R.L. 163.

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that is not a case in point because in that case there was no action to set aside the marriage. It was pretended that the first marriage was null *ipso facto* and that a second marriage had been contracted, and the wife — I am speaking from memory, but it is to be found in Revue Légale, vol. 4, — the wife claimed marital rights or alimony or something of that kind, and it was alleged that one of the marriages, I think the first, was an absolute nullity. The natural position is that the court would not assume the marriage to be null, in the absence of any action taken to set it aside. That case was merely an application of the doctrine of the presumption of the validity of the marriage until the marriage was set aside. As I have said, there never was a doubt before the decision in *Delpit* v. *Côté*(1), as to what the law of the Province of Quebec was. It is conceded by Mr. Justice Jetté, *Laramée* v. *Evans*(2); Justice Papineau had, in that very same case, decided the same thing on demurrer(3). There never had been any question before.

It was argued in the case of *Laramée* v. *Evans*(2) that the marriage was good. To be perfectly frank I should say that one of the earliest commentators on the Code expressed the opinion that, under article 129, such marriages could be celebrated, but Mr. Justice Loranger, in his treatise on the civil law, and Sir François Langelier, in his course of lectures at Laval University, which have been published, agree that marriages of Roman Catholics must necessarily be celebrated before their parish priest. I was saying that I considered the words used in article 44 were used advisedly. It was never doubted in the Province of Quebec that the authority to solemnize

(1) Q.R. 20 S.C. 338. (2) 25 L.C. Jur. 261.
(3) 24 L.C. Jur. 235.

marriage, *quoad* Catholics and *quoad* a Roman Catholic priest, came from the church, and that it was a part of the jurisdiction which he received from his superior. We find this idea stated in article 44. My argument on this would be extremely simple: authorization of the bishop, I submit, is the title of a priest to solemnize marriage. This authorization is necessarily restricted to people of the same communion as the Roman Catholic priests, that is to Roman Catholics. If it were held, under article 129, that the competency of these ministers and rectors extended to all marriages, without any distinction, then the power and authority of the non-Catholic priests would be wider than those of the Catholic priests, and that would be contrary to the principle of equality. I take it that article 129 applies to the religious belief, in so far as the Roman Catholic clergy are concerned, and, to my mind, it would be extremely difficult to otherwise satisfactorily construe article 129 with the second paragraph of article 44.

I think, that it is also possible to discover the true meaning of article 129 by reference to some other provisions of the law. I would direct your Lordships' attention to the provision concerning opposition to marriage. I may say generally that the chief object of the law in enacting articles 128 and 129 was to secure the publicity of marriage and to prevent clandestine marriages. This was, of course, a consideration of public order, and, consequently, they provided for a procedure for the taking out of oppositions to marriage. I do not know that there is a similar procedure in the English law, but in accordance with our law a marriage might be prevented by reason of an opposition. For instance, the father or the mother

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or the tutor or a prior consort of one of the parties, in order to prevent a marriage which would be null according to law, might take proceedings. Some construction must be put on article 129 to meet the provisions of the law concerning opposition to marriage. For instance, when an opposition is taken out by article 1107 of the Code of Procedure, it must be served upon the functionary called upon to celebrate the marriage; by article 1109 of the same code service of nonsuit of the opposition must be made upon the person called upon to solemnize the marriage. Article 61 of the Civil Code requires that the disallowance of the opposition be notified to the officer charged with the solemnization of the marriage. My argument is that there must be some officer, some priest or minister, who, in the intendment of the legislature, is charged with the solemnization of marriage. Take the case of a marriage about to be celebrated in the City of Montreal where there are probably fifty Roman Catholic parishes including the suburbs, and perhaps three times that number of non-Catholic congregations. A marriage is about to take place and that marriage may be stayed by means of an opposition. The law requires that the opposition to marriage be served on the officer charged with the solemnization of the marriage. It seems to me obvious that there must be some particular officer before whom the marriage must be celebrated or otherwise effect could not be given with respect to these provisions as to opposition. There is another important article, article 65 of the Civil Code which states what the acts of marriage must contain. That article, 65, sets forth that the act of marriage must set forth that there has been no opposition or that any opposi-

tion there may have been has been disallowed. How could a priest or minister make this entry that there had been no opposition to this marriage unless he is the only person on whom such an opposition could be served. I know the point taken by Mr. Lafleur in his argument, and it is that under article 65 of the Civil Code there is no requirement or mention of the religious faith of the parties to be married. He says that, if the competence of the officer solemnizing the marriage depends in any way upon the religious faith of the parties, it is most extraordinary that mention of the religious faith of the parties is not required in the act of marriage. My submission is, and it is a complete answer, that all that is required in the act of marriage is the mention of those facts which go to make out the status of the married people, such as their names, the day on which the marriage was solemnized, whether they are of age or minors, whether they were married after publication of banns, whether with a dispensation or license and whether it was with the consent of their father or mother, tutor or curator, or with the advice of a family council when such consent or advice is required, the names of the witnesses, and whether they are related or allied to the parties, and if so on which side and in what degree. Finally, it must be stated in the act of marriage, that there has been no opposition, or that, if there has been any opposition instituted, it has been disallowed. All these facts go to make up the status of the parties. There is nothing in the act of marriage referring to the competence of the person solemnizing the marriage. It is not necessary, at least article 65 does not require, that his name should be given; it merely states that he will sign. All the facts

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mentioned in this act of marriage are facts which go to make out the status of the parties as married people, and certain facts relating to the witnesses and to the consent of the parents or guardians in case these parties be minors. But my submission is, that the law evidently contemplated that there should be one special officer or priest or minister, out of perhaps many thousands, who is called upon to celebrate the marriage. I think that is most important from the point of view of the construction of article 129, because the argument of my learned friend, Mr. Lafleur, if it has any force, would shew that a person could be validly married anywhere in the Province of Quebec, from Vaudreuil on one side to Gaspé on the other. For instance, a minor might go to any one of the hundreds of clergy in the City of Montreal and produce a marriage license and be married without there being any means of preventing the marriage. Now, the law provides a means for preventing such a marriage, and says that the opposition which is taken must be served upon the person who is called upon, or charged, with the solemnization of the marriage. I say, therefore, that there must be, in article 129, one out of many thousands, who alone is competent to solemnize marriage.

I have said that in my humble opinion, the provisions respecting opposition to marriage shew the construction which must be placed on article 129. I would say the same as to the banns of marriage. By article 130 banns are directed to be published in the church to which the parties belong and article 57 states that the officer who is to perform the marriage must be furnished with a certificate establishing that the publication of banns required by law has been

duly made, unless he has published them himself. What would be the object of publishing banns in a church to which the parties belonged if the marriage could be celebrated one hundred miles away? Why, the object of the law would be absolutely defeated. I submit, with confidence, that taking into consideration nothing outside the provisions of these two titles, — "Of Acts of Civil Status" and "Of Marriage," — the limitation for which I am contending must necessarily be placed on article 129 so far as the Roman Catholics are concerned.

I will now take up the second question which I propose to discuss; and first, as to the prior state of the law. I think it is very material on this question to refer to the prior state of the law, and I wish to say a few words on the statute of 1795, 35 George III. ch. 4. The title of that Act is:—

"An Act to establish the forms of registers of baptisms, marriages and burials, to confirm and make valid in law the register of the Protestant congregation of Christ Church, Montreal, and others which may have been informally kept, and to afford the means of remedying omissions in former registers."

If your Lordships will look at section 10 of the Act, there is a reference to a petition which had been presented to the House of Assembly from the churchwardens:—

"From the Church Wardens and Vestry of the Protestant congregation of Christ Church, Montreal, praying the interposition of the Legislature to legalize the register of baptisms, marriages and burials of the said congregation, which have not been kept agreeable to the rules and forms prescribed by the law of this province, and which, etc."

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Through the courtesy of Dr. Roy of the Dominion Archives, I have been able to find the text of that petition which I think should be made a part of my argument. I will cite from the Journal of the House of Assembly of Lower Canada, from the 11th of November, 1793, to the 31st of May, 1794, both being inclusive. It is published in Quebec by order of the House of Assembly in the year 1794. At page 62 — the text is in the two languages, French on one side and English on the other — at the foot of the page I find the following:—

"The petition of the Church Wardens and Vestry of the Protestant congregation of Christ Church, Montreal, was presented to the House by Mr. Richardson and read in both languages, setting forth that the keeping, depositing and preserving in regular and due form and due manner registers of baptisms, marriages and burials, in their parish, most essentially concerns the rights of families and of individuals and that the not keeping and depositing of registers of baptisms, marriages and burials of the Protestant congregation of Christ Church, Montreal, according to the rules prescribed by the law of this province since the first day of May which was in the year of our Lord, 1775, unless provided against and remedied, may be attended with the greatest prejudice to the rights of the families and individuals of the said congregation. And, therefore, praying that leave may be granted to bring in a bill for legalizing the register of baptisms, marriages and burials of the said congregation of Christ Church, Montreal, and for the better keeping, depositing, and preserving the same hereafter.

"The House was then moved by Mr. Richardson, seconded by Mr. Frobisher, and it was resolved that

the petition of the Church Wardens and Vestry of the Protestant congregation of Christ Church, Montreal, be referred to the consideration of a committee of three members, two whereof shall form a quorum, to examine the matter thereof and report the same as it shall appear to them to the House, with power to meet and to adjourn to such time and place necessary and to send for persons, papers and records.

"Mr. Richardson also moved the House, seconded by Mr. de Rocheblave, that he be exempt from being nominated on the said committee as he will not be present at Montreal when the information necessary will most probably be taken, which, upon the question being put, passed unanimously, and Mr. Richardson was accordingly excused by the House from being on the said committee.

"Ordered that Messrs. McGill, Frobisher, McBeath do compose said committee."

And I find at page 220 of the same volume the report of the committee:—

"Mr. McGill, chairman of the committee, to whom the petition of the Protestant congregation of Christ Church, Montreal, relative to the method of keeping the register of baptisms, marriages and burials of His Majesty's British subjects of the City of Montreal, was submitted, reported that the committee had examined and inquired into the allegations of the said petition and had directed him to report their proceedings therein, which he was ready to do when the House should be pleased to receive the same. Ordered that the report be now received."

And he read the report in his place and afterwards delivered the same in at the clerk's table where it was

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once read throughout in both languages, whereof the following is an abstract:—

"The committee met at Montreal on Friday, the 10th day of January last. The Reverend Dr. Delisle and Mr. Tunstall, assistant clergymen attended, also Messrs. Antill, Davidson, Hughes, Edwards, Finley and Winter, church wardens or parishioners. Dr. Delisle produced the book entitled 'Copy of the Register of the Protestants of Montreal, made by me, David Chabrand Delisle, Rector of the Parish and Chaplain of the Garrison, on the 31st December, 1763,' and informed the committee that he had made up that register from notes and memorandum occasionally taken by himself and the parish clerks who had been employed in that office; and that he had not in his possession nor did he know of any other register that had been kept by any Protestant clergyman of Montreal preceding his arrival in this country in 1766. The committee then proceeded to peruse and consider the copy of the register which they found to contain a list or register of christenings, marriages and burials in the following order:—

"*Marriages.*

"They begin 22nd November, 1766, and end in 1793, and a copy of the register contains a list of marriages celebrated by the Reverend Dr. Delisle and Mr. Tunstall during that time, the names of the parties married, but the avocations or places of abode not being inserted, or of the witnesses who were present. The better to judge thereof the committee esteemed it proper to subjoin a copy of the first and last entries of marriages as a sufficient specimen of the whole.

"1. 1766. Mr. Peter Paul Souberiau and Miss

Catherine Félicité Chaumont were married by publication on the 20th November.

"Last. 1793. 22nd December, Mr. John Turner and Mrs. Mary Knowles, widow, were married by license.

"Christenings.

"The register of christenings is perhaps more regular as it appears that when there were sponsors their names are inserted. The first is in 1766 without sponsors; the second is of the same year and with sponsors in the following manner:—

1. Ann, daughter of Mr. Lawrence and Mrs. Jemima Ermatinger, born 16th October, baptized 5th November; sponsors, Mr. Horace Oakes, Miss Moore Oakes, Miss Margaret Oakes.

"The last is as follows in 1793: Abagail, daughter of Samuel and Mary Brown, born 25th October and baptized 8th of November.

"Burials.

"The first appears to have been in 1767 and is entered in the following words:—

"Isabella Holmes, died 24th of May and was buried the 25th.

"The last is in 1793: Margaret Wraser, died the 4th of December and was buried the 5th. And there is no mention of the parents or other relations or places of abode.

"The committee esteem it proper to add that they desired the vestry men and parishioners who are present at the perusal of the copy of the register to examine it and see whether in their recollections there had been christened, married or buried any persons

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whose names were not therein inserted; Major James Hughes remarked that in the list of christenings no less than three persons in his own family had been omitted, namely, his sons Charles and William and his grandson James Walker; from that circumstance it is inferred that an omission as well as of marriages and burials as of christenings.

"Upon the whole your committee is of opinion that it is with reason the petition referred to states that the register of baptisms, marriages and burials of the Protestant congregation of Christ Church, Montreal, have not hitherto been kept in the manner prescribed by the law of this province, which may be attended with great prejudice to the right of families and individuals. The committee conceive it their duty to observe that they have reason to believe that marriages, baptisms and burials have been solemnized by other Protestant ministers as well, Episcopalian, and Presbyterians, at other parts of the province without any register whatever having been kept of them. Your committee, therefore, submit whether a law to remedy these and such other like defects should not be passed as soon as convenient, that the mind of His Majesty's Protestant subjects and others their relations may be quieted and a mode pointed out for the due and legal keeping and registering of all baptisms, marriages and burials of His Majesty's Protestant subjects in the future."

The point I desire to make from that is this: The question was put by one of your Lordships this morning to my learned friend Mr. Lafleur, as to what was the law as to the solemnization of marriages in keeping the registers before 1795. Your Lordships will see by section 10 of the Act referring to the petition I have

just read, it is stated that these registers at Christ Church, Montreal, had not been kept agreeable to the rules and forms prescribed by the law of the province. At the end of the same section, it is provided that a copy be made of this register and that it be compared by a judge of the Court of Queen's Bench at Montreal, that the copy, therefore, shall have the same force and effect to all intents and purposes as if the same had been kept in accordance with the rules and forms prescribed by the law of the province.

Section 11 of this Act is also material. It says:—

"11. And whereas there may be other registers which have been kept in this province, not strictly agreeable to the rules and forms prescribed by law; and be it further enacted by the authority aforesaid, that any register of baptisms, marriages and burials which has been informally kept and not deposited as the law directs before the commencement of this Act, by any rector, curate, vicar or other priest or minister of any parish or of any Protestant church or congregation, and which before the expiration of five years after the passing of this Act, shall be presented along with an exact duplicate or transcript thereof to one of His Majesty's Justices of the Court of King's Bench, or provincial judge of the district wherein such register was kept, in order that the original and the duplicate or transcript thereof may be by him, the said justice or judge, compared, certified and signed. And notwithstanding any defect in point of form or otherwise regarding such register, duplicate or transcript, the same shall severally be received as evidence in all courts of justice of the truth of the entries therein contained, according to the true intent and meaning thereof, and shall have the same force and

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effect to all intents and purposes, as if the same had been kept according to the rules and forms prescribed by the laws of this province."

Then, by section 15 of that Act it is further enacted:—

"15. And be it further enacted by the authority aforesaid, 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 six hundred and sixty-seven, and of a declaration of his most Christian Majesty of the ninth of April, one thousand seven hundred and thirty-six, which relates to the form and manner in which the registers of baptisms, marriages and burials are to be numbered, authenticated or paraphé, kept and deposited, and the penalties thereby imposed on persons refusing or neglecting to conform to the provisions of said ordinance and declaration, are hereby repealed, so far as relates to the said registers only."

My submission is that prior to 1795 the law of the province was the old ordinance of France, and, so far as the registers are concerned, more particularly the 20th title of the ordinance of 1667 and the declaration of the month of April, 1736. That is clearly shewn by the statute of 1795 to have been considered as the law of the province.

The question of instructions to the Governor is a rather complicated question to discuss, but your Lordships have read the instructions contained in the books of Drs. Shortt and Doughty and you will have noticed that there were public instructions and secret instructions. I may refer generally to the report from the pen of Chief Justice Hey, which is published in the appendix to the first volume of the Lower Canada

Jurist and which touches on all these questions. On the 2nd of October, 1763, the famous proclamation of George III. was issued by virtue of which it was claimed that English law has been introduced into the Province of Quebec. Governor Murray acting by virtue of certain instructions — my impression is that they were not the public instructions, but secret or confidential instructions — passed two ordinances which are referred to in the "Quebec Act." These ordinances purported to introduce the English common law into the Province of Quebec. They are discussed at length in the report of Chief Justice Hey to which I have referred, and they are also discussed and the whole question most exhaustively treated in the opinion of Chief Justice Lafontaine in the case of *Wilcox* v. *Wilcox*(1). The point taken as to the proclamation of 1763 was that it did not introduce, *proprio vigore,* the English law into Canada, but provided means by which it might be gradually introduced by means of a legislature to be summoned and which legislature was never summoned. The point as to the ordinances of Governor Murray was that they were beyond his power, that he could not by his own authority introduce the English law into the Province of Quebec.

The provisions of the old French ordonnances refer to the solemnization of marriages by the proper curé. Now, with all due deference, I would say it is possible that these provisions may have been construed as being applicable in the case of Anglican clergymen and Roman Catholic clergymen. This is a subject with which I am not absolutely familiar and I speak with hesitancy. I take it that the same parochical

(1) 8 L.C.R. 34.

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organization existed in the Anglican Church as in the Roman Catholic Church, and that the provision of the law requiring the solemnization of marriage by the parish priest could be applied in the case of the Anglican Church the same as in the case of the Roman Catholic Church. I say that, with hesitancy, because so far as I am aware there is nothing absolutely conclusive as to the authority on which marriages were solemnized by the Anglican community prior to the Act of 1795. My learned friend, Mr. Lafleur, has stated that there is no statutory authority authorizing the solemnization of marriages by ministers of the Church of England prior to the Civil Code.

Section 16 of the Consolidated Statutes of Lower Canada, for the year 1860, which is a consolidation of 35 Geo. III., reads in this way:—

"16. The Protestant churches or congregations intended in the first section of this Act, are all churches and congregations in communion with the United Church of England and Ireland, or with the Church of Scotland, and all regularly ordained priests and ministers of either of the said churches have had and shall have authority validly to solemnize marriage in Lower Canada, and are and shall be subject to all the provisions of this Act."

Quoad the Roman Catholic Church there never has been provision by legislation prior to the Civil Code which could be construed at conferring on priests the authority to solemnize marriage. I take it as an incontrovertible truth that the provisions of the old ordonnances of the French Kings, which were in force in the Province of Quebec, were preserved in operation under section 2 of the "Quebec Act," and that continued to the Civil Code and there was no necessity

for any provision in the laws of Lower Canada authorizing the Roman Catholic priest to solemnize marriage.

As to the Anglican Church any authority its ministers had to solemnize marriage would be an authority derived from the old French law which continued to be in force. At all events that would strike me as the better view. That will come up more particularly under what I may describe as the question of repugnancy, which in two words is this — it is referred to in my learned friend's factum and is somewhat extensively treated of in the judgment of Mr. Justice Archibald in the case of *Delpit* v. *Côté*(1) — and it is, that these provisions for marriage were repugnant to the ideas and principles of the victors and, consequently, did not remain in operation after the conquest. I submit it as an unquestionable fact that the whole body of the French civil law, including these ordonnances, was maintained in force in the Province of Quebec after the conquest, that at no time did the English common law have any effect in the Province of Quebec, and that it is possible to construe these ordonnances as conferring sufficient official authority to any parish priest to solemnize marriage. That, however, is a question that I discuss with a great deal of deference. It may be that authority was assumed by the ministers of the Anglican Church; it may be, as I thought my learned friend suggested, that they assumed they had authority under the law in "Lord Hardwicke's Act." But I would say this: that undoubtedly the whole body of the civil law was in force, and my submission is that there is nothing therein that could be considered repugnant. The question of repugnancy is an absolutely new one; it was never suggested at any

(1) Q.R. 20 S.C. 338.

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time that the provisions of the French law were repugnant and would have been abrogated by the effect of the conquest.

The subsequent special laws I will ask your Lordships briefly to look at, because it is contended by my learned friend, Mr. Lafleur, that they conferred a general authority to solemnize marriage. They were all special laws; they were adopted to come to the relief of certain congregations. I would submit that all these laws which were enacted after the statute of 1795 with respect to different religious communities are merely special laws and do not confer any authority to the ministers outside of their own congregations. I submit that as the proper construction of these laws.

Your Lordships will observe section 17, of chapter 20, C.S.L.C.:—

"17. This Act extends also to the several religious communities and denominations in Lower Canada, mentioned in this section, and to the priests or ministers thereof, who may validly solemnize marriage, and may obtain and keep registers under this Act, subject to the provisions of the Acts mentioned with reference to each of them respectively, and to all the requirements, penalties and provisions of this Act, as if the said communities and denominations were named in the first section of this Act, that is to say:" (Here the communities, etc., are enumerated.)

Your Lordships will see, therefore, that the Act refers to each special statute in which authority is given. Going back to these statutes, if your Lordships will look at 1st Wm. IV. ch. 56 (L.C.), an Act intituled "An Act to afford relief to a certain Religious Congregation at Montreal denominated Presbyter-

ians," the sixth line of which says that they are authorized to solemnize and register all such marriages, baptisms and burials as may be performed or take place under the ministry of such minister or clergyman. The words "under the ministry" I submit refer to the ministry exercised in regard to his own congregation, because the petition they forwarded to the legislature was:—

"That the Reverend George W. Perkins, their present minister, or the person who hereafter may have the pastoral charge of the congregation to which they belong, should be duly authorized to solemnize marriages, administer baptism and inter the dead, and to keep registers authenticated in due form of law for that purpose."

The minister is authorized to keep registers of marriages, baptisms and burials which may be performed or take place under his ministry. Your Lordships will find practically identical language in the other statutes. In 3 Wm. IV. ch. 27, which enables the regularly ordained minister of the United Association Synod of the Secession Church of Scotland, to keep authenticated registers, this is the language:—

"It shall be lawful for every regularly ordained minister of the United Association Synod of the Secession Church of Scotland, having a permanent and fixed congregation, to obtain, have and keep * * * registers duly authenticated according to law, of all such marriages, baptisms and burials as may be performed or take place under the ministry of such minister or clergyman."

I make the point that in each of these particular statutes authority is given of a limited nature. The

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authority is prayed for in regard to the purposes of the congregation; it refers to baptisms, marriages or burials under the ministry of the minister and I submit the whole effect of the statute is that it never was conceived that any authority was given to these ministers outside of their own church so far as it might affect the rights of other denominations. Your Lordships will find by verification that that is the effect of the statute. I have stated that with respect to one statute and I can state it with respect to all.

Well now, I come to consider the objections which have been taken to the construction which I have put on article 129. There is an objection which is founded on the second paragraphs of article 129. It is stated, in the first place, that recognizing that the Roman Catholic priests could only celebrate the marriage of their own co-religionists would be to recognize special privileges in the Roman Catholic Church. I respectively submit that that would not be the effect. At all events, to my mind, it would not be a serious argument and I need not do more than mention that objection. The second argument which is of more technical nature is founded on the second paragraph of article 129, which says that none of the officers thus authorized can be compelled to solemnize a marriage to which impediment exists according to the doctrine and belief of his religion and the discipline of the church to which he belongs. The objection is that this provision would be senseless if Roman Catholic priests could only marry their own parishioners. Mr. Justice Archibald states that it would be of no use because then a person against whose marriage an impediment existed could go to another church where such an impediment was not recognized. I think the effect of the second

paragraph of article 129 favours the view that Roman Catholics can only be married before their own priests, because it is stated that none of the officers thus authorized can be compelled to solemnize a marriage to which any impediment exists. My best submission would be that this recognizes an impediment according to the religious belief of the church to which both the parish priest and the parties belong. To my mind, it does not favour the view that Roman Catholic priests have not exclusive authority *quoad* their parishioners. On the contrary, if there is no impediment, then surely, under the construction of the second paragraph of 129, the celebration of the marriage can be completed. If there is an impediment, then the law recognizes that impediment because it provides that the priest cannot be compelled to solemnize the marriage. I submit that that is the clear and true meaning of the second paragraph of article 129. It does not go to the length of saying that then somebody else could celebrate the marriage, because if there is an impediment to the marriage I would submit that it cannot be solemnized by anybody. If there is no impediment then the Roman Catholic priest could be compelled to solemnize it. It seems to me that that is a perfect answer to my learned friend's argument, which is founded on the second paragraph of article 129.

Another objection is founded upon the question of marriage licenses. Marriage licenses are issued by officers appointed, in the Province of Quebec, by the Lieutenant-Governor, and the whole object of the marriage license is to dispense with the publication of banns. The granting of marriage licenses in the Province of Quebec is left to certain persons who are ap-

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pointed or delegated by the Lieutenant-Governor. In order to obtain the issue of a marriage license it is necessary to give a bond, by two sureties being householders to the extent of $800, stating that no impediment exists to prevent the marriage. The whole object of the marriage license is to dispense with the publication of banns. The Roman Catholic bishop, on the one hand, and the Crown on the other, can both dispense with the publication of banns. The Roman Catholic permission is called a "dispensation"; the permission of the Lieutenant-Governor is called a "marriage license," but, the dispensation either of the bishop or the license of the Lieutenant-Governor cannot affect the solemnization of the marriage; in other words, the license does not confer the authority on the officer solemnizing the marriage and, if there be an impediment, the marriage license will not save the marriage from being declared non-existent. Consequently, no sound objection, to my mind, can be founded upon this. But I think there is a distinction made here, the effect of which is significant. The distinction is made between marriages of Roman Catholics and of non-Roman Catholics. As to non-Catholics a license can be obtained; as to Roman Catholics the dispensation is required before the publication of banns can be omitted. But, the license of the Crown cannot relieve the Roman Catholic priest from the necessity of publishing banns any more than the dispensation of the Roman Catholic bishop can relieve the Protestant clergyman from liability from the solemnizing of a marriage without the publication of banns. I take it that no argument of my learned friend can be founded on this, and I submit that it shews a distinction between marriages between Roman Catholics and non-Catholics.

There remains one question that I should treat on this branch of the subject and it is this: Assuming that a marriage between Roman Catholics must be celebrated before a Roman Catholic priest; — what is the effect of the solemnization of a marriage between two Roman Catholics before a non-Catholic priest? In answer to this, my submission is, that the marriage is non-existent and that there is no valid marriage. The objection is taken that article 152 of the Civil Code refers to marriages contracted in contravention to articles 124, 125, 126, and does not mention article 127, to which I will refer in a moment. I take it that under article 156 such a marriage could be set aside. Article 156 provides:—

"156. Every marriage which has not been contracted openly, nor solemnized before a competent officer, may be contested by the parties themselves and by those who have an existing and actual interest, saving the right of the court to decide according to the circumstances."

The saving clause has been referred to by both Mr. Justice Charbonneau and Mr. Justice Archibald. I submit that that is taken from the old law. The codifiers, on article 156, refer to Pothier, numbers 361, 362, and 451. The doctrine of Pothier, in a few words, is, that a marriage which is not celebrated before the curé of a party is always null, but that in some cases the courts have been of opinion that the plaintiff was unworthy of being heard and that it was presumed that the priest who had solemnized the marriage had received permission of the parish priest of the parties. That I submit is the effect of the saving clause in article 156. It is taken from Pothier, and Pothier states that the marriage, not celebrated before the

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curé of the parties, is always null, but that in certain cases the plaintiff has been put out of court being considered unworthy to be heard. So I submit that, if the marriage be solemnized before another than the proper official, the marriage is null.

Now, article 161 is cited and 161 says:—

"161. When the parties are in possesison of the status and the certificate of their marriage is produced, they cannot demand the nullity of such act."

That, by all the authorities, is held to refer merely to the certificate of marriage, that is, to the act of marriage; but it does not prevent one of the parties from attacking the marriage itself. It is a mere reference to the act of marriage.

Now, I shall take up very briefly the provisions of article 127, submitting this point of my case as subsidiary to the first.

I would like to cite as part of my argument and as bearing on the construction of article 129 the codifier's report on the title of "Marriage," at page 41, the last paragraph of which reads:—

"With the view of preserving to every one the enjoyment of his own usages and practices according to which the celebration of marriage is entrusted to the ministers of the worship to which he belongs, several provisions are inserted in this title which, although new in form, have nevertheless every source and every cause of existence in the spirit if not in the letter of our legislation."

They were considered to be new in form, but they carried out the spirit of the previous legislation. I also wish to cite to your Lordships an article published by the late Mr. Justice Girouard in the Revue Critique, vol. 3, p. 241. This article is a very exhaus-

tive treatise on the whole subject and contains valuable information, and the learned author construed article 129 as I have done.

It seems to me extremely important, in view of the very great gravity, may I say, of the question submitted for your Lordships' determination, that I may insist once more upon the reasons which underlie the provisions I have quoted. The object of the legislature was to secure, so far as it could be secured by legislation, due publicity of the marriage. The fundamental article under the title of "Marriage" is article 128, which I have referred to and which states that marriage must be solemnized openly by a competent officer recognized by law. The codifier states, and I have cited the reference in the factum at page 7, that the publicity required by the former part of article 128 is with a view of hindering clandestine marriages which are, for reasons, condemned by all systems of law, and they add that the word "openly" has a certain elasticity which makes it preferable to all others, being susceptible of more or less extension. It has been used so that it might be suited to the various interpretations that the various churches and the different religious congregations of the province may require of it according to their customs and usages and the rules peculiar to them upon which it is not wished in any way to innovate. All that was wished was to prevent clandestine marriages.

Therefore, a fundamental principle of our law of marriage is that the marriage must be celebrated openly, that clandestinity is a radical vice annulling marriage, and, for the purpose of securing the publicity of marriages and the prevention of clandestinity,

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the law provides ample safeguards requiring the publishing of banns of marriage in the church to which the parties belong. My contention is that the only way to prevent clandestinity is to secure the celebration of the marriage in the place where the parties are known. I do not desire to repeat unnecessarily what I said yesterday, but, as it is so important, I must say again that there would be no object in requiring the publication of the banns in the church to which the parties belonged if the parties could afterwards go to a different part of the province and have their marriage celebrated.

I must put before your Lordships a statement of the legislation of the Province of Quebec on the subject, up to the present date. We see every day the passage of statutes authorizing religious bodies to keep registers of civil status. Here is a list I compiled from the year 1900 to the year 1911 and I find there no less than 15 statutes passed, all declaring that church bodies shall have the power to keep registers of acts of civil status. I have here the statute of 1900, and in that year no less than five of those statutes were passed by the legislature. They comprise all kinds of bodies. These are Roumanian Jews and other Hebrew organizations, the Free Methodist Church of the Province of Quebec, the Syrian Church, calling themselves the Greek Orthodox Church. The following is the list:—

"List of special statutes passed by the Legislature of the Province of Quebec since the year 1900 authorizing religious congregations to keep registers of acts of civil status.

"1900—Congregation of Roumanian Jews, 'Beth David,' of Montreal, 63 Vict. ch. 107.

"1901—Congregation, 'The Chevra Kadiska, of Montreal,' 1 Edw. VII. ch. 86.

"1901—The Free Methodist Church of the Province of Quebec, 1 Edw. VII. ch. 87.

"1902—Congregation, 'Beth Hamedrash Haddodol Chevra Shaas,' 2 Edw. VII. ch. 96.

"1903—Congregation, 'Beth Israel,' 3 Edw. VII. ch. 114.

"1907—The Congregation, Temple Solomon, of Montreal, 7 Edw. VII. ch. 120.

"1908—The Congregation, 'Beth Budah,' of Montreal, 8 Edw. VII. ch. 151.

"1908—The Congregation, 'Bais Israel,' 8 Edw. VII. ch. 153.

"1909—The Greek Orthodox Church Evangeliamos, of Montreal, 9 Edw. VII. ch. 141.

"1910—The Saint Nicholas Syrian Greek Orthodox Church, of Montreal, 1 Geo. V. ch. 99.

"1910—The Syrian Greek Orthodox Church of Saint Nicholas, of Canada, 1 Geo. V. ch. 10.

"1910—The Congregation, 'Kehal Jeshurin,' 1 Geo. V. ch. 101.

"1910—The Jewish Congregation, 'Beth Israel,' of Lachine, 1 Geo. V. ch. 102.

"1910—The Jewish Congregation, 'Nusach Hoaari,' of Montreal, 1 Geo. V. ch. 103.

"1911—The Congregation, 'Chavayria Hall Yisrael,' 1 Geo. V., second section, ch. 115."

I know nothing of the circumstances which led up to the passing of these statutes. I could venture no opinion which would not be an absolutely rash one as to how long these people were in the country and

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whether they had suffered under or complained of any of the disabilities referred to. But I do know, and this is the answer to the contention of my learned friend, that so soon as anybody went to the Legislature of the Province of Quebec and asked for these powers the powers were granted.

Mr. Lafleur has made an argument, and insisted on it with much earnestness, that under my construction of article 129 a lot of people could not lawfully contract marriage in the Province of Quebec, but I desire to point out, and this is only secondary to the object for which I cited the statutes, that whenever a religious body desires to get these powers to keep registers they went to the Legislature of Quebec and obtained them.

Any argument I have made, based on the fact that these people obtained these powers from the Legislature of Quebec, would be in favour of my contention, and an answer to the objection of my learned friend that, under my construction of article 129, people are arriving on our shores every day and that these immigrants cannot get married. I will take up the case of persons who belong to no church in a moment, but what I wish to point out is, and that is why I cited these statutes; what I wish to emphasize to the court is that at the present time a vast number of bodies have obtained and are obtaining from the Legislature of the Province of Quebec authority to keep registers. My argument still is, and I insist on it with all the earnestness I can bring to bear, that all these statutes are special statutes, that general powers are not given, that any powers which these bodies have are restricted to the persons who belong to these bodies; that the intention of the legislature was not

to give them any wider competence than that necessary to register births and celebrate marriages for people who belong to the bodies themselves.

(Pursuant to questions from the Bench the learned counsel discusses the effect of the conquest on the prior law.)

I rely on the distinction between the public and the private law. I say the private law remains. The public law is to a certain extent superseded and it is certainly superseded so far as it belongs to the political branch, but I would cite to your Lordships, and I will supplement the authorities I am now citing by others I shall, of course, communicate to Mr. Lafleur; I would cite Salmond on Jurisprudence.

On the question of the abrogation of the laws concerning religion I will submit with absolute confidence the capitulation and the treaty. Whatever may be the doctrine of international law as to laws concerning religion, in the present case by reason of the capitulation and treaty stipulations the principles of such international law as is suggested could not be applied here, even though they were adverse to my contention.

I would ask your Lordships to listen to a quotation from Salmond. He gives the distinction between public and private laws as follows:—

"Public law comprises the rules which specially relate to the structure, powers, rights and activities of the state; private law includes all the residue of legal principle. It comprises all those rules which specially concern the subjects of the state in their relations to each other together with these rules which are common to the state and its subjects."

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Consequently, private law comprises all these rules which specially concern the subjects of the state in their relations to each other. I would say that laws of religion belong to private law; at least, under our principles it would be an undoubted doctrine to-day. I would also like to refer your Lordships to Holland's Jurisprudence. At page 168 he treats of marriage as classified under private law. I would also cite to your Lordships on the general question, Halleck's International Law, vol. 2, p. 516, 4th edition.

I will read the passage:—

"'The laws of a conquered country,' said Lord Mansfield, 'continue in force until they are altered by the conqueror; the absurd exceptions as to pagans mentioned in Calvin's case, shews the universality and antiquity of the maxim. For that distinction could not exist before the Christian era and in all probability arose from the mad enthusiasm of the Crusaders.' This refers to the municipal laws of the conquered country, but not to its political laws or to the relations of the inhabitants with the Government. On the transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved and new relations are created between them and the Government which has acquired their territory; the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the State. This is a well-settled rule of the law of nations: its provisions are clear and simple, easily understood; but it is not so easy to dis-

tinguish between what are political and what are municipal laws, and to determine when and how far the constitution and laws of the conqueror change or replace those of the conquered."

I, therefore, take it to be an undoubted principle that the private law is not changed by the effect of the conquest. Coming down to the particular case of the Province of New France, after the capitulation of Quebec and Montreal, the law officers of the Crown were frequently consulted and expressed the opinion that the laws of the Province of Quebec had not been changed by the effect of the conquest. The criminal law was introduced and Attorney-General Thurlow criticized the introduction of the criminal law, but apparently it was done by consent. I submit very confidently, and I can send a list to your Lordships without lengthening unduly the argument, that the law officers of the Crown conceded on every occasion when they were consulted that the conquest had not abrogated the laws and customs of Canada.

The law officers of the Crown in England when consulted with reference to the plans of government for Canada expressed the opinion that the King could not by the exercise of his Royal prerogative exempt the Protestant inhabitants of the Province of Quebec from paying tithes to the Roman Catholic clergy. This was cited in the opinion of Chief Justice Lafontaine in *Wilcox* v. *Wilcox*(1). I have a copy of the answer by the law officers of the Crown in my hand; the document was, I believe, only found recently. It is referred to in the collection of Short and Doughty, but it was stated that the document had not then been found. Here is what they state on that point:—

"As to so much of the 22nd article as exempts Pro-

(1) 8 L.C.R. 34.

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testants from paying to the Romish clergy tithes and ecclesiastical dues, we conceive that if by the law and usages of Canada the tithes and dues should belong to the persons who are professing the Roman Catholic religion, His Majesty cannot by his Royal prerogative deprive them of their right to receive or exempt the Protestant inhabitants from the obligation to pay such tithes or other dues."

That document is signed by Sir James Marryat, who was the King's Advocate, William De Grey, who was Attorney-General, and E. Willis, who was Solicitor-General and afterwards Chief Justice.

I cite that, of course, as illustrating what I am claiming, that it was never suggested that the laws of the Province of Quebec on a subject of this nature or on a subject concerning religion had been abrogated.

On the other question as to whether the establishment came into force by the effect of the conquest I will first cite to your Lordships the decision of the Privy Council in the *Guibord Case*(1) :—

"Nor do their Lordships think it necessary to pronounce any opinion upon the difficult questions which were raised in the argument before them touching the precise *status,* at the present time, of the Roman Catholic Church in Canada. It has, on the one hand, undoubtedly, since the cession, wanted some of the characteristics of an established church; whilst, on the other hand, it differs materially in several important particulars from such voluntary religious societies as the Anglican Church in the colonies, or the Roman Catholic Church in England. The payment of *dimes*

(1) *Brown* v. *Les Curé, etc., de Notre Dame de Montréal,* L.R. 6 P.C. 157, at p. 207.

to the clergy of the Roman Catholic Church by its lay members; and the ratability of the latter to the maintenance of parochial cemeteries, are secured by law and statutes. These rights of the church must beget corresponding obligations, and it is obvious that this state of things may give rise to questions between the laity and clergy which can only be determined by the municipal courts. It seems, however, to their Lordships to be unnecessary to pursue this question, because even if this church were to be regarded merely as a private and voluntary religious society resting only upon a consensual basis, courts of justice are still bound, when due complaint is made that a member of the society has been injured as to his rights, in any matter of a mixed spirtual and temporal character, to inquire into the laws or rules of the tribunal or authority which has inflicted the alleged injury.

"In the case of *Long* v. *Bishop of Cape Town*(1), their Lordships said:—

"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; and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body which will be binding on those who expressly or by implication have assented to them."

That authority, I submit confidently, is that the Church of England was not an established church in the colonies. It was never an established church in Canada. I submit that the opinion of their Lordships in the *Guibord case*(2) supports that view. There are no documents which can be cited which

(1) 1 Moo. P.C. (N.S.) 411, at p. 461. (2) L.R. 6 P.C. 157.

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would shew that there was an establishment in Canada of the English Church. There are certain instructions issued by the Crown to the Governors who were sent out here to govern Canada. There were two kinds of instructions, and probably your Lordships have read the report of Chief Justice Hay, the second Chief Justice of Quebec under the English rule, on the whole question. Your Lordship will find the report or opinion of Chief Justice Hey in the appendix of the first volume of the Lower Canada Jurist. The Royal instructions are there referred to. There were the private instructions and the instructions under the sign manual which constituted letters patent and which were destined to be published. The former category, or the private instructions, had no force of law and could not be relied upon. The other instructions were of a different character. Now I would say this, that I have read these instructions and, outside of what I stated yesterday, they contain nothing that is of any direct character. They were undoubtedly instructions sent to the Governor to endeavour to do certain things if it were possible or if it were thought advisable, but there is no clause in them, I submit, that would go the length of establishing the English Church in Canada.

As to the jurisdiction of the Bishop of London in Canada I will read paragraph 37, which is to be found at page 140 of the volume of Constitutional Documents by Shortt and Doughty:—

"37. And to the end that the ecclesiastical jurisdiction of the Lord Bishop of London may take place in our province under your Government, as far as conveniently may be, we do think fit, that you give all countenance and encouragement to the exercise of the

same, except only as collating to benefices, granting licenses for marriage and probates of wills which we have reserved to you, our Governor and to the Commander in Chief of our said province, for the time being."

Undoubtedly, the granting of licenses for marriages was reserved to the Governor of Canada.

While we are on this point I wish to make it doubly clear that there is nothing in this article 37 that points to the establishment of the English Church in Canada.

Paragraph 32 says:—

"You are not to admit any ecclesiastical jurisdiction of the See of Rome or any other foreign ecclesiastical jurisdiction whatever in the province under your Government."

But that has no bearing on the point. The ecclesiastical jurisdiction of the See of Rome could be excluded without there being any established church in Canada.

I will take up the question as to what the English law at the time as to marriage was. Assuming for the sake of argument that the English law concerning marriage was introduced either it was "Lord Hardwicke's Act" or the English common law. According to the English common law as defined in the case of *Reg.* v. *Millis* (1), the marriage had to be celebrated before a priest.

Taking the other side of the argument, that under English law at that time marriage *per verba de præsenti* was considered a valid marriage then, if the English law was introduced into the Province of Quebec by the effect of the conquest, a marriage in a certain form would be valid if the parties were Protest-

(1) 10 C. & F. 534.

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ants and a marriage in another form would have to be resorted to if the parties were Catholics. I am submitting, if it is held that the English law was introduced, that there would be endless confusion. I would understand the logic of the proposition that the whole English law was introduced as to the old inhabitants as well as to the others, but there were the treaty stipulations which prevented this law being applied to the old inhabitants of the colony. Then, I say, that, in the absence of anything shewing that the English law was introduced, with the single exception of marriage licenses, that we are bound to assume that there was no English law introduced on the subject.

The license system could not be applied in view of the stipulations to the Roman Catholics. It was at most a dispensation of the necessity for publishing the banns. The subject of marriage licenses is not unknown; I think it can be traced far back in the history of England. Dispensations were granted by the Pope prior to the Reformation and afterwards by a statute which was passed, I think, in the reign of Henry VIII., the authority was granted to the Archbishop of Canterbury. The Crown has exercised the jurisdiction to grant marriage licenses as part of the Royal prerogative, but it does not shew that the English law of marriage was introduced into this country. There is nothing to shew that. We have absolutely no documents and no decision under the English law upholding the contention that the English law was introduced here. The first decision that can have any bearing on the subject is the decision of Chief Justice Sewell in *Ex parte Spratt*(1). That was after the statute of 1795 and it was on a question whether dis-

(1) Stu. K.B. 90.

senting ministers had the right under the statute of 1795 to obtain registers of acts of civil status, and he decided that they had not for the reason that they were not in holy orders. The reason I refer to the decision is that it is the earliest on the subject which could have any relation to marriage and the authorities he quotes therein are all French authorities. It may be that looking carefully into old court registers something may be discovered, but certainly nothing has ever been published up to this date.

Then, my Lord, if that be the case, I would rely on the general principles of international law, that the private law is not abrogated by the effect of the conquest. I point out to your Lordships, as extremely significant, that my learned friends on the other side who are interested in setting out any authority pointing to the introduction of the English law, have not done so, outside of the judgment of Mr. Justice Archibald, who merely expresses an opinion and who is not in any better position than we are to determine the question. I would say, therefore, and I believe I am warranted in saying so, that under the general rule we cannot assume that the English law as to marriage was introduced.

Then, looking at the treaty stipulations, it has never been doubted that I am aware of that they secured absolute independence — I am using that word advisedly — to the Roman Catholics and to their clergy. Whatever doubt there may have been on account of certain answers made by General Amherst, on some points which were put to him at the time of the capitulation of Montreal there is no doubt as to the guarantee of the free exercise of the Roman Catholic religion. The wording of the capitulations is

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worthy of attention. I refer to the articles of the capitulation of Quebec, and the articles of the capitulation of Montreal. The articles of the capitulation of Quebec, 1759, read:—

"*Articles de Capitulation de Québec,* 1759.

"Articles de capitulation demandés par M. de Ramzay, Lieutenant pour le Roy commandant les haute et basse villes de Québec, Ch. de l'Ordre Royal & Militaire de St. Louis, à son Excellence Monsieur le General des troupes de sa Majesté Britanique.

"The capitulation demanded on the part of the enemy, and granted by their Excellencies Admiral Saunders and General Townshend, etc., etc., etc., is in manner and form hereafter expressed."

"*Article* 2.

"Que les habitans soient conservés dans la possession de leur maisons, biens, effets et privileges.

"Granted upon their laying down their arms.

"*Article* 6.

"Que l'exercice de la relligion Catholique, apostolique et romaine sera conservé; que l'on donnera des sauvegardes aux maisons des ecclésiastiques, relligieux et relligieuses, particulièrement à Mgr. l'Evèque de Québec, qui rempli de zèle pour la re relligion et de charité pour le peuple de son diocèse désire y rester constamment, exercer librement et avec le décense que son état et les sacres mystères de la relligion Catholique, apostolique, et romaine exigent, son authorité episcopale dans la ville de Québec lorsqu'il jugera apropos, jusqu'à ce que la possession de Canada ait été decidée par un traité entre S. M. T. C. et S. M. B.

"The free exercise of the Roman religion is

granted, likewise safeguards to all religious persons, as well as to the Bishop, who shall be at liberty to come and exercise freely and with decency, the functions of his office, whenever he shall think proper and until the possession of Canada shall have been decided between their Britannic and most Christian Majesties.

"Que la présente capitulation sera executée suivant sa forme et teneur, sans qu'elle puisse être sujette à l'inexecution sous prétexte de represailles ou d'une inexécution de quelque capitulation précédente.

"Granted.

"Le présente traité a été fait et arreté double entre nous au camp devant Québec, le 18 Septembre, 1759.

"Chas Saunders.
"Geo. Townshend.
"De Ramzay."

The articles of the capitulation of Montreal, 1760, read:—

"*Articles de Capitulation de Montréal,* 1760.

"Articles de capitulation entre son Excellence le Général Amherst Commandant-en-Chef les troupes & forces de sa Majesté Britanique en l'Amerique Septentrionale, et son Excellence le Mis. de Vaudreuil, Grand Croix de l'Ordre Royal et Militaire de St. Louis, Gouverneur et Lieutenant Général pour le Roy in Canada.

"*Article* 27.

"Le libre exercise de la Religion Catholique, apostolique et Romaine, subsistera en son entier; en sorte que tous les estats et les peuples de villes et des campagnes, lieux et postes éloignés pourront continuer de

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s'assembler dans les églises, et de frequenter les sacramens comme cy devant, san estre inquiété en aucun manière, directment ou indirectment. Ces peuples seront obligées par le Gouvernement Anglais à payer aux prêtres qui en prendront soin les dixmes, et tous les droits qu'ils avoient coutume de payer sous le gouvernement de sa Mte. Très Chrétienne.

"Granted as to the free exercise of their religion; the obligation of paying the tithes to the priests will depend on the King's pleasure.

"Fait à Montréal le 8 de Septembre, 1760.

"Vaudreuil.

"Done in the camp before Montreal the 8th September, 1760.

"Jeff. Amherst."

You will see that there is no restriction as to the free exercise of their religion, and your Lordships will notice in what wide terms this was demanded by article 27, and it is granted without any restriction except as to the obligation to pay tithes to the clergy.

The word "estats" is used meaning, no doubt, "orders." The clergy were a distinct order as well as the noblesse. There were the three orders, the clergy, the noblesse and the tiers d'état, which swallowed up the two others. Now, take the Treaty of Paris, which is material in this connection. After saying that His Most Christian Majesty renounces all pretensions to Nova Scotia and Acadia and so forth, it says:—

" His Britannic Majesty on his side agrees to grant the liberty of the Catholic religion to the inhabitants of Canada; he will consequently give the most precise and most effectual orders, that his new Roman Catholic subjects may profess the worship of their religion, according to the rites of the Roman Catholic Church as far as the laws of Great Britain permit."

As to the restriction which has been referred to several times, there is abundance of opinion as to what effect the restriction could have.

I would take it, and I think I can say so, that my position, which I conceive to be founded on authority is, that the Treaty of Paris did not supersede the capitulation. I will be able to refer your Lordships to authority for that basis. What is stated is that the treaty is a contract between one Government and another Government, but the Articles of Capitulation is between a Government and the inhabitants of a country. I think your Lordship will find that in the case of *Campbell* v. *Hall*(1). The inhabitants of the country, in consideration of their laying down their arms, are granted certain privileges. To my mind it is an undoubted principle founded on reason that a treaty is between two nations and capitulation is a pact — I do not think I can choose a more proper term — between the conqueror and the inhabitants, so I will say that I am entitled to look at these three documents as forming the title for the free exercise of the Roman Catholic religion. I would think that the stipulations of the capitulation cover my point, that the free exercise of the Roman Catholic religion is guaranteed. I would say that it is guaranteed to the church as much as to the inhabitants. It was guaranteed to all orders of Canadian society. My position on this branch of the argument would be that marriage, according to the doctrine of the Roman Catholic Church, is a sacrament, and I would say the administration of the sacraments is exclusively attributed to the ministry of the priests of the Roman

(1) Lofft. 655; Cowp. 205.

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Catholic Church, and that if any interference with this administration of the sacraments were permitted it would be a violation of these stipulations. I submit that these reasons are fundamental and that they would cover the construction of the provisions which I have cited to your Lordships.

Then, I have shewn what the construction of these articles are; that article 129 must be restricted as I have stated and I shall not repeat what I have said on that subject.

Before I touch on article 127, I desire to say something which I began to say this morning, namely: that the object of the law is to prevent clandestinity of marriage, that if my learned friends' contentions are right, clandestinity is rendered not only possible but extremely easy, that some restriction must be put on the provisions of the law to secure the due publicity of marriage, and that the number of religious bodies obtaining statutory authority, as I have shewn, is increasing so rapidly that it becomes a fundamental necessity that the views of the codifiers and that the proper construction of article 129 be insisted upon. If my children wanted to contract marriage, in spite of my objection and in spite of the impediments that might be against it, it would not be possible for me to prevent it because some of these people might have a church or place of meeting in a back store, and if my learned friends' contention is right, that means they will have as much authority as anybody else, then there would be thousands of clergymen irrespective of locality, irrespective of religion, who could solemnize marriage. If that system is to be allowed under my learned friends' contention, then the law has failed in its main object to secure the pub-

licity and non-clandestinity of marriage.

Article 127 of the Civil Code provides:—

"127. The other impediments recognized, according to the different religious persuasions, as resulting from relationship or affinity, or from other causes, remains subject to the rules hitherto followed in the different churches and religious communities."

"The right, likewise, of granting dispensations from such impediments, appertains, as heretofore, to those who have hitherto enjoyed it."

Article 127 follows articles 124, 125, and 126 which prescribe what might be called the scriptural impediments to marriage as resulting from relationship in the Levitical degrees; marriage in the direct line, ascending or descending; marriage, between brothers and sisters; marriage between uncles and nieces, or between nephews and aunts. After these provisions, article 127 is introduced as a general provision purporting to cover all other impediments.

The codifiers at first drafted this article, so that it read:—

"The other impediments admitted according to the different religious persuasions as resulting from relation or affinity within the degree of cousins-german and other degrees, remain subject," etc.

The codifiers presented a supplementary report in which the words, "within the degree of cousins *germane* and other degrees" were stricken from the article, and the words, "or other causes" introduced. They explained why they did so. One of them, Mr. Justice Day, dissented. The explanation shewed clearly what the meaning, in the opinion of the codifiers, was to be placed on the article. The majority of the codifiers say:—

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"Two of the commissioners recommend a modification of article 11*a* in the title of marriage, in order to remove all doubt as to the intention to leave the subject in the same state as it is at present.

"Mr. Commissioner Day dissents from the proposed change, because, by the addition of the words 'other causes,' it has the effect of extending the grounds of impediment contemplated by the article as adopted, and appears to him to recognize, as legal impediments, certain obstructions to marriage, dependent upon ecclesiastical rules and discipline, and binding only upon the conscience of the parties whom they affect."

I understand my learned friends to take the position that the word "and other causes" must be controlled by the impediments mentioned in articles 124, 125, and 126 as being *ejusdem generis,* with the impediments mentioned in these articles. The intention of the codifiers would appear to have been entirely different, and further I would say that this rule cannot be applied for the following reasons: in the first place, the rule *ejusdem generis* does not apply where the genus is entirely exhausted or covered by the preceding words. For instance, if the words which precede exhaust the whole genus, then to give some meaning to the general words following it is necessary to give them more extension. It is only when the general words following such a word compel the enumeration of the special words that they can be restricted to things of similar nature to those mentioned by the special words in the statute. I take that to be the undoubted rule of legal interpretation. Well now, the very wording of the article shews that it was intended here to give a greater extension to the mean-

ing of the words "or other causes" because the first impediments were impediments which have been recognized at all times and I think in all systems by the civil law. Here it was proposed to introduce a new set of impediments which would vary according to the belief of each church. There is in article 127 an enumeration of all causes of impediment, that is to say, causes of impediment resulting from relationship or affinity, and I would say that that relationship or affinity comprises the whole genus of impediments which result from those causes. Then, there were other impediments recognized by different canonical systems which were different. There was the impediment resulting from holy orders, from perpetual vows; there were several impediments of a similar nature. I submit that the words "other causes" comprise all these impediments. They may vary according to the different churches, and it was so intended by the codifiers, and it was deemed by the codifiers impossible to make the enumeration that would be absolutely necessary. It was impossible to do so by reason of the number of religious societies which were in contemplation of the law, and it was necessary to provide by a general article for all these impediments which were recognized by each church, and which had received the passive, if not the express consent, of the members of each church to the rule which their church had decreed. My learned friends opposite say that these impediments are impediments recognized by the civil law. I confess I am unable to follow this argument. Ie seems to me self-evident that the impediments referred to here are impediments not already recognized under the civil law, because the different articles have enumerated the impediments of

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the civil law. I submit that these are canonical impediments; impediments that have been recognized by the different canonical systems.

I will discuss the argument which I understand is made, that these impediments referred to are not necessarily the impediments known to the civil law, but they must be impediments of a similar nature to those enumerated in the three preceding articles. I take issue with my learned friends on this point; I take issue absolutely with them and my submission is respectfully that their contention cannot be maintained, or otherwise article 127 would have absolutely no meaning.

If my learned friends suggest any impediment of the same nature as those enumerated or of a similar nature, that could be comprised by article 127, it would not be necessary to my argument to say that impediments resulting from more remote degrees of relation would be of a similar nature and would be comprised in article 127. But article 127 enumerates the impediments resulting from relationship or affinity, and consequently the words "or other causes" would have no effect at all. And, as it is necessary to give them an effect, I would say that the construction claimed by my learned friends cannot be sustained. My submission is that it was intended to recognize all canonical impediments without it being thought advisable to attempt any enumeration of them. The impediment of clandestinity was an impediment by the canon law; I think there can be no question about that. It was made in express terms an impediment by the Council of Trent. It greatly strengthens my point that clandestinity was recognized as an impediment by the civil law in France al-

though the decrees of the Council of Trent were not received in France. Nevertheless, the impediments resulting from clandestinity were recognized in France. The old ordinances of the French Kings were to the same effect on this point as the decrees of the Council of Trent. Some of your Lordships are no doubt familiar with the verse in which the canonical impediments were enumerated and among these there is a reference to the impediment of clandestinity. It was also recognized as an impediment; the Council of Trent made it one. This is the verse:—

"Error, conditio, votum, cognatio, crimen,
Cultus disparitas, vis, ordo, ligamen, honestas,
Aetas, affinis, si forte coire nequibis,
Si parochi et duplicis desit præsentia testis,
Rapta si sit mulier, nec parti reddita tutas,
Hæc facienda vetant connubia, facta retractant."

I think that would be absolutely beyond question now, and it has never been questioned by any writer on the French law; on the contrary, the authority is all the other way, that clandestinity was an impediment. I have given in the factum several references and these references enumerate clandestinity among the impediments which were recognized in France in spite of the fact that the decrees of Council of Trent had not been received there.

I have given in the factum several references to writers under the old French law, shewing that clandestinity was considered in France as an absolute impediment to marriage. I may, perhaps, read a few extracts.

Thus Durand de Maillane, Dictionnaire de Droit Canonique, "Empêchement," p. 305, 2nd column, says:

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"Le Concile de Trente a ajouté deux autres empêchements dirimants qui subsistent dans les lieux où ses décrets sont en usage; savoir, la clandestinité et le rapt."

Page 306, 1st column:—

"A l'égard des empêchements dirimants, nous admittons en France les douze qui précédaient le Concile de Trente, et les deux que ce Concile a ajoutés."

Page 314, 2nd column:—

"XIII. Empêchement, clandestinité, si parochi et duplicis desit praesentia testis. Voyez Clandestin, mariage."

Nouveau Denisart, V. Empêchement de mariage, vol. 7, p. 518:—

"XIII. 30. Le défaut de célébration du mariage en face de l'église par le curé du domicile des parties ce qui forme le dix-huitième et dernier empêchement dirimant."

These extracts will suffice for the purpose of my argument, the other references in the factum being absolutely to the same effect.

It seems to me it would be idle to say that such an impediment would be an impediment more in word than in essence because what article 127 intended to cover were the impediments recognized by the canon law, and if this is an impediment recognized by a canon law, as it undoubtedly is, it is covered by the terms of article 127: Mr. Justice Charbonneau (p. 117 of 18 R.L.N.S. and p. 267 of the Q.R. 41 S.C.) cites Pothier (ed. Bugnet, vol. 5, p. 45,) as considering as an impediment "une déqualification subjective, inherente à la personne des conjoints." But Pothier says, vol. 5, at page 42 (ed. Bugnet), No. 85:—

"Nous ne traiterons, dans toute cette partie, que des empêchements de mariage qui se rencontrent dans les personnes. Il y a d'autres empêchements qui naissent du défaut de quelqu'une des choses qui sont requises pour la validité des mariages; cette matière sera traitée dans la quatrième partie."

And in the fourth part of his work he treats of clandestinity.

It is to be observed that Pothier, in the part cited, stated that clandestinity was absolutely recognized theretofore as an impediment by the canon law. My submission is that, under article 127, consequently, this impediment would render a marriage between two Catholics, before any other than a Roman Catholic priest, impossible. A valid marriage between two Catholics, before any other than a Roman Catholic priest is impossible. The impediment being of the class of absolute impediments, would import nullity.

There is another point I should touch on and that is the effect of the impediment as casting a nullity on the marriage. The very nature of an absolute impediment creates nullity. The objection of Mr. Justice Charbonneau is that the nullity is not declared and he says that, by article 152, an action of nullity is given to all parties interested to set aside marriages contracted in violation of articles 124, 125, and 126. But there is no mention of article 127. My submission is that article 127 is comprised *quoad* an action of nullity. Then by article 156 of the Civil Code:—

"156. Every marriage which has not been contracted openly, nor solemnized before a competent officer, may be contested by the parties themselves and by all those who have an existing and actual in-

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terest, saving the right of the court to decide according to the circumstances."

Article 156 gives an action in nullity to the parties themselves and to all who have an actual interest. The action in nullity is given in each case to the same class of persons. So, I submit that Mr. Justice Charbonneau is wrong when he says that there is no action to have the marriage set aside by reason of the impediment of clandestinity. The decrees of the Council of Trent were published in the Province of Quebec. Of course, on this submission to this court, certain facts, if material, must be taken, I would not say as admitted, but as not contested. I have two certificates from the Vicars-General of Quebec and Montreal stating that the "Tametsi" decree of the Council of Trent is read once a year in every church of the Province of Quebec.

The following are the certificates:—

"WE, THE UNDERSIGNED, Vicar-General of the Archdiocese of Quebec, in the Province of Quebec, hereby certify that the decree *'Tametsi'* concerning the reform of marriage, adopted in the 24th session, 1st chapter, of the Council of Trent, was promulgated by Monseigneur de Saint-Vallier, Second Bishop of Quebec, in the *Rituel du diocèse de Québec* (edition of 1703) and moreover, that the ordinance requiring the said decree to be read once a year, contained in the said Rituel, judging by the invariable tradition, custom and practice regarding such ordinances, and a personal experience of forty years as regards the Basilica of Quebec, has been executed, and that the text of the said decree has been read in each parish of the Archdiocese of Quebec on the first Sunday

after Epiphany since its promulgation until the Decree of the Sacred Congregation of the Council, 2nd August, 1907, came into force.

"C. A. MAROIS, V.G.

"Seal.

"Archbishop's Palace of Quebec,
"April 29th, 1912."

"Montreal, le 25 avril, 1912.

"We, the undersigned, Vicar-General of the Archdiocese of Montreal, in the Province of Quebec, hereby certify that the decree "Tametsi" concerning the reform of marriage, adopted in the 24th session, 1st chapter of the Council of Trent, has, since the erection of the Diocese of Montreal and until the promulgation of the decree of the Sacred Congregation of the Council of the 2nd August, 1907, been read each year in each parish church of this diocese on the first Sunday after Epiphany.

"Given at Montreal, under the seal of the Archdiocese this 25th day of April, 1912.

"EMILE ROY, Canon.
"Vicar-General."

And the Benedictine Decree was introduced in Canada in 1764. It was published in 1741. The Bishop of Quebec, at the time of the cession, was Mgr. Pontbriand, and he died before Montreal was surrendered and the Vicars-General of Quebec administered the See of Quebec until his successor was appointed some six years afterwards, and questions were put to the court of Rome and the answer was given extending the Benedictine declaration.

My submission to the court is, therefore, that the answer to sub-question (*a*) should be in the affirmative.

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On sub-question (*b*) I will state frankly that I do not consider I have any satisfactory reason to give to the court under the construction of article 127. I think it will be sufficient for me to say that the Benedictine Decree concludes the matter.

That, my Lords, is the case and the argument which I have to lay before the court.

Hellmuth K.C.—I propose, my Lords, to deal with the first and third questions, both of which may be characterized as questions of jurisdiction.

The question of jurisdiction is necessarily, my Lords, an extremely important question, not only for the Dominion and the provinces, but in this matter, for, one might almost say, the people throughout Christendom generally, because for a great many years the *lex loci contractûs* has always been the law which, in one respect, governs the validity of a marriage. That is to say, if an Englishman, or a Frenchman, or a German, or an Austrian, came out to Canada and was married here, assuming that by his own law, the *lex domicili,* he and the woman with whom he desired to contract marriage were capable of contracting it, the absolute validity of that marriage would depend upon whether the parties had observed the form and ceremony prescribed by the law of the place of celebration. Therefore, it is a question whether the law of the place of celebration rests with the Dominion or rests with the individual provinces to enact. If it were to be held that under the "British North America Act" the law of the place of celebration is that of the province — whether it be in Ontario or Quebec or any other province — then any law that might be passed in this respect by the Dominion of

Canada would be entirely beyond its powers, and the parties who might assume that they had been married according to the law of the Dominion of Canada in regard to the mode of celebration, would find there had been no valid marriage at all. I say, at the very outset, that this question of jurisdiction involves not merely the rights of the provinces and the rights of the Dominion but the rights of people of other countries, who, although their domicile may be that of a foreign country, may come to the various provinces and be married.

Perhaps, at the outset, one should inquire what is necessary to constitute a valid marriage. Undoubtedly, consent is necessary, but following consent there are two absolute essentials, or, perhaps, I should say an essential and a requisite, because I think the words are used in that sense in some of the authorities. There must be, of course, capacity to contract and that is invariably governed by the law of the domicile, and, in the second place — I am differing here entirely from my friends on the other side — there must be, in order to constitute a valid legal marriage, a celebration or a going through of the form prescribed by the law of the place where the marriage is celebrated. That is covered by innumerable authorities. Dicey, on the Law of Domicile, at page 15, lays down this rule, Rule 44:—

"Subject to the exception hereinafter mentioned, a marriage is valid when (1) each of the parties has, according to the law of his or her place of domicile, the capacity to marry the other, and, (2) any one of the following conditions as to the form of celebration is complied with; that is to say: (1) if the marriage is celebrated in accordance with any form recognized

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as valid by the law of the country where the marriage is celebrated, called hereinafter the local form."

He goes on and deals with extra-territorial marriages, and so on, in embassies, and he lays down the requisites in these cases. At page 155, in relation to the subject, he says:—

"The result is that the validity of a marriage, with the right depending on its validity, is governed by two different laws, namely: (1) by the law of the parties' domicile which determines their capacity to contract; by the law of the place where the marriage is celebrated which determines in general the formal requisites of the marriage."

Then I cite a very old writer, Shelford, on Marriages and Divorce, at page 5 of the original, which we have not in the library, the page of the book in the library is 27. The heading of the article is: "Validity Depends upon Conformity to Law." I may say, my Lords, that I am not now in any way dealing with the question of church decrees or anything of that kind; I am dealing with the civil contract of marriage, if one can speak of marriage as a contract at all, which Mr. Bishop seems somewhat to doubt. Bishop says you may call a marriage a contract as you may call a locomotive a horse, because there are more things in which marriage differs from a contract than in which it complies with the terms of a contract. But, there is no doubt there is a portion of marriage which is a contract, it involves the consensual contract of the parties to it, but this is only the beginning of the creation of a valid marriage. Shelford says:—

"Marriage being a civil contract its validity depends on its having been celebrated in the manner,

and with the formalities required by law. In some countries only one form of contracting marriage is acknowledged; thus in England, after the "Marriage Act," with the exception of Jews and Quakers, all marriages were required to be celebrated according to the form prescribed by the Church of England."

That is to say, that people could not say in England: we desire to be married, we take one another for man and wife, we will go through all kinds of solemn forms; for the law says you must have an Anglican clergyman pronounce you man and wife or you are not married at all. The questions, when I shall come to them are entirely irregular in form, because it is not a question of declaring a marriage null and void; there is absolutely nothing creating the marriage status, no matter what form may be gone through, unless you comply with the requirements of the local law in regard to its celebration. I refer also to Hammick in "The Marriage Law of England," second edition, page 23; Foote, second edition, page 70; Eversley & Crays, Marriage Laws of the British Empire, pages 2 and 53; Ringrose, Marriage and Divorce Laws of the World, at page 18.

A marriage that might be perfectly good according to the forms of England, between parties capable of contracting, but which was celebrated in France where the English form has no force or validity, but where other forms and ceremonies were prescribed, would only be good if celebrated according to the forms prescribed in France, where the marriage is celebrated; except, of course, in exceptional cases when people get married at the embassies. I have the authority here of the House of Lords in regard to

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that matter, where in one case marriage was celebrated in Austria, between a Roman Catholic and a Protestant, according to the form, and the only form, in which marriage could be celebrated in Austria, which was by a Roman Catholic priest. Although that Protestant man, at that time, was, by the law applicable in Ireland, the place of his domicile, not entitled to marry a Roman Catholic by means of a Roman Catholic priest and could not have been so married in Ireland — the Roman Catholic priest would have been liable at that time to have been hanged or something of that kind, if he had celebrated the marriage — yet the House of Lords, not later than this very year, held that the marriage celebrated in Austria was a perfectly legal and valid marriage, because it had complied with the *lex loci celebrationis,* and that the law of the domicile could not be put beyond its territory. That is the case of *Swifte* v. *The Attorney-General for Ireland*(1). The House of Lords held in that case that the law in regard to Roman Catholics in Ireland was only territorial, and only applied, so far as the celebration was concerned, to the celebration of a marriage in Ireland. Indeed, their Lordships, in upholding the judgment of the courts in Ireland, adopted the reasoning of the courts there, and I ask your Lordships to see the reasoning of the judges in Ireland, because it is the latest case, practically, on this subject(2).

Then, the question may arise (and again I differ from my learned friend, Mr. Nesbitt) : What was the common law of England either at the time of the conquest or at the time of the "British North America

(1) [1912] A.C. 276. (2) [1910] 2 I.R. 140, at page 151 *et seq.*

Act"? My submission to your Lordships is, that from the time of King Edmund, the Saxon King, A.D. 940, down to the time of the Reformation, the common law of England was that no person could be married in England, except a mass priest was present. And, after the Reformation, the common law of England was that no person could be married except either by a priest or a deacon. That that is so, has never been questioned since the decision in *Reg.* v. *Millis*(1). The old rule, as taken from Thorpe's edition of the Ancient Laws, page 505, is cited in the edition of Holmsted on the Marriage Laws of Canada. I cannot express my concurrence in what Mr. Holmsted says throughout by any means, but I quite accept his citation from Thorpe. Rule 8 of Thorpe — this is in the time of Edmund — says:—

"At the nuptials there shall be a mass priest by law who shall, with God's blessing, bind their union to all posterity.

"9. While, it is also to be looked to that it be known that they, through kinship, be not too nearly allied, lest they be afterwards divided, which before were wrongly joined."

We get some way back there and we find that after the *Millis Case*(1) in 1844, there was an equal division of opinion in the House of Lords as to whether that was or was not the common law of England, or whether it was not competent and sufficient for two persons who were capable of contracting, who had the capacity, to come together and solemnly *per verba de præsenti* declare that they were married. There was, as I say, an equal division of opinion in the

(1) 10 C. & F. 534.

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House of Lords as to that, and my learned friend, Mr. Nesbitt, read the very able and wonderfully researchful judgment of Lord Brougham. But my learned friend did not say that it was a dissenting judgment. It was a judgment that did not prevail because, the House being equally divided, the judgment of the court below, which held that the common law of England did require a priest to be present, was upheld, and Lord Campbell, who joined with Lord Brougham, in the dissent, was able, in *Beamish* v. *Beamish*(1), to frankly say that while his opinion as one of these dissenting in *The Queen* v. *Millis*(2) was an opinion that he might still hold, yet, that the decision in *The Queen* v. *Millis*(2) was absolutely binding upon him. He said:

"However, it must now be considered as having been determined by this House that there could never have been a valid marriage in England before the Reformation without the presence of a priest episcopally ordained, or afterwards without the presence of a priest or of a deacon."

One cannot find language, stronger, clearer, or more definite than that. The very judge, who had dissented in the previous case of *Millis*(2), says that what he formerly contended against must now be held to be the law of England.

Now, my Lords, I do not wish, at this stage, to take up time unnecessarily, but I think it is incumbent on me at least to point your Lordships to the authorities which render this view practically — I do not wish to use too strong language — practically unassailable. There is, in fact, I may say, no decision

(1) 9 H.L. Cas. 274. (2) 10 C. & F. 534.

to the contrary. One can find in some of the States of the Union expressions in regard to common law marriages, but they have no application to any country that is under English rule, in any shape or form. There is no such thing as a common law marriage in England or Canada; there is in Scotland.

In *Brook* v. *Brook*(1), dealing there with the matter of English subjects domiciled in England, but who had gone to Denmark to be married, and where the other side of the essential or requisite of marriage came up for consideration — that is, where the offence against the law of domicile could not be cured no matter how correctly the form had been followed — in that case a man went to Denmark with the view of marrying his deceased wife's sister, then a marriage incapable of being contracted in England. He was married according to the forms necessary in Denmark and according to the then law of Denmark it was a legal marriage. But, he had only gone there for the purpose of getting married, and he did not in any way abandon or give up his English domicile. The House of Lords in that case held that the marriage was invalid for want of capacity to contract it in such a case.

I refer to Lord Campbell's judgment, at page 207. It is laid down here that although the form of celebrating a marriage may be different from that required by the law of the country of domicile, that marriage may be good everywhere; but if the contract of marriage is such in essentials as to be contrary to the law of the country of domicile, and is declared void by that law, it is to be regarded as void in

(1) 9 H.L. Cas. 193.

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the country of domicile though not contrary to the law of the country in which it is celebrated. This qualification upon the general rule that a marriage valid where celebrated is good everywhere, is to be found in the writings of many eminent jurists who have discussed the subject.

I refer further to what Lord Campbell says, at page 218, and Lord Cranworth, at page 223, in discussing another marriage.

One more case I cite to your Lordships, the case of *Catherwood* v. *Caslon* (1), judgment of Baron Parke, at page 265.

That case goes to shew, as it is laid down, that the mere proof of ceremony is not enough; they must comply otherwise with the requirements of the law. A well-known case was cited here, from a judgment in Lower Canada, in the case of *Connolly* v. *Woolrich* (2), and your Lordships will find some remarks there quite apposite in regard to this very subject-matter. At page 244, in the judgment, it is said:—

"By what law is the validity of marriage to be decided?"

And then the judgment says:—

"Validity of marriage depends upon the *lex loci* of the place of solemnization."

And for that, several authorities are given.

Now, I challenge any possible dispute on the proposition that in order to constitute a valid marriage there must be a solemnization. That is, there must be a going through of such forms and ceremonies, whether those be of the most primitive character or of the most elaborate ritual, as are prescribed by the laws of the place where it is celebrated, and that there

(1) 13 M. & W. 261. (2) 11 L.C. Jur. 197.

is no such a thing in Canada, and never has been since the time of the conquest, any law by which there could be a marriage, merely on a consensual contract. But, my Lords, in this case, it is not at all an instance of the Dominion Parliament, by its bill, attempting to say — marriage may be celebrated, or a valid marriage may be created or constituted by the mere consent of the parties. The promoters of this bill have boldly come out and said — we propose to deal with the solemnization of marriage. They have, by the very language they have used in the bill, stated that in plain words. The bill says "every ceremony or form of marriage (that is, every solemnization of marriage) before or hereafter performed by any person authorized to perform any ceremony of marriage." Let me take a concrete illustration: Rabbi Jacobs, of Toronto — with great respect for him — is authorized to celebrate, by the laws of the Province of Ontario, a marriage between Jews of his congregation and professing his faith, and between nobody else, and two Christians go to Rabbi Jacobs and are married. The Dominion Parliament, under this bill, would say that, as Rabbi Jacobs is authorized to perform a certain ceremony between Jews, that ceremony of marriage which he has performed between Christians, and which he is not authorized by the Provincial law to perform, is perfectly good.

I think somebody has pointed out that the bill only says that a validly solemnized marriage is valid. I do not think that is arguable. Let me get it down again to a concrete case. If the Province of Quebec says a Roman Catholic priest is the only person who is authorized to perform a marriage between two Roman Catholics, if a Protestant of any denomination does

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perform that ceremony, the bill says it is valid. It cannot mean anything else. It simply means — we will amend your solemnization of marriage law and widen and broaden it. The Dominion, in effect, says to the province: you cannot say this person may solemnize this marriage, and that person may solemnize some other marriage, but if you give a man authority to solemnize any marriage, you must give him authority to solemnize all marriages. That is the meaning of that bill and I submit to the court that no other meaning can be taken out of it. And that being so, we have the Dominion at once stepping in to deal with matters exclusively assigned to the province, one of which is the solemnization of marriage. Why stop there; why not say — the province must authorize everybody to solemnize marriage; the province must put no limit in any respect in regard to the form ? My submission is, that the Province of Ontario to-day, or the Province of Quebec to-morrow, can alter in any way they see fit their laws in regard to the solemnization of marriage.

It comes simply down to this, that you say to the province: you may play with solemnization of marriage, you may enact penalties, but nobody need pay any particular attention to them; you cannot actually carry out what is admitted in regard to every other subject of legislation assigned to the province; you cannot carry the thing to its logical conclusion; you cannot say that a marriage not solemnized according to your power under the "British North America Act" is not valid. The bill means that, or there is nothing in it at all. The argument with regard to consensual contracts being sufficient is not open to my learned friends on the other side upon

this bill, because they boldly say that the solemnization which the province has laid down is not necessary, in certain cases, or else, this bill means nothing.

I am going to ask your Lordships, if you come to the conclusion that the Parliament of Canada has no power to enact this particular bill, if you think it necessary or wise or just that the second question should be answered at all. If the Parliament of Canada has no part or parcel in jurisdiction in regard to the solemnization of marriage, if the question of the solemnization of marriage does rest with the province, why then should the Dominion request your Lordships to answer what the law in any province is. If they cannot amend or alter it, should it require amendment or alteration, and if that must be done by the provincial legislature, is it not that legislature only which should ask your Lordships what is the meaning of their own laws. Can the Dominion, in relation to a subject in regard to which they have no legislative capacity — let us take some subject which is entirely within their jurisdiction beyond all question, such as contracts — can the Dominion ask your Lordships with regard to a contract, which is solely concerned with the sale of lands in the province, what the meaning of the legislation of the Province of Ontario is with regard to it ? I think the only body that could come before your Lordships for any authority to ask for interpretation of that question would be the body that can, if necessary, amend or alter or change that law, and not a body that has no jurisdiction over it.

The power of the legislature as to "solemnization of marriage" is absolute and full, and the difficulty with this question is really not as great as it appears,

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because, under our system of government, we have had a lot of these constitutional questions up where the subject-matters have more or less been held in some instances to overlap and the rules have been laid down for construction. Your Lordships are familiar with all these cases; most of them you have taken part in, and in every case it has been held, where there is any overlapping, that the jurisdiction is as clearly defined and as capable of exercise by the province, in its own field, as it is by the Dominion.

Your Lordships have been referred to the memorandum of the law officers of the Crown in regard to what was covered under the head of "solemnization of marriage" in their opinion, and to the remarks, *obiter* though they are, of Mr. Justice Gwynne, in the *City of Fredericton* v. *The Queen*(1), at pages 568 *et seq.*, where he says, in dealing with another matter, that the solemnization of marriage, that is, the power of regulating the ceremony and the mode of its celebration, is a particular subject expressly placed under the jurisdiction of the local legislature as a matter which has always been considered to be purely of a local character.

In the Judicial Committee, in the case of the *Citizens Insurance Company* v. *Parsons*(2), Sir Montague Smith deals with the matter in much the same way. That view was not only taken by judges, but when at a later stage, the acts relating to the marriage of a man with his deceased wife's sister was discussed in Parliament, the Hon. Mr. Blake made a speech upon that bill which will be found in the Debates of the House of Commons of February 27th, 1880, at page 299. Whatever views one might have as to matters

(1) 3 Can. S.C.R. 505. (2) 7 App. Cas. 96.

which Mr. Blake advocated, he stood out before the whole of this Dominion, and the whole of the world practically, as a great constitutional lawyer; a man who was not likely in the Dominion Parliament to waive one jot of the powers of that Parliament at that time, and he then recognized that as one of the requisites to a marriage which rested with the province and in regard to which the Dominion has nothing to say.

The right to say who shall perform a marriage ceremony, between persons of different religions; how persons of different religions will have to be married as to ceremonial, is a matter which is not a marriage act in the sense of capacity to contract, but is purely a solemnization of marriage act. That is absolutely, I submit, beyond controversy at the present moment, and this court — whether it is sitting as a court or as an advisory board — is practically bound by the decision of the House of Lords in *Swifte* v. *The Attorney-General for Ireland* (1). The act there in question was absolutely such an act, dealing with religion — that is the religious belief of the parties — and dealing with the persons who might celebrate that marriage.

Now, a marriage contract, using that loose expression, is not an ordinary contract, it is what may be commonly called a solemn contract, that is, in order to be valid, it has to be entered into in a certain solemn form, and, can any one, looking at the division of jurisdiction between the Parliament of Canada and the legislatures of the provinces, doubt for one moment that the form, the solemnity of the form, is left entirely with the province. That is the point, I

(1) [1912] A.C. 276.

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respectfully submit, that has to be decided here. Is not the form of the contract, the solemnities which must follow that form, left entirely with the legislatures ? And if they choose to say to-day or to-morrow that all marriages between Roman Catholics must be celebrated in one way, or that all marriages between Anglicans must be celebrated in another way, that is absolutely, whether one approves of it or not, left to each individual provincial legislature, according to the will of people who return members to that legislature.

They have the right to draw the line as to beliefs for this reason. When the first Act that one can find dealing with matters of this kind in England was passed they drew the line there. Will your Lordships look at 4 Geo. IV. ch. 76, which is intituled "An Act for amending the Laws respecting the Solemnization of Marriages in England." The section therein relating to the publication of the banns set out everything in regard to licenses. It provides about parishes or extra-parochial places, and it provides for the consent of guardians and parents. Everything in relation to what the law officers of the Crown in their report think appertains to the solemnization of marriage, is contained in that Act. That is an Act specially dealing on its face with the solemnization and it goes a long way to shew what in England at that time was deemed to fall within solemnization. But that Act does not say one word in reference to capacity to contract; it does not say anything in regard to divorce; it is an Act to provide the form, the means rather.

Then, there is a very curious illustration as to what was done with regard to religious beliefs in the Act of 6 & 7 Wm. IV. ch. 85. By the second section

of that Act it was provided that the Society of Friends, commonly called Quakers, and also persons professing the Jewish religion, might continue to contract and solemnize marriages according to the usages of the said society and of the said persons respectively, and every such marriage is hereby declared and confirmed good in law provided that the parties to such marriage be both persons of the said society or both persons professing the Jewish religion. Marriage celebrated according to the Jewish religion, I do not know so much about the Quakers, but according to the Jewish religion there was a very, very high ritual and ceremonial. It is a more elaborate ritual than either the Roman Catholic or the Anglican, and I am going to point your Lordships to what has to be done. If that high ritual was performed over a Christian and a Jew, there was absolutely no marriage. If the Rabbi performed the highest marriage ritual in the world over any one except two Jews it was absolutely null; they both had to be Jews. So that the Parliament of England recognized, even in 1836, and subsequently recognized by 19 & 20 Vict. ch. 119, sec. 21, a ceremony in regard to both Quakers and Jews. In regard to both the Parliament of England made the validity of the marriage depend upon two things, the religion of the persons to be married and the religion of the person who performed it, and yet, that all came under the solemnization of marriage.

Then I want to refer your Lordships, with regard to Dominion and provincial jurisdiction, to *The City of Montreal* v. *Montreal Street Railway Co.*(1), at page 343, the judgment of Lord Atkinson, where, dealing with sections 91 and 92 of the "British North

(1) [1912] A.C. 333.

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America Act," he says to the Dominion, you must not, in a subject exclusively assigned to the provinces under section 92, encroach at all; and the solemnization of marriage is entirely within the exclusive jurisdiction of the province and upon that solemnization the Dominion, because they have marriage and divorce assigned to them, cannot trench. The solemnization is a part that is cut out and taken away entirely from "marriage and divorce."

(Counsel was asked as to the effect of the capitulation and treaty.)

That refers to the second branch of the case. Just in regard to that, it has struck me in this way, that the agreement that was made, the capitulation and the treaty, was not a mere guarantee to an individual Catholic at all. It was a guarantee to the conquered country. There is a very curious bit of advice which was given in 1722 and which will be found reported in 2 Peere Williams's Reports(1). It is headed: "An uninhabited country newly found out and inhabited by the English to be governed by the laws of England." I read from page 74:—

"Memorandum, 9th August, 1722, it was said by the Master of the Rolls to have been determined by the Lords of the Privy Council, upon an appeal to the King in Council from the foreign plantations,—

"1st. That if there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so, wherever they go, they carry their laws with them, and, therefore, such new-found country is to be governed by the laws of England; though, after such country is inhabited by the English, Acts of Parliament made in England,

(1) 2 P. Wms. 74.

without naming the foreign plantations, will not bind them; for which reason, it has been determined that the Statute of Frauds and perjuries, which requires three witnesses, and that these should subscribe in the testator's presence, in the case of a devise of land, does not bind Barbadoes; but that,

"2ndly. Where the King of England conquers a country, it is a different consideration: for there the conqueror, by saving the lives of the people conquered, gains a right and property in such people; in consequence of which he may impose upon them what laws he pleases. But, until the conqueror gives them new laws, they are to be governed by their own laws, unless where these laws are contrary to the laws of God or totally silent.

"3rdly. Until such laws given by the conquering prince, the laws and customs of the conquered country shall hold place; unless where these are contrary to our religion, or enact any thing that is *malum in se,* or are silent; for in all such cases the laws of the conquering country shall prevail."

That is to say, when a country is conquered, while a conqueror has the right to impose his own laws, the people are to be governed by the laws they have until the conqueror chooses to do so.

Then there is a very interesting article, in the report of the Canadian Archives, for 1891, from Richard Cartwright, Junior, of the 12th of October, 1792, dealing with this very question, and he speaks of the marriages which have taken place in Upper Canada without any clergyman being present (page 85). He says that officers have celebrated marriages and that some clergymen have subsequently come in, evidently being clergymen of the Anglican communion, and celebrated marriages.

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I will give a memorandum to your Lordships of *Reg.* v. *Roblin*(1), where Chief Justice Robinson says that under the Act of 32 Geo. III. ch. 1, the statute of 26 Geo. II. ch. 33, "Lord Hardwicke's Act," came into force: *Hodgins* v. *McNeill*(2); *O'Connor* v. *Kennedy*(3). Whether "Lord Hardwicke's Act' was in force or whether the common law of England was in force, or whether the French law with the treaty was in force, at all events at the time that the "British North America Act" came into force, there was no question that marriage could no longer be celebrated in any part of Canada — I am speaking of civilized Canada at that time — without some form or ceremony, in order to render it valid. So that it is not necessary to carefully delve into the question of whether it was "Lord Hardwicke's Act," or the common law of England, or the law of France as amended and introduced here, which brought into force at that time the decree of the Council of Trent, so far as Lower Canada was concerned, requiring the presence of a clergyman or priest; there had to be a ceremony or form of some kind used at that time; at all events there had to be, without doubt, at the date of the "British North America Act."

Bayley K.C. (for the Attorney-General of Ontario).—I wish to make a brief statement as to the position which the Province of Ontario takes.

While of opinion that it is difficult to give an unqualified "yes" or "no" to any one of the questions submitted in this case, and that the law on the subject is difficult to determine, the Province of Ontario favours

(1) 21 U.C.Q.B. 352, at pp. 354-5.
(2) 9 Gr. 305.
(3) 15 O.R. 20.

a uniform general marriage law for the Dominion if so framed that the legislative authority of the provinces in relation to the solemnization of marriage is not thereby violated, and the Province of Ontario adopts so much of the argument of counsel for the Dominion as is consistent with the view above expressed, and no more.

The Province of Ontario considers that an Act of Parliament which renders valid throughout the Dominion marriages performed in a province by persons legally authorized by such province would result in consolidating and perfecting provincial authority throughout Canada and, in this view, the passing of such an Act by the Dominion Parliament would enlarge rather than encroach upon provincial jurisdiction.

R. C. Smith K.C. (for the Attorney-General of Quebec).—My Lords, I come here under express instructions to discuss only the constitutional question, and not to discuss the merits of the second question that has been submitted. I will ask your Lordships' patience later to add several reasons why that second question should not be considered and answered, but, inasmuch as your Lordships' attention has been concentrated upon the constitutional questions submitted, I think it would be proper that I should add anything I have to say with regard to that branch of the case before referring to question No. 2 at all. It is not, my Lords, that I at all desire to trouble the waters if I refer to the terms of this reference. The difficulty which I encounter is that arising from the words in the bill "and duly performed according to such laws." I think it is perhaps common ground now, and we

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have all agreed to treat the bill as having some meaning, and as having been moved in pursuance of some definite intention, and the only intention that could possibly be evident by the bill as drafted, has been expressed by my learned friend, Mr. Hellmuth. It must mean, and I think it cannot mean anything else than this: that it is intended to legalize a marriage performed by a person or functionary, or solemnized by a person or functionary, who would, in the Province of Quebec, have authority to solemnize marriages between any persons or class of persons. That is to say, that it will be impossible, if this bill becomes law, that there should be a person capable of solemnizing a marriage in the province between any two persons without being equally capable of solemnizing a marriage between all persons. That is the evident intention.

I submit for your Lordships' consideration this: that the "British North America Act," when it was finally crystallized into legislation, was the result of a contract, and I say with all possible respect that those who desire the stability of Confederation, cannot preserve that stability better than by a conscientious and a frank and an honest interpretation of that Act, giving to each section the intention that the framers of the "British North America Act" would give it. I am going to argue this upon very narrow grounds indeed; I am going, I think, to shew your Lordships, as has been so eloquently and logically shewn by those who preceded me, that this bill deals exclusively — so far as it attempts to deal effectively with anything — with the quality and the character of the functionary solemnizing the marriage. And, if I have any difficulty in arguing that, it is because

the difficulty arises more from the disposition, which I cannot resist, to treat the matter as obvious. The very first words of the bill I submit, condemn it. It says: "Every ceremony or form of marriage," and that is what the bill deals with and, with all possible respect, it is what it was intended to deal with.

Now, before I come to discuss that would your Lordships allow me to refer to the second clause of this bill?

The second clause I do not think it is necessary for me to discuss, because I think if it legislated, or purported or attempted to legislate, effectively concerning what appears to be its subject-matter, it would open up a very wide subject as to the purview of the powers of the provinces with regard to property and civil rights, etc. The second clause of the bill uses the words "shall be absolute and complete." Now, my Lords, Parliament has never legislated with regard to questions of property, succession, or any questions of civil rights and property. I assume that when this bill says "these rights shall be absolute and complete" it must mean, in accordance with the laws of each province, because there are no other laws. So that section 2 of this bill, while it does declare absolute and complete rights, not only of the persons themselves, but of their offspring, it does not presume for one moment to decree what these rights shall be. I assume, as I am bound to do, that it would naturally mean these rights as defined by competent authority, which is the provincial authority. If it were to go any further it would very greatly broaden the scope of these rights and would involve a discussion even more extended than that to which your Lordships have so far listened. I do not pro-

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pose to discuss the second section of the bill as though it dealt with the rights of married people because I cannot conceive for one instant that the general authority to legislate upon the question of marriage, *quoad* marriage, involved the right in the Dominion to prescribe the social relations and the property obligations and everything of that sort, of married people. That would be giving to the word "marriage" a meaning which never could have been intended. It does not mean that because Parliament may legislate upon the subject of marriage, that Parliament can legislate with respect to every right of a married person. No, it has only the power to legislate upon marriage and, if it had power to legislate as to anything incidental it must be incidental to marriage *quoad* marriage and not to all the multifarious rights and interests, whether property obligations or otherwise, of the parties themselves. That would be an absolutely impossible view, so that, I do not feel on this reference, and with the particular wording of clause 2 of the bill, that I am called upon to go into any question so broad as that.

To revert to the question of jurisdiction to pass this bill, there is one part of the "British North America Act," and one part only, in which there is any power of remedial legislation. When the Imperial Parliament was considering the "British North America Act" it considered the question of remedial legislation and what remedial legislation should be conferred upon the Dominion, and in section 93 of the "British North America Act" we have that power of remedial legislation with respect to education alone, and only within the limits of certain circumstances and in so far as these circumstances should render it necessary.

I say respectfully that that is the only clause or section of the "British North America Act" that deals in any way whatever with remedial legislation, and the fact that we have such a section, shewing that the question of remedial legislation was considered by the Imperial Parliament, would be an absolute answer to the suggestion that, because a province exercised either inadequately, imperfectly or wrongly a power conferred upon it, Parliament would have remedial power. I say there is nothing in the "British North America Act" that could sanction such an inference or such an argument.

Now the marriage ceremony, the persons capable of solemnizing marriage, everything connected with the contract, so far as solemnization is concerned, has always been religious. The qualification of a person celebrating or solemnizing marriage is primarily derived not from civil authority but from ecclesiastical authority. In this, the whole history of France, as well as the whole history of England, agrees entirely. I do not think it can be challenged for one moment, as far as the solemnization of marriage is concerned, that that has been historically always religious, and it does not advance the argument one whit to say it may have been something else, that other functionaries may have been appointed by the State; that we might have had justices of the peace or other civil functionaries; I say it does not advance the argument one whit to say that their might have been other functionairies because the fact of the matter is that historically marriage has been always — and I need not go further than the two countries from which Canada has been peopled, France and England — marriage has always been a religious and not a civil cere-

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mony. The State took what was an established institution of the church and enacted laws concerning it. And here I think it is important and relevant to consider that even what is purely evidential was, I say, derived from the ecclesiastical authority originally, and not from the civil authority. Your Lordships have in the decrees of the Council of Trent provisions for the publication of banns and for the keeping of registers, and all the elaborate provisions of civil law which we have to-day respecting the keeping of registers of civil status were foreshadowed in ecclesiastical legislation long ago. The Council of Trent referred to the Council of Lateran and the Council of Lateran provided for the publishing of banns and the keeping of some register of civil status. Therefore, we have not only what relates to the solemnization as regards the persons before whom or by whom it is solemnized, but we have a provision for the publication of banns and the keeping of registers of civil status which we undoubtedly find to be of ecclesiastical origin.

As regards France, the first reference as to the keeping of these registers of civil status is found in the Ordonnance de Blois, which is directed to prevent clandestine marriages. We see there that the civil law comes in and adopts what has been decreed by the ecclesiastical law in regard to the publication of banns and the keeping of registers. Then we have the Edit de Henri IV., and the Declaration of Louis XIII.

The whole history of marriage in France shews it to have been primarily a religious ceremony, and the most important thing connected with that ceremony was the officer or the person before whom that ceremony could be solemnized. In the Ordonnance of 1667

we have, of course, very precise provisions with regard to the keeping of registers of civil status. In the Edict of Louis XIV., 1697, we find it said that the essential solemnity to the sacrement of marriage is the presence of the proper curé of the parties. I know your Lordships have given attention to all these things, but I am merely following rapidly these papers to shew that throughout the history of France the presence of the person celebrating was considered as of the essence of the solemnization. Perhaps I need not detain your Lordships with this, you will find the special references in the Edict of Louis XIV., Ritual of the Diocese of Quebec, and Declaration of Louis, 1736.

Then, I ask your Lordships' attention for a moment to the Act 32 Henry VIII. ch. 38, this being an Act passed in 1540. You will notice that the word always used is "marriage solemnized." We have there the expression, "such marriage being contracted and solemnized in the face of the church." We have also the expression, "before the time of contracting that marriage which is solemnized" and reference is also made to the Levitical decrees in connection with marriage. That Act, so long ago as 1540, adopts the Levitical decrees of consanguinity, and all through, it deals with solemnization in the face of the church and so on.

Of course, your Lordship is familiar with Mr. Bishop's reasoning that marriage is not a contract, but a status. Whether the word "status" more correctly describes marriage than "contract," it clearly involves a contract, and so far as it involves a contract that contract is consensual, but it requires the sanction of solemnization. I do not think we gain any light by dissolving the contract entirely from the

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solemnization; I do not think we gain anything by that or that it throws any light upon the question.

The House of Lords, considering the terms of "Lord Hardwicke's Act," 1753, discussed the fact that the word "solemnization" is used in connection with matrimony as absolute evidence that the word had a well-founded and well-understood meaning. It says the banns must be published on three Sundays preceding the solemnization of the marriage, and at the end of the first section it says that the marriage shall be solemnized at one of the parish churches or chapels where such banns have been published, and no other place.

Throughout the different sections of "Lord Hardwicke's Act" the term "solemnization of marriage" is used and it all shews clearly that the words had even at that date an absolutely clear and defined meaning. I am, of course, not pretending to elaborate the very full argument of Mr. Mignault, but when we come down to the articles of the capitulation of Quebec, 1759, and the articles of the capitulation of Montreal, 1760, and the Treaty of Paris of 1763, and the "Quebec Act" of 1774, they all granted the free exercise of the Roman Catholic religion. The question has arisen here, as to whether this was a permission granted to certain individuals to resort to churches of their own. It was, in the fullest possible terms, the granting of the exercise of the Roman Catholic religion, and then coming to the Treaty of Paris we find that, whereas that is granted in the fullest and amplest terms in section 4, in the very following section (section 5), there is a provision for the encouragement of the Protestant religion, and a provision that later on, as His Majesty from time to time shall think fit, he

will make provision for the support of the Protestant clergy.

The point I make here is that both religions were from that moment fully recognized. The granting in the Articles of Capitulation of the free exercise of the Roman Catholic religion presupposed naturally the exercise by His Majesty's other subjects of their religion, and that was acted upon from that very moment and in every subsequent Act both systems are fully recognized. My point now is simply this: that marriage was an established institution of both religious systems and in both religious systems the person celebrating was of the very essence of solemnization of marriage. In the Act 35 Geo. III. ch. 4, 1795, both systems are recognized and that is an Act passed a very short time after. I will not trouble your Lordships by references to these other Acts further than to say that the word "solemnization of marriage" occurs in every case. We cannot get away from the fact that in the various branches of the Protestant Church and in the Roman Catholic Church marriage was an established institution and that the person who solemnized was of the essence of the solemnization. Then, we have that recognized in articles 57 and 128 of our own Code, which, it must be remembered, was the state of the law in the Province of Quebec when the "British North America Act" was passed.

Then we have before us the course of legislation extending over centuries by the very Parliament that enacted the "British North America Act." If your Lordships have any curiosity to look at these statutes there is a list of them in the first volume of Philimore's Ecclesiastical Law, pages 643 and 644. There is a list there covering two pages of marriage cases,

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dealing with solemnization of marriage, curing defects in solemnization of marriage, prescribing the hours in which solemnization of marriage could take place and so on. In that long list there is not a statute that does not deal with the solemnization of marriage as involving as an essential the presence of a priest or a clerk in orders.

All our elaborate systems of registration of civil status are directly traceable to the Council of Lateran and the Council of Trent. I have some reason to believe that there were earlier provisions than those particularly with respect to the registration of baptism. Is it conceivable, my Lords, that in the Parliament that for centuries — I do not require to go back further than Henry VIII. — had been enacting laws respecting solemnization of marriage, and always treating solemnization as meaning the one thing, and in the whole history of that legislation there is nothing that is antagonistic to this one view or that is at variance or incompatible with this one view — is it conceivable that the British Parliament in enacting the "British North America Act" had any doubt whatever as to what the signification of solemnization was ?

One observation on what is called the doctrine of overlapping. In *Hodge* v. *The Queen*(1), page 130, we find this declaration:—

"It appears to their Lordships that *Russell* v. *The Queen*(2) when properly understood is not an authority in support of the apparent contention and their Lordships do not intend to vary or depart from the reasons expressed for their judgment in that case."

On the following page there is that declaration so frequently referred to, that the legislatures of the

(1) 9 A.C. 117. (2) 7 App. Cas. 829.

provinces are not to be deemed with respect to the matters assigned to them, to exercise a delegated authority, but are deemed to have all the power which the Imperial Parliament in the plenitude of its powers, passed or could confer. The latest declaration on this question is in this recent decision of the Privy Council upon the question of jurisdiction on the Reference in the Insurance Companies cases(1), and Lord Loreburn, the Lord Chancellor, says:—

"Numerous points have arisen, and may hereafter arise, upon those provisions of the Act which draw the dividing line between what belongs to the Dominion or to the province respectively. An exhaustive enumeration being unattainable (so infinite are the subjects of possible legislation) general terms are necessarily used in describing what either is to have, and with the use of general terms comes the risk of some confusion, whenever a case arises wherein it can be said the power claimed falls within the description of what the Dominion is to have, and also within the description of what the province is to have. Such apparent overlapping is unavoidable, and the duty of a court of law is to decide in each particular case on which side of the line it falls in view of the whole statute."

The point to which I ask your Lordships' very careful consideration is this (and I must say that it impresses me quite as strongly as any other point arising on this argument), that where you have the general subject committed to the Dominion Parliament and you have a portion of that very subject, as has been not inaptly said, carved out of it, detached from it, I respectfully suggest to your Lordships that there can be no application of the doctrine of overlapping.

(1) [1912] A.C. 571, at p. 581.

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Neither can there be any application of incidental or implied powers. If your Lordships were to say that under the doctrine of implied or incidental powers the Dominion Parliament by virtue of its general power to legislate on marriage could also legislate regarding the solemnization, the "British North America Act" would be defeated absolutely. In other words, what I ask your Lordships to hold is that, in this particular case, solemnization of marriage calls for an exact delimitation, and I say that nothing else can possibly be a reasonable or true interpretation of the Act. It calls for an exact delimitation, or, otherwise, why should it have been detached or carved out of the general subject of marriage? If on any pretence whatever the Dominion Parliament is to be allowed to trench upon the solemnization of marriage on the pretence of legislating upon marriage, then I say that the object and purpose of the Imperial Parliament in clearly carving out that portion of the subject would be defeated by such an interpretation.

Another thing I submit as an essential consideration is this: If the Legislature has power to legislate it has power to legislate effectively. To concede that the legislature has power to pass laws relating to solemnization of marriages that may be violated with impunity as far as the validity of the act done in contravention is concerned, is, I say, to take away the power of legislation. If the legislature is given power to legislate with respect to solemnization, surely it has the power to say, at least within the province, what you do in contravention of this law that we enact is null, or what you do without the sanction of what we have prescribed is null. If you are going to give the power of legislation at all it must be neces-

sary that you are entitled to enact a law which has some force and to provide that a thing which is done contrary to it cannot stand. Again, my learned friend Mr. Nesbitt says that solemnization relates only to what is evidential. I need not go back into history again to shew that solemnization of marriage existed long before there was any evidential proceeding at all, long before there was publication of banns, long before there was any registry kept of it. The act of solemnization is quite distinct from the record of that act. The record of that act may be incidental to it in that sense, as a necessary consequence of it that it should be preserved and so on, but the registration of the marriage and the keeping of the register is one thing, and the actual solemnization is another. The solemnization existed long before any of these requirements, which my learned friend treated as evidential, had any existence at all.

Another argument of my learned friend is this: That allowing the legislature to prescribe nullity in case the requirements of the provincial laws are not observed is an invasion of the power of Parliament with regard to divorce. I say with all possible respect that the fundamental error there is this: The distinction between, as we say in civil law, that which is void and that which is voidable. We do not pretend for a moment to say that the effect of the Quebec law is to annul a marriage which has had valid existence. For the purpose of my present argument I would concede my learned friend's most extravagant claim with regard to divorce, and I say respectfully this, that if the Province of Quebec can validly legislate regarding the solemnization of marriage then if that law be not observed the marriage

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has no existence and never had any existence. If the Province of Quebec can legislate concerning the solemnization of marriage it can create what is the condition precedent to the existence of the thing at all. It is not, that the thing has to be annulled.

I would be willing to go to the extreme and say that suppose the Legislature of Quebec at its next session were to pass an Act saying that the laws of the Province of Quebec relating to the solemnization of marriage are hereby repealed, and the Province of Quebec is left without any law whatever relating to the solemnization of marriage, it is not debatable that such a law would be absolutely constitutional. I say that if the Province of Quebec passed such an Act tomorrow it would not invest the Parliament of Canada with a scintilla of legislative power regarding solemnization of marriage. The power is derived from the "British North America Act," and I say that the "British North America Act" has committed to all the provinces the power to legislate regarding solemnization, and if they do not exercise it, that does not give the Dominion power. If they abuse it, if they enact an absurd law, no matter what they do in that respect, that does not confer power on the Dominion; as I pointed out this morning the only case in the "British North America Act" in which there is any suggestion of remedial power is in section 93 with regard to education.

A very plausible argument was presented by Mr. Lafleur in these terms: If clandestinity be an impediment then the bill in question is constitutional because the Dominion would have the power to deal with impediments. That would be altogether too easy a solution of this question.

The word "impediment" has been used by some high authority in connection with this, and I am willing to let it go at that, but it is begging the whole question to say that the Dominion could deal with it. Your Lordships have to inquire first as to clandestinity. Is clandestinity an impediment which relates to the solemnization of marriage, which is within the provincial jurisdiction, or is it an impediment which relates to that which is within the federal jurisdiction ? It does not help us a bit to make use of the term "impediment." We have to inquire whether it comes within a subject-matter which is assigned exclusively to the province or whether it comes within a subject-matter assigned to the Dominion. In this particular case, beyond all question I suppose it relates to the person who is to give solemnity to the Act and it must come under the terms "solemnization." I do not think there is much to be gained by citing analogies. The power to legislate regarding solemn declarations one would naturally conclude included the nomination of the person who was to receive solemn declarations. The power to legislate with regard to a notarial instrument would involve the nomination of the person who was to give effect to the instrument, and so on. How could it be otherwise ? I could not conceive it possible that solemnization did not include the person who was to give solemnization or who was to solemnize as the bill says. This bill deals exclusively, in both its clauses, with the functionary who is to solemnize. It is not necessary for my argument that I should try to enumerate what powers are included in marriage or what is the residuum of legislative power remaining with the Dominion. All that is necessary for our argument

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is that this particular bill deals solely with one question, the nature and character of the official who is to solemnize. With that I submit our argument is complete. As I said in opening, I would not be willing to concede as much as has been claimed with regard to the power of the Dominion to legislate as to rights resulting from marriage and all sorts of incidental property rights. I think things of that sort would have to be determined as they arise in proper cases. Our argument is complete in saying that as regards this bill it deals with one thing, and that, we say, incontestably comes under solemnization. I do not think I can add anything on this question, my Lords; it is a question on which I am sure your Lordships are well advised.

Permit me to say a few words now as to the answer to question 2. The bill uses the expression "without regard to the religion of the person," and the second question refers to marriage "unless contracted before a Roman Catholic priest." It deals with the one thing throughout and it is enough for our argument to say that that comes clearly under solemnization. The *Swifte Case*(1) that my learned friend Mr. Hellmuth commented on was a clear authority for saying that the person celebrating certainly comes under the form of ceremony.

This division of authority, shall we call it, on the subject of marriage, also follows the general lines of private international law, which, if anything were necessary, — I do not say anything is necessary — would also aid in interpreting it.

Just a word or two on the second question in the reference. It is my duty to pray your Lordships not

(1) [1912] A.C. 276.

to answer the second question. In the first place I do it because it seems that probably and inevitably your Lordships will answer to the first question that the bill is unconstitutional as dealing with solemnization of marriage. If your Lordships reach that result, as we hope your Lordships will, is there any necessity for answering question No. 2? In the second place we say that there cannot be any question submitted which involves more complete private rights than this question. It involves a declaration which would not only cause disturbance, but would put the ban of absolute nullity upon scores of marriages of persons who are not represented at all before your Lordships. My learned friends, Mr. Lafleur and Mr. Mignault, have been placing before your Lordships their views upon that question, but the individual whose rights as a married person or whose legitimacy is in question is entitled to be represented by his own counsel. My learned friends say that your Lordships' declaration would be advisory. We know that it would; but, should your opinion go that way, as far as the name and fame and standing of every person married under the conditions set forth in these general questions is concerned, it would place the stamp of illegitimacy upon the children and the stamp of illegitimacy authenticated by the highest tribunal in the country. The Civil Code, which says that marriage contracted in good faith produces civil results, is very indefinite, and it would have this effect. It is conceded at once that while a marriage in good faith or an ordinary putative marriage may have the effect of producing legitimate offspring, that the parties themselves would be free to contract another marriage, and it would be practically dissolving the marriage

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tie as far as that part of it is concerned. At all events it is obvious that it involves a pronouncement upon the rights of those who are not here represented. My learned friend, Mr. Lafleur, said, while speaking on the *Hébert* v. *Clouâtre* case(1), that there are hundreds of other cases in exactly the same position. I say that no wider admission could have been made before your Lordships. I cite the declaration of Lord Herschell, in *Attorney-General for Canada* v. *Attorney-General for Ontario, etc.*(2), (referred to by the Lord Chancellor in *The Companies Case*(3),) that their Lordships declined to answer one of the questions because it involved certain private rights with respect to certain riparian proprietors; rights which are not measurably comparable for a moment with the rights of individuals involved in such declarations as your Lordships are asked to make with regard to the invalidity of certain marriages.

What I am asking is, that your Lordships should refer question No. 2 back to the Governor in Council asking his Royal Highness in Council to consider whether there is necessity now for answering that question in view of the answer which I presume you will give to question No. 1; or referring to His Royal Highness the other consideration that there is now *sub judice* before a competent tribunal the very same question. Your Lordships may make either of these representations to His Royal Highness in Council and I feel that they would commend themselves to him. At all events I am absolutely confident that whatever representations your Lordships would make would be acted upon.

(1) Q.R. 41 S.C. 249. (2) [1898] A.C. 700, at p. 717.
(3) [1912] A.C. 571.

Aimé Geoffrion K.C. (for the Attorney-General of Quebec).—On questions No. 1 and No. 3, which I intend to refer to together, I have little to add to the argument made by Mr. Smith as to the construction of the words "marriage" and "solemnization of marriage." Mr. Smith has very forcibly pointed out that "solemnization of marriage" must be considered as having been carved out of "marriage" relegated to the Federal Parliament, so as to be exclusively within the power of the province, and, that the doctrine of overlapping does not, therefore, apply. Mr. Smith has given, as a reason why the jurisdiction as to solemnization should be absolutely exclusively in the province, and not divided between both, the decision on the overlapping theory, and the fact that we are here with a general power in the federal and a special power in the province. As was pointed out by Mr. Justice Duff, in every case where the question of ancillary or overlapping power has come up it was in connection with property and civil rights, where the general power was in the province and the special power, carved out, in the Federal Parliament. I would like to quote an authority bearing indirectly on that question which is to be found in *City of Montreal* v. *Montreal Street Railway Co.*(1), pages 343 and 344. Lord Atkinson, suggesting that the previous decisions dealt only with the residuum power given by the opening words of section 91, adds that some considerations before the court appear to refer to matters enumerated in section 91, namely, the regulation of trade and commerce. There is here, as you will notice, a departure from the general proposition till then always acted upon as regards the ancillary or overlapping power theory.

(1) [1912] A.C. 333.

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It is there held that as regards the regulation of trade and commerce which is a federal subject, the natural meaning of the words used has to be restricted so as to allow of the powers expressly granted to the provincial legislatures remaining with the provincial legislatures. This is really only developing further what has been intimated in the *Citizens Insurance Co.* v. *Parsons*(1). In that case their Lordships intimated that the words "trade and commerce" had been restricted and could not have the full effect the words otherwise would have because if so it would absolutely nullify powers given expressly to the provincial legislatures. In the *Montreal Street Railway Case*(2), they go further and they state that the residuum power can never be used so as to curtail the special powers given to the provinces. And, while the general express powers given especially to the Federal Parliament do curtail the special powers given to the legislatures, their Lordships go on to assimilate to the residuum, the trade and commerce clause without any apparent reason to distinguish, except that they cannot apply to the trade and commerce power the same rule of construction as they applied to the bills of exchange power, the bankruptcy power, without absolutely nullifying the power of property and civil rights given to the legislature. The analogy between that case and the present case is complete. If you apply to the general allowance of "marriage" in the federal authority, the theory of overlapping as it has been applied to bills of exchange, railway legislation and so on, you completely nullify the solemnizing power or at least you completely nullify its exclusive character. All

(1) 7 App. Cas. 96. (2) [1912] A.C. 333.

that could be suggested as regards the effect of giving to the words "trade and commerce" their true construction, was that if you did so it would, to a large extent, nullify the exclusive character of the allowance of property and civil rights to the local legislature. It was shewn that whenever there was federal legislation dealing with trade and commerce, which also affected property and civil rights, then the power of the provincial legislature became void, if the construction applied to bills of exchange and bankruptcy was to be applied to trade and commerce, and it would, therefore, nullify in great part the exclusive authority of the province to legislate respecting property and civil rights. In the present case, if this court does not hold that "solemnization of marriage" is carved out from "marriage" completely, so as to be exclusively given to the province, and so that the Federal Parliament under the word "marriage" cannot touch it, you will nullify absolutely the exclusive power of the provincial legislatures regarding solemnization. I would suggest that the logical working out of this analogy should lead your Lordships to hold, either broadly, that the rule about overlapping as applied in the cases summed up in these last decisions applies only when the general power is in the province and the carved out power is in the federal authority or, if your Lordships are not prepared to go that far, I would ask your Lordships to hold, at least, that giving effect to the overlapping theory so as to extend the federal power would have the effect of nullifying the exclusive power of the provincial authority in this matter, and that, therefore, the overlapping theory cannot be applied. We should read the "British North America Act," as regards the words

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"marriage and divorce," as marriage laws minus all laws respecting solemnization of marriage. That is all that has ever been assigned to the federal authority.

I was trying to answer the point that the law respecting the solemnization of marriage is also a law respecting marriage. I submit that the authority is assigned to the two powers from different points of view: one as being a law respecting marriage, and the other as being a law respecting solemnization. I am pointing out that "marriage" absolutely has never been assigned to the federal authority, and we must read the "British North America Act" as a whole, qualifying the allowance of marriage to the federal authority by the allowance of solemnization to the province. And so the only thing left to the federal power is marriage minus solemnization. And, I submit, that the moment that marriage minus solemnization is the only thing assigned to the federal power, the whole question is at an end. This, I submit, disposes of every one of the objections made so far.

I do not intend to add anything to the argument as to what solemnization is. I respectfully submit that the very authorities cited by Mr. Nesbitt shew that the designation of an officer, or of a person before whom one must appear to get married, is legislation respecting solemnization. The American authorities which he cited say that solemnization consists of a third party appearing at the making of the contract, but, I submit that, in the days when the "British North America Act" was passed, the word "solemnizing" had a more limited meaning. Even taking Mr. Nesbitt's own definition, the designation of the person, or of the officer before whom the parties must appear to make the contract, is obviously legislation respect-

ing solemnization. I submit that any law that touches that question, that specifies that for certain purposes it shall be one officer and for certain other purposes it shall be another officer, is necessarily legislation respecting solemnization. Then, if it is legislation respecting solemnization, the next point is as to the argument of Mr. Nesbitt to the effect — and I understood this to be his main argument — that, while the power to prescribe how marriages shall be solemnized is in the province, the power to determine when nullity results from failure to comply with that law is in the federal authority. Mr. Nesbitt might have suggested that the power to make that mandatory provision is with the province and the power to impose the sanction is with the federal authority, a rather unusual division of legislative power. But, Mr. Nesbitt has gone further, and he has stated that the province has the right to impose penalties for non-observance. His argument amounts to this, that the province can legislate as regards solemnization, can prescribe what forms must be followed in order to get married, and can impose one definite condition, namely, a penalty for disobedience to its laws, but cannot impose, what is the most ordinary condition in such cases, nullity for non-compliance with the law. I submit that such a distinction is illogical. It would have been more logical to say that the power of imposing a sanction would be in one authority, while the power of making the mandatory order would be in the other. Surely, the legislature which imposes the formality must be able to say what would be the consequence of non-compliance. Our Quebec Code says that the failure to make publication, in marrying without a license, entails only a penalty. There are many formalities that

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the parties would be willing to frustrate if the result would be only a penalty and not a nullity. There are other formalities as an essential condition of the contract, and it is clear that the judgment of the legislature in prescribing what formalities it may prescribe will be influenced by the consideration of the success and the failure to comply with these formalities. The suggestion of my learned friend is that the provincial legislature could plainly legislate requiring formalities, but without knowing what the Federal Parliament would do about it; whether it would prescribe an absolute or a relative nullity or a penalty. It is obvious that any legislature which undertakes to declare a mandatory provision, must, in order to make that provision wisely, know what will be the consequences flowing from disregard of it. It is unheard of where the division between the power to make a rule and the power to impose a consequence for disregard of it has been divided between two independent bodies. And yet, the theory of my learned friend, Mr. Nesbitt, would lead to this. He says that the province can prescribe formalities, but he says the province cannot say whether there will or will not be a nullity for non-observance of them. He admits that some person has the power to say that nullity shall result from non-observance, and, therefore, he contends it must be in the Federal Parliament. It seems obvious that the moment a provincial legislature repeals a requirement that a certain form shall be followed — a requirement which under the laws existing anterior to Confederation had to be followed or if not their non-observance resulted in a nullity — it seems to me that the common sense view is that the repeal of the requirement would carry with it

the repeal of the nullifying clause. But the suggestion of my learned friend would be that the nullifying clause would have to remain in force until the Federal Parliament would repeal it. We can work out indefinitely a regular Chinese puzzle which would result from giving the power to prescribe forms, to repeal requirements as to form, to amend the laws as regards forms, to one authority, and to put in the other authority the power to say whether the consequence of non-observance shall be a penalty, an absolute nullity, or a relative nullity.

This brings me to deal with the argument in reference to divorce and I think the word "divorce" should be given a construction — if it is the only construction that can be given to it — that does not produce the results I have indicated. The word "divorce" may be given a meaning which, when tortured, may include actions in nullity, but in its strict sense it does no such thing, or, at least, it is possible of being construed as not including nullity. Under the law of our province the distinction is obvious. We have an absolute nullity, we have a voidable relative nullity, and we have, beyond that, the right to rescind a contract at the request of one party for non-fulfilment of his obligation by the other. I cannot do anything better than to suggest it as pointing out the distinction between the three actions; an action to have it declared that a marriage has always been void, an action to annul a voidable marriage, and a divorce action to cancel an absolutely previously binding contract, because one of the parties has broken his engagement. I submit that this distinction is recognized expressly by the English Act. The "Matrimonial Clauses Act" of 1837 clearly distinguished be-

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tween actions to annul and divorce. What was called divorce *a mensa et thoro* is now called judicial separation. In that Act, however, the previously existing distinction is recognized, between an action for dissolution of marriage, which is divorce, and an action to annul, which is not, but which declares that on account of a defect in the making of the contract it should be set aside. It is difficult to argue conclusively, with any chance of success, that when there is an absolute nullity the judgment that recognizes it divorces. I am discussing the question of formalities now, because to a certain extent the Civil Code makes certain want of formalities a nullity, and I want to say a few words as to where a distinction should be made between absolute and relative nullity. Is it logical to use the word "divorce" in the "British North America Act," which at the time of its passing had such a definite meaning, so as to import into the Act such an illogical distinction as this — that if the provincial legislature prescribed a form it is denied the right to say that there will only be a nullity if the parties are in bad faith, or that it will only be annulled if the judge thinks the circumstances justifiable?

It seems to me perfectly obvious that this bill purports to legislate on solemnization of marriage, because it says that although the laws before Confederation said that if you do not follow certain formalities you are not married this bill undertakes to say that, nevertheless, although you have not observed these formalities prescribed by the pre-Confederation laws, you are validly married. That is amending the law respecting solemnization of marriage. The whole question lies in the submission that it is only "mar-

riage," minus "solemnization," that is left to the federal authorities. If that is correct, then this bill which says that, in future, your marriage will be good even if you do not go through certain formalities prescribed by the province, and which previously were neglected under the pain of penalty, is absolutely *ultra vires* of the Federal Parliament. Can it be suggested that the jurisdiction as to prospective legislation is in one authority, while the jurisdiction as to retrospective legislation shall be within another authority? I fail to see any justification for such a proposition. What is done under the "British North America Act" is invariably to leave to the same authority the power as to prospective and retrospective legislation. The validity of an Act as regards its retrospective character depends on its validity as regards its prospective character. The prospective character of this bill, worded as it may be, is simply saying that in the future you need not comply with certain formalities which the previously existing law required.

It has been suggested by one of your Lordships, that suppose there is no law in the province respecting solemnization, and that province refuses to pass a law respecting solemnization, that the Federal Parliament could do so, and then that would constitute a valid marriage, or if you like, that they could go back to the Roman form of marriage and declare, that that would be a marriage, and then make it subject to conforming to the solemnization. My submission is that if the legislature repeals every law governing marriage, there is only one effective remedy in the hands of the federal authority and that is the disallowance of such a provincial act. The fact that the

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province repealed all its solemnization of marriage laws would give no authority to the federal parliament.

I want to protest against the theory advanced that the law of Quebec, as construed by Mr. Mignault, is what your Lordships call an abdication, and that that should be given as a reason why the Federal Parliament should interfere in the matter of solemnization. I think your Lordships are entitled to construe the "British North America Act" by the conditions existing in Canada at the time of its passage. The fact that there are a number of French people, having French laws, living in Canada, is referred to in the various cases before the Privy Council, defining property and civil rights. In the present case, what your Lordships may think absurd is considered by a large part of the population of Quebec as the only right thing to exist. It may seem to your Lordships extraordinary, but nevertheless the people of the Province of Quebec think it is right. And, when Confederation was brought about, why was there this extraordinary division between marriage on the one hand and solemnization on the other hand. It was not because one was of national importance and the other was not; it was because of the religious differences and the resulting difference in the points of view of the majority in one province compared with the majority in another. It was because the Roman Catholic majority in Quebec thought the views of their co-patriots of other religions so entirely different from theirs that they would not understand their views, and so the Catholic majority in Quebec would not entrust their other co-patriots with the power to legislate upon the solemnization of marriage, and that is why

the solemnization was entrusted to the province. The people of Quebec were convinced that the majority of other religions and origin could not understand their feelings as they did themselves, and so they were not willing to allow them to interpret them for them, and so the solemnization of marriage was entrusted to the provinces in the "British North America Act." By the Roman Catholic people of Quebec, rightly or wrongly, it was considered more of a religious than of a civil ceremony, and they were unwilling to entrust the matter to the Dominion and they wanted to be the sole judges as to when and how they would change their minds on the question of marriage. They were unwilling to abandon their authority over the question as to how they could get married to any other authority than themselves.

When the Roman Catholic population of Quebec entered into Confederation they had to make certain concessions from their religious point of view, and, no doubt, the people of Protestant religions, had to make concessions, and it is to be assumed that the people of the other provinces agreed to leave the question of mixed marriages, and even Protestant marriages, as to solemnization, in the hands of the provincial authorities in Quebec, trusting either to the reasonableness of the Quebec Legislature to pass just laws, or to the power of disallowance by the Dominion which was for them an effective protection. At all events, whatever the reason, the solemnization of marriages, mixed marriages and Protestant marriages, was left in the power of the provincial authorities. I do not understand that Mr. Mignault, in his argument, insisted very strenuously on the point that mixed marriages were null unless contracted before a Roman Catholic priest.

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I have only, my Lords, to add a few words. The position of the Province of Quebec, with respect to questions No. 1 and No. 3 is in favour of maintaining its jurisdiction. The position of the Province of Quebec, with regard to question No. 2, is that it has no opinion to offer and no argument to present as to what is the existing state of the Quebec law. All it has to state on that point is that the law of Quebec is the law of Quebec and that the Province of Quebec alone can change it. If the law of the Province of Quebec is Quebec law alone, the law of Quebec being the law of Quebec, Quebec alone can change it, and the only reason why the Supreme Court should be called upon to give an opinion disappears. I submit, that there is excellent ground to justify this court in asking the federal executive whether it insists on an answer to question No. 2, notwithstanding the answer which may be given by this court to questions No. 1 and No. 3. I need not insist on the fact that the answer to question No. 2 may lead to very serious results. If it is answered in the sense of the invalidity of these marriages, then there may be many who want a divorce who will be willing to step into the box and say they were Roman Catholics, when, as a matter of fact, they were practicing no religion at all. It may not affect the illegitimacy of the offspring because bad faith would be hard to prove and illegitimacy in the Province of Quebec depends on there being bad faith in contracting an invalid marriage. I am instructed to point out some of the possible consequences that might follow from the answering of question No. 2, and I submit that every ground of public policy and good sense suggests that it should not be answered by your Lordships. Is it not well to

leave things as they have been going along and under conditions in which no great harm has resulted to anybody ? Before the agitation arose we were getting along in perfect peace and harmony, and there were only three or four cases in dispute, but the moment the agitation arose we heard of a great many others. I point out to your Lordships that in the Province of Quebec the *Hébert Case*(1) is pending in the Court of Review, and that on that case a decision will be given.

I am instructed to submit the point to your Lordships, as to whether the decision of the Privy Council is conclusive that, when an opinion is asked by the federal authority concerning a matter which exclusively affects the Province of Quebec, there is jurisdiction in the federal authority to ask that question, and whether you are bound to answer it. The recent Privy Council decision(2) proceeds on the basis that the power to consult the court must be somewhere and that admittedly if it is not in the province it must be in the Federal Parliament. In that case, what was being dealt with incidentally was the power of the provincial legislature to legislate but, practically, it meant the power of the Federal Parliament to legislate, because, in almost every case, the question as to what is the power of the Federal Parliament to legislate, involves the question as to what is the provincial power to legislate. In that case it could not be contended that it appertained to the provincial legislatures alone. The question as to whether the Federal Parliament can pass an act is a question which the Federal Parliament can refer, but I submit, your Lordships, that if the question is one

(1) Q.R. 41 S.C. 249. (2) [1912] A.C. 571.

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which concerns exclusively a provincial law, or on which the Federal Parliament has no power whatever to legislate — the disallowance period having passed — the Federal Parliament has no right to refer such a question to the court.

Newcombe K.C.—If your Lordships please, speaking on behalf of the Attorney-General of Canada, I am principally concerned to answer the objections raised by my learned friends, Mr. Smith and Mr. Geoffrion — and to some extent apparently supported by Mr. Hellmuth — to the answering of what are termed here questions No. 2 and No. 3. The attitude of the Province of Quebec is, of course, in this respect, not quite consistent with that which she has maintained throughout the proceedings from the very commencement. But, my Lords, these provincial objections which were formerly urged before this court, and which were raised here yesterday by my learned friends, Mr. Smith and Mr. Geoffrion, have been conclusively and finally over-ruled by the Privy Council in its recent decision with reference to companies legislation (1). It is well known that the contention of the provinces was a very broad one, going to deny entirely the authority of the Parliament to require this court to answer in an advisory capacity any sort of a question at all, whether relating to the construction of the "British North America Act," to the interpretation of Dominion statutes, to the administration of the laws of Canada, or to provincial powers of legislation, or to the enactments of the provinces in the execution of those powers.

(1) [1912] A.C. 571.

But, there was also a more limited contention put forward which found favour with some of your Lordships — that, while questions affecting federal powers, questions the answers to which might be made the basis of Dominion legislation, questions affecting the interpretation of these powers which are to be executed by the Dominion under the "British North America Act," might be submitted, that questions of interpretation of provincial powers or questions of interpretation of provincial statutes, on subjects within the jurisdiction of the provinces as distinguished from the Dominion, could not be put to this court. And although that distinction was not urged very forcibly upon the appeal before the Judicial Committee, still it was there.

Now, the result of the judgment (upon the construction of it which I submit to your Lordships) involves the power in the Dominion, in the broadest terms, to submit any question of law or fact which the Governor-General in Council may be advised in his own good judgment to submit for the consideration of this court. But, while it is quite open to my learned friends of the Province of Quebec, if they think there is room in view of what has been decided, to renew that contention, so far as my learned friend Mr. Hellmuth is concerned, in the observation which I happened to hear during the time I was listening to his argument, he has no brief or instructions from the Government to submit or to suggest to your Lordships that any one of these questions should go unanswered.

We have a factum filed denying the jurisdiction of Parliament to enact bill No. 3, signed by Mr. Mignault and Mr. Hellmuth, counsel retained by the Dominion of Canada, and whatever weight your Lord-

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ships may attach to Mr. Hellmuth's observations I wish you to consider them subject to the statement that he certainly has no instructions to submit on behalf of the Government that any one of the questions which have been solemnly submitted by the counsel for the Government to your Lordships, should not be answered. Outside of instructions he should make no suggestion on that point. He is either instructed or he is not instructed; his instructions are the limit of his authority to submit anything to the court. As to the course your Lordships should take I have submitted and I maintain that the power of the Governnor-General in Council to submit every one of these questions and to require your Lordships to answer them is conclusively set at rest by the recent decision of the Judicial Committee(1).

The practical question remains as to what course should be adopted by the court under the circumstances of the present reference and I would like to direct your Lordships' attention for a moment to the circumstances out of which this reference arose. A bill was introduced into the Parliament which is set out in what is termed the first question. That bill came up for discussion and being a bill predicated upon nothing but the solemnization of marriage it seemed hard to resist the conclusion that it did not relate to that very subject. But, it was maintained that it did not relate to the solemnization of marriage; that there was either an overriding power in the Parliament to control provincial legislation in the exercise of its powers to solemnize marriages or that this bill did not relate to that subject; I think the latter was the contention upon which the pro-

(1) [1912] A.C. 571.

moters of the bill rested. Now, my Lords, in these circumstances the absence of jurisdiction by the Parliament to enact the bill seemed to be reasonably clear, but considering the uncertainties of the law and that, in these constitutional questions particularly, the variety of judicial opinions is only limited by the number of courts to which resort may be had, it seemed necessary to submit a question upon the subject. Now, I say a "question," because in the view I submit there is really only one question here. You may say that there are five questions here if you like, or you may say there are three, but, in my view, there is really only one question before the court, because what exists is an interrogation of the court arising out of the circumstance that this bill was introduced into the House of Commons and was advocated there as a measure which the House had authority to pass and which, in the exercise of its judgment, should receive effect as law. Then, the subject being very important and the authority of the Parliament to interfere with it at all being, at least, very doubtful, the Government concluded that the matter should stand over until judicial advice could be obtained, and the result was this interrogation which is before your Lordships.

Nobody says that what they call question No. 1 is not a perfectly proper question. It is the main point of the interrogation: Is this bill a bill which the Parliament has authority to enact? But, it is very plain to see that when a question is submitted to a court it cannot be foreseen what the answer to that question may be, and, therefore, in order to cover the ground so as to put Parliament in a position to deal intelligently with the subject, (if it be renewed,) it is necessary to

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put several inquiries, the one bearing upon the other, anticipating any sort of conclusion which the court may arrive at. Now, if your Lordships should conclude that Parliament has jurisdiction to pass this bill, it is obvious, I submit, that it is a very important and necessary inquiry as to what is the law of the Province of Quebec in respect to the point raised by the second question. Questions No. 2 and No. 3, in that view, especially question No. 2, become of the utmost importance, and I would respectfully urge that your Lordships should not hesitate by reason of any of the considerations which have been urged, to answer these questions on their merits if your conclusion be favourable to the jurisdiction of the Parliament upon the first question.

It is said that these questions may affect marriages, the status of parties who are not and cannot be represented in this court. The same is true, my Lords, of every case that is heard in this court, because other interests which are not represented and which cannot be represented under the practice of the court are affected, and are determined in every case which your Lordships decide. If the *Hébert Case*(1) comes to this court, the decision on it might affect hundreds of people, and yet they are equally without representation and without means of representation in that case as they are upon one of these references. The same is true of every case that has been heard and determined by this court by way of reference under the procedure of section 60 of the "Supreme Court Act." It is true that my learned friend points to one question of the *Fisheries Case*(2) — and a single one — which Lord Herschell

(1) Q.R. 41 S.C. 249. (2) [1898] A.C. 700, at p. 717.

objected to answer because it related to the rights of riparian proprietors acquired previous to Confederation, and in that case his Lordship said that these people were not, and could not be represented before the court and he did not see fit to answer. But he did answer all the other questions and these other questions affected existing rights to the fullest extent. Take the question, for instance, as to the section in the "Fisheries Act" where it was enacted — and the Act had been standing there ever since the Union — that the Dominion might make leases of property in fisheries. The Department of Marine and Fisheries had been exercising that jurisdiction to grant fishery leases from the very beginning; there were hundreds of these leases outstanding; and yet the court proceeded cheerfully and without any protest to say that the Government had no power to grant these leases, but, the lessees were not and could not be represented although the property which they thought they had was taken away by that very decision. The same result may be shewn with regard to the other references.

Then, there is the public interest and there is the private interest to consider and the public interest overweighs the private interest. Your Lordships cannot question the policy of any action of the Parliament within its jurisdiction, and if the Parliament has considered it good policy for the peace, order and good government of the country that these questions should be set at rest generally in this way, then I say that no single private interest, or group of such interests, should stand in the way of the determination of such questions as the Governor-General in Council

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sees fit to submit. The constitution, it is said, is carefully balanced so that no one of the parts of the Dominion can pass laws for itself except under control of the whole acting through the Governor-General. The Governor-General in Council in the exercise of that control, and by the authority of the Parliament, has submitted these questions in view of the situation which I have endeavoured to state. If your Lordships conclude, therefore, 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 bill a different situation is before your Lordships. If there be no jurisdiction to enact the bill, if you answer the first part of the interrogatory in the negative, I see no reason to suppose that the latter part is not to be grouped with that; Question No. 1 and question No. 3 as they stand here appear to go together:—

"3. If either (*a*) or (*b*) of the last preceding question is answered in the affirmative, or if both of them are answered in the affirmative, has the Parliament of Canada authority to enact that all such marriages whether,

(*a*) heretofore solemnized, or,

(*b*) hereafter to be solemnized,

shall be legal and binding?"

That reference is in reference to the character, status, or qualification of the person before whom the marriage is celebrated. The bill says:—

"3. Every ceremony or form of marriage heretofore or hereafter performed by any person author-

ized to perform any ceremony of marriage by the laws of the place where it is performed, and duly performed according to such laws, shall everywhere within Canada be deemed to be a valid marriage, notwithstanding any differences in the religious faith of the persons so married and without regard to the religion of the person performing the ceremony."

That speaks of the religion of the person performing the ceremony and as to the religious faith of the persons married. Question 2 reads:—

"2. Does the law of the Province of Quebec render null and void unless contracted before a Roman Catholic priest, a marriage that would otherwise be legally binding, which takes place in such province,

(*a*) between persons who are both Roman Catholics, or

(*b*) between persons one of whom, only, is a Roman Catholic?"

That has to do with the person before whom the celebration takes place, and question No. 3 is concerned with the power of the Parliament to enact whether such marriages whether heretofore or hereafter solemnized would be legal and binding. These questions go together and if No. 1 be answered in the negative, No. 3 must be answered in the negative.

Now, my Lords, I have very little to add; it is certain, I submit, that between the view of the executive and the view of the court as to whether a question should be answered or not, in the last resort the view of the executive prevails. But in the meantime situations change and opinions develop, and if it appear on the reading of this submission that there is in effect one interrogation, that it is divided into

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clauses having regard to what might follow from the different views which the 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 unnecessary, 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.

The two bodies are engaged, each in its own sphere, in working out the constitution of the country. In arguments before the court extreme cases are often put, but they are not good as illustrations for the purpose of arriving at the principle. It would be an extreme case that the Government insist upon very extravagant questions, unusual and improper, being put and answered by the court. It is time enough to consider that when such a case arises. It never has arisen yet and I do not anticipate, and I do not see that there is any reason to anticipate that there should ever be any conflict between the executive and the judiciary in the administration of section 60 of the "Supreme Court Act." That section contains a very useful power and one which has been often invoked and which the courts have accepted and acted upon in the settlement of the great constitutional questions of the country. The Government in the submission of questions, so far as intention goes, is certainly very careful to submit nothing but what is of public importance and what, in the view of the Government, may properly be answered by the court. The court, in its superior knowledge of the constitution and the working of the laws, may upon the con-

sideration of these questions see reason, instead of answering categorically, to submit points for the consideration of the Government 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 situation created in view of the public agitation and the introduction of this bill.

Nesbitt K.C. (in reply).—My Lords, my desire first, is, to get back to what is, after all, the real question, namely, whether the Dominion has power to pass the bill referred, and to arrive at a right conclusion upon that question.

The first essential is a careful examination and a right understanding of the terms of the bill itself. The bill pre-supposes three things: (1) It pre-supposes a provincial official, appointed and authorized by one of the provinces to solemnize marriages — no matter for the moment what marriages, but "some" marriages — in other words, it pre-supposes some machinery established by the province for the solemnization of marriages in the province. The power of the province to establish such machinery is in no way questioned or impaired by the bill. (2) It pre-supposes also that the parties seeking the protection of its provisions shall have their marriage solemnized before this provincial official — that is, that they have availed themselves of the solemnizing machinery established by the province. (3) And lastly, for more abundant caution, it pre-supposes that all other relevant provincial requirements, with the one exception to be mentioned in a moment, have been complied with. Unless the requirements of these three suppositions have been complied with, the benefit of the

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bill cannot be obtained. In short, the language of the bill is confined strictly to the object which it is designed to effect, and neither touches nor impairs anything but the difficulties which it is intended to remedy. It does not dispense with the performance of any ceremony, nor relieve any one concerned from any penalty which they may have incurred under the provincial law owing to failure in such performance. What it does, and all that it does, is to relieve the persons who have fulfilled its requirements from the effect, upon the validity of their marriage — not upon any other liability to which they may have exposed themselves — which the province has said shall prevent them from availing themselves of the machinery of solemnization which it has established. In other words, it relieves them from the effect upon their marriage of article 127 of the Civil Code.

It is admitted — indeed learnedly contended by the other side — that the incapacity of the parties to avail themselves of the provincial machinery I have mentioned is an impediment so-called, and an impediment within the meaning of that article. It is admitted also that the Dominion has jurisdiction to create and remove impediments to marriage under its undoubted jurisdiction over the capacity of the parties. What foundation, then, is there for the objection of the power of the Dominion to pass this bill, which is designed to remove this impediment of clandestinity as it is carefully worded so as to do nothing more.

My submission is that the Dominion, under the right to legislate upon the broad subject of marriage, as to the status or capacity of the parties, can enable any person to enter into that state, to obtain that

status and can prescribe what is precisely necessary to create that status, leaving it for the provinces to pass any laws they see fit to solemnize the status which the Dominion has so allowed to be created.

But my friend, Mr. Mignault, has endeavoured to put his case on question 2 upon the provisions of the Code apart from article 127. I shall leave it to my friend, Mr. Lafleur, to discuss how far it is possible for Mr. Mignault to support his contention without the assistance of that article. But, Mr. Lafleur has pointed out in opening, and I point out again that, even as so put, Mr. Mignault's contention involves this — that there is no way in which those who profess any religious belief not recognized by one or other of the special Acts that have been referred to and no way in which those who profess no religious belief whatever can validly contract marriage at all. That has been referred to at somewhat greater length since I made this note — my learned friends opposite are left in the extreme dilemma that, although the Dominion has complete and absolute jurisdiction on the subject of marriage to declare throughout the length and breadth of the Dominion what shall constitute marriage, so far as the Province of Quebec is concerned, if Mr. Mignault is correct, there are great numbers of people in that province with an absolute inability to obtain that status from any jurisdiction. My friend, Mr. Mignault, has no answer to the contention that those who profess no religious belief whatever cannot, under his argument, validly contract a marriage in the Province of Quebec at all. His idea is that such persons can, if they choose, and if they can afford it, apply to the legislature for a special Act of their own, which they may or may not

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obtain. So that the situation is, if he be right in his contention, that many of the inhabitants of the Province of Quebec have no capacity to marry, there being an absolute impediment to their marriage. Why, if this be so, is it not competent to the Dominion, in the exercise of its admitted jurisdiction over capacity and impediment, to confer upon such persons the capacity which my learned friend, Mr. Mignault, by his answer to the difficulty, admits that they now lack, and to remove the impediment to their marriage, which under his contention is imposed upon them.

As to the second clause of the bill it is, I submit, interesting to discuss any questions as to the power of the Dominion under the word "marriage," to legislate upon the property rights and so forth which may flow from the establishment of the marriage contract. The bill, which alone is before your Lordships, touches none of these matters, but simply leaves the parties to such rights in these respects as, their marriage being established, they may have under the provincial law. It gives them no greater rights than such as may be conferred by the province legislating in its own sphere, upon any other married people, the words "rights and duties as married people," obviously mean only such rights and duties as the competent authority — the Dominion, possibly, in some respects; the provinces, in others — may confer upon persons validly married.

I turn now to the argument of my friend, Mr. Hellmuth, and it seems to me, if I may say so, that he has completely misapprehended the argument which I addressed to your Lordships in opening this discussion. I am quite prepared to admit to the fullest extent — I could not do otherwise if I would — the principles

laid down by the authorities he has cited. But I was unable to understand their effect upon my argument. They establish, as I understand them, that a marriage validly solemnized according to the laws where the solemnization takes place, is, *quâ* that solemnization, valid everywhere — in other words that the "form" of the marriage is governed by the *lex loci contractûs*, or *celebrationis* as it is sometimes called, and differs in that from the *capacity* of the parties to the marriage, which is governed by the law of their respective domicile. And, consequently, if a marriage be solemnized in a country by the laws of which certain ceremonies are essential to the formation of a valid marriage, or, in other words, where those ceremonies are actually made part of the very contract, and those ceremonies are omitted, or defectively performed, the marriage, being invalid by the *lex loci contractûs* is invalid everywhere. No one, I should think, could dispute that proposition. But, it has no application to my argument or to any of the questions before the court, for it assumes the very point at issue in all of them. It assumes, and is based upon the assumption, that by the law of the place where the marriage is contracted the proper observance of the prescribed forms and ceremonies is essential to the validity of the marriage. But the very questions before the court in this case are: (1) Has the province made a particular form of solemnization essential to the validity of a marriage, and, (2), if it has purported to do so, is such legislation within its powers?

I am, of course, not dealing with the former question because an affirmative answer to it is just as necessary a pre-supposition of my present argument

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as it is of my learned friend's proposition. But, my friend's authorities can have no application to the latter question either, which is the one I am now discussing, that as to the legislative power of the province, because those authorities equally pre-suppose an affirmative answer to this question as well. Every case that Mr. Hellmuth discussed is based upon the ceremony, the form being made an essential part of the validity of the contract, and made by a power with undisputed rights to deal with the whole subject-matter, contract, solemnization and everything else. But, that does not forward the discussion here. What we have to discuss is a question of legislative power under a divided jurisdiction, and the only question with which I am now concerned is one on which my friend's authorities throw no light at all, namely, whether or not it is within the powers of the provinces under "solemnization of marriage in the province" to make any ceremony at all essential to the validity of a marriage.

The "British North America Act" says "solemnization of marriage"; that is, solemnization of that status, of that condition pre-supposing the status existed. I should think that a very large majority of your Lordships — I hope not all — are startled by the argument, but, were it not for the fact that it had been taken in, so to speak, the breath of our lives from the beginning that marriage means something connected with a ceremony and that a ceremony is essential to it, I should have thought that the language of the Act would be perfectly plain — the solemnization of the status, which status is entirely within the sole and absolute jurisdiction of the Dominion to deal with entirely; and when the Dominion says what

shall form that status when people are married the provinces can pass any legislation they please with reference to the solemnization of it, but they cannot for one moment interject or interpose something that is essential to the validity of that marriage. The Dominion alone has the power to deal with that.

My contention, as I have said, is that ceremony is not essential to the validity of a marriage. And here again my learned friend, Mr. Hellmuth, seems to have fallen into some misapprehension. He appears to have thought that the purpose for which I cited *The Queen* v. *Millis*(1) and *Beamish* v. *Beamish*(2) is answered by pointing out that what those cases actually decided was that under the law of England a certain form or ceremony, namely, the presence of a priest, had always been essential to the validity of a marriage. But that decision — that is, the point actually decided — has no application to my argument, for the same reason that my friend's other authorities have none, namely, because it was based upon special legislation making the ceremony essential. The purpose for which I cited *The Queen* v. *Millis*(1) was to shew, from the reasoning and authorities to be found there, what the situation was and always would be apart from such special legislation, and to establish that, apart from legislation to the contrary, the contract of marriage and its solemnization are two separate and distinct things, and that, even when some ceremony was prescribed, its absence did not invalidate unless it appears from the legislation that that was the intention. My friend cited *Swifte* v. *Attorney-General for Ireland*(3), but I should think that that authority made perfectly clear the difference.

(1) 10 C. & F. 534. (2) 9 H.L. Cas. 274.
(3) [1912] A.C. 276.

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Lord Loreburn says that legislation relates only to the form of ceremony and, therefore, is not extra-territorial, but he points out the distinction. In that case the form or ceremony was made an absolute essential, a condition precedent to the validity of the marriage, and the legislation was passed by a legislature fully competent to deal with the subject. It throws no light on it except the sort of side-light that may be gathered from case after case cited by Mr. Hellmuth where the statutes used the word "solemnize" as distinct from the other, and, as I say, with every submission, points to the one conclusion to be drawn from this Act — that what you are dealing with is the power of the provinces, not to legislate upon marriage, but simply on the solemnization of the existing status — of a status, the right to prescribe all the essentials of which are in the Dominion. Deny that proposition and you will say that although the Dominion has complete and absolute power, notwithstanding anything contained in section 92, to deal with the subject of marriage, to create that status with the subject of marriage, and, therefore, to create that status and, therefore, to legislate upon all its essentials, yet the provinces can step in and, by interposing anything they see fit under the guise of solemnization, can say that that status cannot come into existence. I submit that such a result will certainly make your Lordships pause a long time before you bring it into effect. It was for this reason that I quoted so largely from Lord Brougham and Lord Campbell. They held that there was no such special legislation in England, and, consequently, discussed what the position was in its absence. And what they say as to this neither was disputed, nor, I suppose,

could be disputed. From their reasoning I argue that the power claimed by the provinces to make any ceremony essential to a valid marriage, and to invalidate marriages where such ceremony has not been performed, cannot be conferred on them by the words "solemnization of marriage," in any proper meaning of these words, and, consequently, the power to override any such invalidating provincial legislation must be in the Dominion under the word "marriage." Under the word "marriage" the Dominion must have power to define what marriage means, to say what are, and, consequently, what are not essentials, of a valid marriage; in other words, as Mr. Justice Idington put it, to say that marriage is what marriage is; and you cannot get out of the word "solemnization" the power to add another essential to marriage. The result I submit is that, even though the bill cannot be supported as removing an impediment or conferring a capacity, — for that argument has nothing to do with the argument I am now urging — it is still within the power of the Dominion as asserting its jurisdiction over marriage.

One other observation about the *Montreal Street Railway Case*(1). That case, I submit, has no bearing whatever upon the real point of the construction of the "British North America Act" involved here. As I understand it, what is involved here is this: Granted the subject is one for which there is a special heading under section 91 of the "British North America Act," anything that is necessarily incidental to that can be passed by the Dominion Parliament, this overrides any of the matters involved in section 92. I think that is established beyond doubt.

(1) [1912] A.C. 333.

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But His Lordship, the Chief Justice, puts this, which needs to be grappled with, — as I understand him he says you have out of that head in 91 a special head of its own delimited and coupled with property and civil rights and, therefore, that it hinges upon the rule of construction that I have been urging. Now, I say that, if anything, it points and adds force to the rule that I have been urging. You have got to take first marriage, and out of that is taken — they have seen fit not to leave property and civil rights to be dealt with at all — but out of that they have taken the solemnization of that condition. Suppose they said "the solemnization of that status," would your Lordships say that they could say that under the head of "solemnization" they could destroy that status by inserting terms that would render the bringing of that status into existence absolutely useless. You have the word "marriage" coupled with "divorce" and you have to read the two together. Divorce must be given the meaning of anything that relates to the untying of the supposed *de facto* condition of marriage. Why should you make marriage of a less breadth or importance than divorce when you have eliminated out of that simply the solemnization of that status ? Now, the answer to the first question is only with regard to the bill and the answer to the third question is as to the general validity. The Dominion can create a court and can give that court full power to deal with, if I am right in my argument, the undoing of that marriage which would set the parties loose, as for instance, on the ground of physical incapacity. Under this authority the Dominion could give that court any rules it sees fit, to declare what it shall be governed by. Could the Dominion not say

that if the parties have gone through the solemnization in a form that is prescribed they may have the status or may not have the status; and could not the Dominion legitimize the children and declare that the parties had the status of married people? Could a province, under the guise — and this is my last suggestion — could a province, under the guise of solemnization, limit the right of a citizen to enter into the state of marriage; could the provinces say that a red-haired man must only be married to a red-headed woman? Can the provinces curtail and fetter the rights of a citizen in that respect upon which the Dominion alone has the right to legislate? Can a province declare as to the right of a citizen to enter into the married state; can a province limit his capacity by any attempt to say that he can only do it by so and so?

Lafleur K.C.—My Lords, as I intimated in my opening remarks, an investigation of the conditions of our laws immediately after the conquest does not seem to me to be pertinent or necessary for a decision in this case, because, as I observed to your Lordships, we have a declaratory statute immediately preceding the Code which seems to me to do away with all doubts as to the rights of the several churches to celebrate marriage, and it only becomes a matter of construction as to how far the authority of the clergymen of each of these communities extends in the celebration of marriage. That there is no restriction as to the persons whom they may marry is my view on the matter, and nothing that I have heard up to this time has disturbed that.

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The declaratory Act is the Consolidated Statutes of 1860. May I say this with reference to the law before that date, and I consider it useful only in leading up to a statement of what the law was in 1860 and at the time the Civil Code was enacted. It appears to me that the Articles of Capitulation in 1759 and the Articles of Capitulation in 1760, and the Treaty of Paris, in 1763, had this effect, and no more: It gave to the Roman Catholic subjects of His Majesty free exercise of their religion and the fullest and freest rights in that respect, but it appears to me that it cannot be successfully contended that the grant of this right and privilege to the Catholics of the colony implied the exclusion in any sense of the religion of the conquering nation or delimitation or restriction of the rights of the clergy of the conquering nation who were clearly entitled to exercise their ministry in the conquered country. It seems to me that any other contention is repugnant not only to the British constitution but to a reasonable construction of these Articles of Capitulation and to the language of the treaty. It would seem to me on the face of it that you cannot pretend that by tolerating a religion, which was then repugnant to the religion in the constitution of the conquering country, that you restricted in any way the religion of the conqueror in the conquered territory. That would seem to be self-evident as a matter of constitutional law.

Therefore, it does not seem to me to be reasonably arguable that the grant to the Roman Catholic subjects of His Majesty of the free exercise of their religion whether under the capitulation of Quebec or the capitulation of Montreal or the Treaty of Paris gave them any exclusive rights as against the Anglican Church. That, I think, is reasonably clear.

I say that so much of the French canonical law as was inconsistent with the free exercise of the ministry of the Church of England, after the conquest, was repugnant and could not survive the conquest. So much of that law as would exclude the ministry of the Anglican Church clergymen would be quite incompatable with the law of the conqueror and would be repealed, and I find that is the law by reason of the declaratory statute that says that Anglican clergymen had the power before 1861, which presupposes existence of that power from the time of the conquest down to this date; and remember, when you come to the next step after the capitulation of Quebec, and the capitulation of Montreal in 1760, you have in the "Quebec Act" of 1774, language which introduces, in the 8th section, the laws of Canada. Now, that must mean the laws of Canada as they existed immediately before the Act. It says that resort shall be had to the laws of Canada as the rule for the decision of matters of controversy relative to property and civil rights. That means and includes the law that was brought in as a necessary part of the conquest, and which had not been repealed. The "Quebec Act" simply repealed the proclamation of Governor Murray, which purported to introduce the English civil law as a whole into the country, and all the previous ordinances and other Acts and instruments which had been issued thereunder. But it did not affect what I contend was a necessary part of our system immediately after the conquest and that is the exercise of the ministries of the Anglican clergymen according to the rites of their church, and in that respect their authority was absolutely unrestricted, and they could marry any one whomsoever.

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What confirms that view is the fact that between 1774 and 1860 you find no statute which purports to give to the clergy of the Anglican Church the power to marry. You have statutes granted to dissenters to give that power; and you have it given at a very early date to the Church of Scotland, and you will find from the statute that the authority given in 1827 to the Church of Scotland is absolutely unrestricted.

Now, with regard to the Anglican Church no special statute was necessary because of the position of things which necessarily occurred at the time of the conquest, viz., the introduction of the power of the clergy of the conquering nation and of the exercise of that religion. It is only in 1860 that any reference is made to the subject by a statute which recognizes the rights of the various communities to celebrate marriage.

I submit that that Act, being a declaratory interpretative Act, justifies my contention. That statute with reference to the Scotch Church is absolutely unrestricted, the clergy of that church can celebrate all marriages.

It helps one to understand this legislation when we see that section 16 of the Act, ch. 20, Con. Stat. L.C. 1860, made provision separately for the Church of England and the Church of Scotland. Then you pass on to section 17 of that Act, which recites the numerous statutes passed to enable various religious communities to keep registers of civil status, beginning with the Baptists and ending with the Quakers. The recital of these Acts covers two pages and includes almost all the dissenting sects which had arisen in Canada up to that time. Of course many more have arisen since and we have had a great deal

of private legislation giving them the right to keep registers. But the enacting part of that Act says, that this Act extends also — independent of the Anglican Church and the Scotch Church — to the several religious communities and denominations in Lower Canada mentioned in this section of the Act, to the priests or ministers thereof, who may validly solemnize marriages and may obtain and keep registers under this Act subject to the provisions of the Act mentioned, with reference to each of them respectively. So that if there was any restriction in any Act applying to a religious denomination its powers would be restricted *pro tanto*. It is not very material, but, if your Lordships refer to the Act respecting the Jews you will find that they did not effectually restrict the powers of the Jews in that respect, but that they did restrict the power of the Quakers by saying that they should have the right to celebrate marriages between persons professing the faith of the said religious Society of Friends commonly called Quakers or one of whom may belong to that denomination.

But I suggest that this interesting inquiry into the old law becomes superfluous when we have the law immediately before the enactment of the Civil Code clearly laid down in the statute of 1860. I say it is the source of the Code, and that statute gives the state of the law which you have to consider, if you are going to consider the antecedent law at all, in explaining unambiguous words in the Code. But, my submission is that there is no ambiguity in the Code, that nothing could be clearer than article 129 and that it needs no reference to antecedent law to construe it, and if you go beyond the existing law then you must take the law that existed immediately be-

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fore the enactment of the existing law, and not go back one hundred years before for your authority. The law which immediately preceded the Code is the law laid down in the statute of 1860, and it gave no restricted authority to the ministers of religion, except in so far as a special Act in some cases may have restricted them. That brings me once more to article 129, to which I am loth to return, because it seems to me I have taken up a great deal of your time over it already. To the Baptists, to the Presbyterians and so on, the powers are given to the ministers of these bodies almost in the same words in each statute.

It would be impossible, where all religions are tolerated as they are with us, where all sects are lawful and are able to carry on their ministry without any difference being made between them by the law of the land, to carry out a system in these days that originated at a time when there was only one State Church. It is inapplicable in its terms to the present complicated state of things and there I take it we find an explanation of the general terms used in article 129 of the Code. The observations of the commissioners which have been cited by Mr. Mignault go no further than this: That it was intended to frame this article in general terms because of the difficulty of the situation but not to make any distinction between one and the other in law. My learned friend's contention, if I understood it at all, was this: that the Catholic priest's authority to marry was restricted to the Catholics, the Anglican clergyman's authority was restricted to the Anglicans, and so on, every sect was restricted to its own congregation. I submit you cannot find that even suggested by the terms of article 129. I say, on the contrary, it is precluded by

the language of article 129. The first paragraph of article 129 is of so general a character that you cannot import any such idea into it unless you had it in your mind beforehand. I would defy any one who is not familiar with the history of this country to take that article *per se* and read into it all that the ingenuity of Mr. Mignault has read into it. He is filled with all the historic lore that he has so well expounded to your Lordships, but take any judge who is free from any such prepossession and get him to construe article 129, — can you imagine he would introduce any such restriction into it? It says:—

"All priests, rectors, ministers and other officers authorized by law to keep registers of acts of civil status are competent to solemnize marriage."

It says they are competent to solemnize marriages generally; not, to solemnize particular marriages between certain persons. And then it goes on to say what is inconsistent with the idea of their being so restricted; it says that

"none of the officers thus authorized can be compelled to solemnize a marriage if any impediment exists according to the doctrine and belief of his religion and the discipline of the church to which he belongs."

Mr. Mignault suggests that that means that where there is an impediment to the marriage the priest or clergyman is not compellable to marry. Of course he is not; if there was an impediment he would not need article 129 to relieve him of the obligation; he would not have the right to celebrate the marriage. The provisions of that paragraph are intended to apply to a case where there is no legal impediment but where there is conscientious objection on the part of the minister.

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Can it be doubted that the Parliament since Confederation has the power to pass bills for the relief of consorts who have been married and to authorize them to marry again? That power has not been disputed. Take the case of two persons who have thus procured divorce from the Parliament of Canada and who have been authorized to marry again, presenting themselves before an Anglican clergyman or a Roman Catholic priest; surely that is a case where the article applies. That clergyman is not compelled to celebrate that marriage because it is contrary to the doctrine of the church to which he belongs although the parties are free to marry. They are free to marry but they cannot compel that clergyman to marry them. That is surely the natural meaning of that article, and to give it any other meaning is to deprive it of any sense at all.

Just one or two observations with regard to the other articles you are referred to in connection with article 129. It seems to me that if you look first at the place where the marriage is to be celebrated, and I do not think that would be conclusive in any event, but even if it were there, which I contend it is not, and that the marriage must be celebrated in the parish of the parties, it could not always be celebrated in the parish in one place because the parties might have different parishes. I will comment on article 63 as to that. However, that is not the question, the question is:—Assuming that the *locus* of the marriage is defined and restricted, that does not restrict the capacity of the officer to marry persons who come from another place, as long as he performs his ministry within his jurisdiction, if jurisdiction there be. I shall refer briefly to these articles. By article 57

the banns must be published where the parties reside, in their respective churches, but as you see from this article the marriage is not necessarily solemnized by the person who publishes the banns, and all the person who performs the marriage has to do is to get a certificate shewing that the banns have been published.

Take the case where they are in different parishes, and then there must be two competent since the marriage is celebrated by the curé of the parties. By article 63 the marriage is celebrated at the place of domicile of one or other of the parties.

My learned friend says there may be two competent to solemnize the marriage, and I say there may be more, but at all events he cannot contend there is only one competent. The marriage is to be celebrated at the place of domicile of one or other of the parties and if it is solemnized elsewhere the person officiating is obliged to ascertain the identity of the parties. That is a natural consequence of having your marriage solemnized outside of your domicile. Surely, that shews that the provision is merely directory. If you look at article 1105 of the Code of Civil Procedure, which has not been referred to, you will find it confirms the idea that the *locus* is not a matter of necessity, but the obligation is placed on the officer of identifying the parties if they are married elsewhere than at their domicile.

I do not attach the slightest importance to the question of the *locus* where the marriage is to be celebrated, because it does not seem to me that touches the question of the capacity of the clergyman when he is officiating in that *locus*. I merely wished to give your Lordships my construction of these articles

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which, I admit, leave the law in an unsatisfactory condition, though not as unsatisfactory as the law with regard to marriage licenses.

Now, as to the application of section 127 of the Civil Code — that is really the last fortress of my learned friend, Mr. Mignault. After he is driven from the field in his restricted construction of article 129, he still says that, under the provisions of article 127, there is an incapacity in the case of Catholics to have a marriage celebrated before any one else than a priest of that religion. What I have to submit, with respect to article 127, is that, whatever may be regarded by the canonists as its meaning, we must construe what is the meaning and application of the word "impediment" in article 127, having regard to its place in the Civil Code and to the context. You find that it is under the chapter headed: "Of the Qualities and Conditions Necessary for Contracting Marriage," and among the disabilities there enumerated you will find there is want of puberty, impotency, minority, alliance and relationship. Articles 123, 124, and 125 deal with relationship or affinity, and article 127 says:—

"The other impediments recognized according to the different religious persuasions, as resulting from relationship or affinity or from other causes, remain subject to the rules hitherto followed in the different churches and religious communities."

My submission was and is, that these other causes must be causes of the same nature, causes within the purview and scope of that chapter, that is, they must be qualities and conditions necessary for contracting marriage and of the character of the others, viz., they are disabilities of the persons. The whole chapter

deals with the competency of the candidates for marriage. The next chapter deals with a totally different subject, and that is the competency of the officer who solemnizes the marriage. I say you introduce a hopeless confusion if you construe article 127 as in any way referring to the formalities relating to the celebration of marriage, and I say it is a misnomer and a misuse of language for lawyers to say, when they are construing article 127 of the Code, that that is an impediment to the marriage of the parties, when the heading of the chapter within which the article is found treats of the qualities and conditions necessary for contracting marriage in the parties themselves.

My submission is that that must all refer to the qualifications and conditions of the candidates for marriage. The next chapter deals with the qualities of the celebrating officer. You cannot say that in a chapter that deals with the qualifications and conditions required for marriage, you could consider the objection to or incompetency of a public officer. Article 127 has left that subject-matter of canonical impediments to the diffierent churches and in the next chapter, which deals with the competency of the public officer, it has not left it to any church to say; the Code itself says what a competent officer is. I submit that the language of that section is very plain.

Now, I have only one word to add as to sub-question (*b*) of question No. 2. I shall say very little on that for the obvious reason that my learned friend, Mr. Mignault, does not support the view that mixed marriages are at all in jeopardy; he believes that they are valid. An expression fell from the Chief Justice yesterday to the effect that the whole question was

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settled by the terms of the Benedictine declaration, and I concede that settles the question so far as the application of article 127 is concerned. That is clear, because under the Benedictine declaration it seems to be a canonical impediment and so there is an end to that question. But I say it does not do away with the difficulty which does result from the restrictive interpretation put upon article 129 independently of article 127.

If the minister of each sect were restricted to his own congregation, then there would be an end to the possibility of mixed marriages at all, there would be no clergyman by which they could be celebrated. That is the legitimate conclusion of Mr. Mignault's argument, but he recoiled from that legitimate conclusion when it comes to be applied in practice.

THE CHIEF JUSTICE.—As this is the end of the argument, it remains for me, on behalf of my brother judges and myself, to say that we are extremely indebted to the bar for the very valuable assistance they have given to us throughout the whole of this argument. We have all been impressed with the unfailing patience and courtesy of counsel, and the learning displayed by them, which we all agree is quite worthy of gentlemen who occupy the very high position that you occupy at the bar of your respective provinces.

The court reserved its decision and, on the 17th day of June, 1912, their Lordships proceeded to give the following reasons for their respective opinions.

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THE CHIEF JUSTICE.—To the first question, my answer is "no."

Whatever may be, with respect to the capacity of the parties, the authority over marriage which is vested by section 91 in the Dominion Parliament, there can be no doubt, in my opinion:—

1st. That a marriage is not valid and can produce no civil effects until solemnized.

2nd. That solemnization, which includes the form and ceremony of marriage, is, by virtue of section 92 of the "British North America Act," within the exclusive legislative competency of the different provincial legislatures.

3rd. That there is no marriage within a province where all the legal formalities prescribed by the legislature of that province are not observed.

4th. That Parliament has no power or authority to remedy any omission or defect or to dispense with any of the requirements with respect to form or ceremony which are prescribed by the legislature of the province within which the marriage is solemnized.

Therefore, Parliament has no authority to enact in whole or in part Bill No. 3 of the First Session of the Twelfth Parliament of Canada, intituled "An Act to amend the 'Marriage Act'" the purpose of which is to provide a legislative remedy for or dispensation from any defect or requirement in "every ceremony or form of marriage" and to regulate the "rights and duties of the persons married and of the children of such marriages."

In answer to question 2:—

In view of the replies given to questions 1 and 3 and the reasons assigned therefor by the majority of the judges here, I beg to ask that I may be relieved of

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the obligation to answer the first branch of this question No. 2 for the following, among other, reasons:—

1st. Because Mr. Newcombe and Mr. Hellmuth, both acting for the Attorney-General of the Dominion, have informed the court, in substance, that this question was predicated on the assumption that questions 1 and 3 would be answered in the affirmative.

2nd. Because, as at present advised, I am of opinion that there is no appeal to this court from the judgment of a Quebec court in a case which would involve the determination of this abstract question;

3rd. Because the question involves the determination of a point that is in issue in a case now actually pending before a competent Quebec tribunal, and I respectfully suggest that in such circumstances proper respect for judicial ethics requires us to abstain from unnecessarily expressing an opinion which must be without force or effect;

4th. Because the Attorney-General of the Province of Quebec, who is immediately responsible for the administration of justice in that province and the guardian of the legal rights of its inhabitants has represented to this court that although the answer to the first branch of this question is only advisory in its character, litigants in that province will necessarily be prejudiced by any answer that may be given, to use the language of the Lord Chancellor "without so much as an opportunity of stating their objections." In these circumstances, adopting the suggestion of the Lord Chancellor, I give the above reasons as some indication of the "high degree of constraint and inconvenience" which is certain to result from a merely academic answer to the first branch of this question.

To the second branch of this question, I answer "no."

In answer to the third question, I can add nothing to the reasons given in support of my answer to question No. 1. If the power to authorize the solemnization of marriage in a province is vested exclusively in the Provincial Legislature, there can be no authority in the Parliament of Canada to retrospectively validate a marriage defectively solemnized or to provide that future marriages may be solemnized otherwise than in accordance with the requirements of the provincial law.

DAVIES J.—Question 1(*a*). "Has the Parliament of Canada authority to enact in whole or in part Bill No. 3 of the First Session of the Twelfth Parliament of Canada, intituled 'An Act to amend the Marriage Act'" ?

The bill provides as follows:—

1. The "Marriage Act," chapter 105 of the Revised Statutes, 1906, is amended by adding thereto the following section:—

"3. Every ceremony or form of marriage heretofore or hereafter performed by any person authorized to perform any ceremony of marriage by the laws of the place where it is performed, and duly performed according to such laws, shall everywhere within Canada be deemed to be a valid marriage, notwithstanding any difference in the religious faith of the persons so married and without regard to the religion of the persons performing the ceremony."

"(2) The rights and duties, as married people of the respective persons married as aforesaid, and of the children of such marriage, shall be absolute and complete, and no law or canonical decree or custom of or in any province of Canada shall have any force or effect to invalidate or qualify any such marriage or any of the right of the said persons or their children in any manner whatsoever."

(*b*) If the provisions of the said bill are not all within the authority of the Parliament of Canada to enact, which, if any, of the provisions are within such authority ?

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I construe this bill as attempting, in its first section, to validate by Dominion legislation marriages solemnized by or before a person having only a limited provincial authority to solemnize marriages in cases where such person has ignored such limitations and attempted to solemnize a marriage beyond the powers given him by a provincial legislature.

The bill is supported on the ground that the subject-matter of "Marriage and Divorce" was assigned by the 91st section of the "British North America Act, 1867," to the Dominion Parliament, and that as a consequence that Parliament has the exclusive power of legislation with regard to essentials over the whole subject-matter, and that this exclusive power has not been lessened or diminished by the assignment in the 92nd section of the same Act to the Provincial Legislature of the exclusive power to legislate with regard to "the solemnization of marriage."

The contention submitted by Mr. Nesbitt was, in effect, that under our constitutional Act of 1867, all questions relating and essential to the contract of marriage, namely, its definition, the capacity of the parties to enter into it, and all the circumstances upon which its validity are to depend, are assigned to the exclusive jurisdiction of the Dominion Parliament while the regulation of the evidential formalities authenticating the contract, they not being essential to its validity, are assigned to the legislatures of the provinces. All matters of substance would thus be assigned to the Dominion. Mere matters of form would be assigned to the provinces and their neglect or violation though punishable by penalties prescribed by provincial law would not in any way affect the validity of the marriage.

The conclusion was submitted by counsel for the promoters of the bill that the contract of marriage is and always was "entirely independent of any religious or other ceremonial accompaniment" and that in the absence of Dominion legislation the common law had to be resorted to in order to determine whether parties were legally married or not,

I cannot bring myself to believe that these contentions can prevail. They are not in my opinion based upon a true construction of the "British North America Act, 1867." In my judgment the division of legislative power created in that statute and assigned respectively to the Dominion and the provinces was not one which gave exclusive legislative power over all the essentials of the subject-matter of marriage to the Dominion, and that over non-essential formalities only to the provinces. The Imperial Parliament, when passing that Act, will at least be credited with the knowledge that so-called common law marriages were not valid in England and that it had been judicially determined by the House of Lords in the case of *Beamish* v. *Beamish*(1), that

> it was settled by the decision of *The Queen* v. *Millis*(2), that to constitute a valid marriage by the common law of England it must have been celebrated in the presence of a clergyman in holy orders.

In the light, therefore, of the law as it existed in England at the time of the passage of our constitutional Act, 1867, on the subject of marriage and also as it then existed in the colonies being confederated into the Dominion and also in view of the differences of race and religion prevailing amongst the inhabi-

(1) 9 H.L. Cas. 274. (2) 10 C. & F. 534.

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tants of the various provinces, I cannot doubt that in assigning the exclusive power of legislation over the solemnization of marriage to the provinces, the Imperial Parliament intended to confer upon them a much greater power than that of legislating on mere non-essential formalities.

The subject-matter, "the solemnization of marriage in the province." covers and aptly expresses, in my judgment, every manner or mode in which competent parties, intending to contract marriage with each other, might validly so contract. No limitation was placed upon the power of the legislatures to which that subject-matter was assigned. Their powers are plenary. The legislatures of the several provinces may within their several legislative jurisdictions make religious ceremonies necessary to validate a marriage or may make its solemnization before a civil functionary of any kind sufficient for the purpose with or without witnesses. It is probable that they would have power to declare the solemnization of marriage to be complete without the presence of a priest, clergyman, minister, civil functionary, or witness, and by the mere consent of the parties intermarrying evidenced in writing or by mere words. As their powers of legislation are plenary and exclusive over the subject-matter assigned to them, no limitation can be placed upon their exercise and any invasion of their jurisdiction by the Dominion Parliament under the guise of legislating upon marriages and divorce would be *ultra vires*. If apt and proper language is used in provincial legislation, making any form of solemnization or the presence of any designated person or any person of a designated class, religious or civil, essential to the validity of the solemn-

ization of a marriage and such requisite is disregarded and ignored, the marriage is *ipso facto* void and cannot be validated by the Dominion Parliament.

I construe the division of legislative powers made by our constitutional Act as carving out of the subject-matter of marriage and divorce assigned to the Dominion a distinct and essential part denominated "the solemnization of marriage." The legislative powers of the Dominion cover the subject-matter of marriage and divorce minus that part of it carved out and assigned exclusively to the provinces. The judicial rule of construction of the two sections, 91 and 92, of the "British North America Act" that the Dominion Parliament in exercising its powers of legislation under any one of the enumerated powers of section 91 may do so to the extent of invading or interfering with the subject-matters assigned to the provincial legislatures, so far as is necessarily incidental to effective legislation on the part of Parliament within the enumerated subject being legislated on, is a rule of construction necessary to the practical working out of the division of legislative powers assigned to the Dominion Parliament on the one hand and the provincial legislatures on the other. Efficient legislation could not be had if such salutary rule was not adopted. But that rule has no application, in my opinion, to the unique case we now have before us where a special subject-matter is assigned to the Dominion Parliament and a portion of that subject-matter carved out and deducted from it and specially assigned to the provinces. If the rule was applied to such a case it would defeat the very object and purpose of the division as I construe its meaning.

The conclusions above expressed seem to have been

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those of the Crown law officers of England as found in the despatch from the Secretary of State for the Colonies to the Governor-General dated the 15th January, 1870.

The questions submitted to them were whether the authority to grant marriage licenses was vested in the Governor-General of Canada and whether the power of legislating on the subject of marriage licenses was solely within the Parliament of Canada. That opinion is stated by the Secretary of State, as follows:—

> It appears to them that the power of legislating upon this subject is conferred on the provincial legislatures by 30 & 31 Vict. ch. 3, sec. 92, under the words "the solemnization of marriage in the province"; the phrase "the laws respecting the solemnization of marriages in England" occurs in the preamble of the "Marriage Act" (4 Geo. IV. ch. 76), an Act which is very largely concerned with matters relating to banns and licenses, and this is, therefore, a strong authority to shew that the same words used in the "British North America Act, 1867," were intended to have the same meaning, "Marriage and divorce," which by the 91st section of the same Act are reserved to the Parliament of the Dominion, signifying in their opinion all matters relating to the status of marriage between what persons and under what circumstances it shall be created and (if at all) destroyed. There are many reasons of convenience and sense why one law as to the status of marriage should exist throughout the Dominion which have no application as regards the uniformity of the procedure whereby that status is created or evidenced.
>
> Convenience, indeed, and reason would seem alike in favour of a difference of procedure being allowable in provinces differing so widely in external and internal circumstances as those of which the Dominion is composed and of permitting the provinces to settle their own procedure for themselves, and they are of opinion that this permission has been granted to the province by the Imperial Parliament and that the New Brunswick Legislature was competent to pass the bill in question.

For these reasons, I am of the opinion that the proposed bill, the constitutionality of which is submitted for our opinion is, upon the construction we

put upon its language, beyond the authority of the Parliament of Canada to enact.

I answer the first question in the negative.

The second question submitted to us, reads as follows:—

2. Does the law of the Province of Quebec render null and void unless contracted before a Roman Catholic priest, a marriage that would otherwise be legally binding, which takes place in such province,

(*a*) between persons who are both Roman Catholics, or (*b*) between persons one of whom, only, is a Roman Catholic.

In view of the answer I have already given to the first question that the Dominion Parliament has not the power to pass the bill submitted to us as it is construed by me, and that the exclusive power to legislate on its subject-matter is by our constitutional Act assigned to the provinces, I proceed to examine the law of the Province of Quebec and I am of opinion that the answer to both parts of the second question above set out must be in the negative.

The answer depends entirely upon the construction of the legislation of the Province of Quebec as embodied in the Civil Code and its amendments. That Code was enacted by the late Province of Canada and became law before our constitutional Act was passed in 1867. The legislature of the late Province of Canada had jurisdiction over the whole subject-matter of marriage. There was no divided jurisdiction as there is now between the Dominion and the provinces. The Code, therefore, contains many provisions upon the subject-matter of marriage, such as title 5, chapter 1, of Marriage, defining "the qualities and conditions necessary for contracting marriage," and chapter 2 "of the formalities relating to the solemnization

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of marriage," and chapter 3 "of oppositions to marriage." It is necessary to bear this in mind when putting a construction upon the articles of these several chapters of the Code.

I am of the opinion that Mr. Lafleur's contention is sound, namely, that the question now being discussed can be decided by reference to the Code itself without reference to the historical aspect of the question or the state of the law antecedent to the passing of the Code and *must* be so decided without reference to previous legislation on the subject if the language of the articles which control and govern the answer to be given the question are intelligible and unambiguous.

I think the judgment of the Judicial Committee in *Robinson* v. *Canadian Pacific Railway Co.*(1) ample authority for that latter proposition. In delivering the judgment of the Board, Lord Watson says, at page 487:—

> In the course of the argument, counsel for the parties brought somewhat fully under their Lordships' notice the law of reparation applicable to cases like the present, as it existed prior to the enactment of the Code; and they discussed the question whether, and if so, how far, chapter 78 of the statute of 1859 altered or superseded the rules of the old French law. These may be interesting topics, but they are foreign to the present case, if the provisions of sect. 1056 apply to it, and are in themselves intelligible and free from ambiguity. The language used by Lord Herschell, in *Bank of England* v. *Vagliano Brothers*(2), with reference to the "Bills of Exchange Act, 1882," (45 & 46 Vict. ch. 61), has equal application to the Code of Lower Canada: "The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities." Their Lordships do not doubt that as the noble and learned Lord in the same case indicates, resort must be had to the pre-existing law in all instances where the Code contains provisions of doubtful import, or uses language which had previously acquired a technical meaning.

(1) (1892) A.C. 481.

(2) [1891] App. Cas. 145.

But an appeal to earlier law and decisions for the purpose of interpreting a statutory Code can only be justified upon some such special grounds.

But apart from judicial authority, I agree that article 2613 of the Civil Code is conclusive upon the point, as express provision is therein made upon the subject-matter of the question.

While I contend that the Code itself until altered either by Parliament or the Legislature of Quebec under their respective powers is the sole arbiter of the law on the subject-matter of marriage and its solemnization irrespective of what that law was previous to it being enacted, still the subject of the antecedent law was so largely discussed at bar and the whole subject is so important that I may be pardoned if I shortly refer to this antecedent law and its gradual development.

Before and up to the time of the conquest the Roman Catholic religion was the only one tolerated in Quebec, and the priests of that church were the only ones who could solemnize marriage there.

In England, on the contrary, the Anglican Church was at the time of the conquest the only one tolerated. Its ministers and priests were the only ones who could solemnize marriage in England, and Roman Catholics were subjected to severe penalties.

Anything, therefore, in the law of Quebec at the time of the conquest which required any person not a Roman Catholic to be married before a priest of that religion or prevented any person of that religion who so desired from being married before a priest or clergyman of the Anglican Church, was so far opposed to the will of the Government of the conquering power as it had been previously expressed upon the

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subject, that it must be taken to have been abrogated by the conquest.

The capitulations of 1759 and 1760, and the provisions of the Treaty of Paris, 1763, conceded to the Roman Catholic inhabitants of Quebec the "free exercise of their religion as far as the laws of Great Britain permitted."

In 1774, eleven years after the Treaty of Paris, the Quebec Act was passed by the Imperial Parliament and it declared, section 5, that "His Majesty's subjects of the said province (Quebec) professing the religion of the Church of Rome of and in the new Province of Quebec may have, hold and enjoy the free exercise of the religion of the Church of Rome, *subject to the King's supremacy.*"

I do not doubt that under these concessions, treaty rights and statutory provisions, the priests of the Church of Rome could legally solemnize marriages between the Roman Catholic inhabitants of Quebec, but their *exclusive* power to do so was gone. The privileges and concessions made to the Roman Catholic subjects of the King as to the free exercise of their religion was what it expressed to be, a concession, a privilege, a right, granted to the people, not to the church. They involved necessarily, it seems to me, the right, amongst other things, to have the marriages of Roman Catholics solemnized by the priests of their own church, but they neither recognized nor in any way sanctioned any exclusive right which would be repugnant to the laws of the conquering nation and they were in the treaty and in the "Quebec Act" made expressly "subject to the King's supremacy."

There cannot be any doubt either in my mind that the clergy of the Anglican Church, the established

church of England, and which, it seems to me, became the established church of Quebec, retained also their power to solemnize marriage in Quebec. That power was not exclusive either. It was concurrent with the privilege involved in the grant to the Roman Catholic inhabitants of the conquered country to have their marriages solemnized by priests of their own church.

Beyond that, it does not seem to me there was any limitation upon the exclusive right which they, as the priests and clergy of the established church of England, possessed and brought with them to Canada after the conquest.

Then followed the statute of Lower Canada, 35 Geo. III., ch. 4 (1795), enacting amongst other things, that

> in each parish church of the Roman Catholic 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 evidence in all courts of justice, in each of which the said rector, curate, vicar or other priest or minister doing the parochial or clerical duty of such parish or such Protestant church or congregation, shall be held to enregister regularly and successively all baptisms, marriages, and burials *so soon as the same shall* have been by them performed.

The judicial construction placed upon this Act was that it extended to priests or ministers of the Anglican Church only, and did not include what were then called Protestant dissenting churches or their clergymen.

Although the statute did not expressly confer the power to marry upon the clergy required to keep the registers of baptisms, marriages and burials, it assumed the existence of such powers and was a statutory recognition of them.

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And here I may remark that at no time subsequently was express power to solemnize marriage given by statute to the priests and clergy of the Anglican church until 1861, or to the priests of the Roman Catholic Church, until the Code was passed in 1866.

In the meantime, however, Scotch and other immigrants had come to Quebec, accompanied by the clergy or ministers of their own churches. These solemnized marriages amongst their own people, and in 1804 the Legislature passed an Act confirming these marriages and adjudged them "to be good and valid" except in cases where the parties were incompetent to contract marriage with each other, without, however, conferring upon these clergy any powers to marry in the future.

In 1821, another similar confirmatory Act was passed, 1 Geo. IV. ch. 19, while in 1827 the Act of 7 Geo. IV. ch. 2, was passed, which *inter alia* enacted

> that all *marriages* which have heretofore been *or shall hereafter* be celebrated by ministers or clergymen of, or in communion with, the Church of Scotland, have been and shall be held to be legal and valid to all intents and purposes whatsoever, anything in the said Acts or in any other Act to the contrary notwithstanding.

This Act not only confirmed past marriages, but also validated

> *all marriages which should thereafter be celebrated by ministers or clergymen of or in communion with the Church of Scotland.*

There was no limitation at all with respect to the place where the marriage should be solemnized or the persons between whom these ministers should solemnize marriage, no suggestion or language from which it could be implied that the religious beliefs of both or either of the contracting parties had anything to do with the validity of the marriages solemnized.

The statute I am citing would, of course, be construed as embracing only marriages the parties to which could legally intermarry with each other.

Then followed a series of Acts conferring on the ministers of different Protestant denominations being previously licensed thereto by the governing power and authority "to have and keep registers of baptisms, marriages and burials according to the laws of the province."

The language of these statutes differed somewhat. Some of them conferred the power upon "regularly ordained" clergymen of a denomination having a permanent and fixed congregation. The power was conferred in the case of the Wesleyan Methodists

upon the Wesleyan preachers or ministers in connection with the society in Great Britain known as the Conference of the people called Methodists being previously licensed thereto by the Governor, etc.

Nothing was said about these preachers or ministers being regularly ordained or having either permanent or fixed congregations.

A great many of these statutes were passed; none of them conferred express power to marry, though it seems to have been universally accepted that the power was of necessity impliedly given. Some gave simply the power to keep registers of such baptisms, marriages and burials as might be performed or take place under the ministry of such minister, etc.

With the exception, however, of the Quakers, there was no limitation confining the marriages these clergymen celebrated to their own denomination. In the case of the Quakers, there was the limitation that one of the contracting parties should belong to that body.

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In the Consolidated Statutes of Lower Canada, 1860, ch. 20, the general Act is found, and this is a most important Act.

The first section reads as follows:—

1. In order by the keeping of uniform and authentic registers of the baptisms, marriages and burials in Lower Canada, to secure the peace of families, and to ascertain various civil rights of Her Majesty's subjects therein: In each parish church of the Roman Catholic communion, and also in each of the Protestant churches or congregations within Lower Canada to which this Act extends, there shall be kept by the 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 legal evidence in all courts of justice,—in each of which the said priest or minister of such parish or church or congregation shall enregister regularly and successively all baptisms, marriages and burials, so soon as the same have been by him performed.

The sixth section is also important:—

6. In the entries of a marriage in the registers aforesaid, mention shall be made in words, of the day, month and year, on which the marriage was celebrated, with the names, quality or occupation and place of abode of the contracting parties, whether they are of age or minors, and whether married after publication of banns or by dispensation or license, and whether with the consent of their fathers, mothers, tutors or curators—if any they have in the country—also the names of two or more persons present at the marriage, and who, if relations of the husband and wife or either of them, shall declare on what side and in what degree they are related:

(2) Such entries shall be signed in both registers by the person celebrating the marriage, by the contracting parties, and by the said two persons, at least,—and if any of them cannot sign his or her name, mention should be made thereof in the said entries. 35 Geo. III. ch. 4, sec. 4.

It will be noticed while many facts have to be set out in the register nothing whatever is said requiring the mention of the religious faith or connections of either of the contracting parties between whom the marriage was to be solemnized and if the limitations sought to be read into the powers con-

ferred upon these clergymen were intended, surely they would have been required to state the facts on which their very jurisdiction to marry depended.

Then comes the 16th section declaring that

all regularly ordained priests and ministers of either of the said churches (the Church of England and Ireland and the Church of Scotland) *have had and shall have authority validly to solemnize marriage in Lower Canada.*

Could language be broader or stronger? By what authority could any court read any limitation into the power so declared to exist in the clergy of the Anglican and Scottish churches beyond the necessary one that the contracting parties were persons who could lawfully intermarry?

Then comes section 17:—

17. This Act extends also to the several religious communities and denominations in Lower Canada, mentioned in this section, and to the priests or ministers thereof, who may validly solemnize marriage, and may obtain and keep registers under this Act, subject to the provisions of the Acts mentioned with reference to each of them respectively, and to all the requirements, penalties, and provisions of this Act, as if the said communities and denominations were named in the first section of this Act.

Then follow the names of the different religious communities and denominations, twenty-one in number.

The powers given to the clergymen of these several denominations are given subject to "the provisions of the Act mentioned with reference to each of them respectively," and if it is sought to impose any limitation upon these powers, these special Acts must be appealed to and the limitation shewn.

I have already quoted one, the Wesleyan Methodist, and have examined all the others and I fail to

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find any except that relating to the Quakers and possibly the Jews, which justifies the argument that the power to marry conferred on the several clergy of the different churches named was limited either with respect to the place where the marriage was solemnized or to the religious faith or affiliations or connections of the contracting parties.

This law continued until the Code was passed and I again repeat that unless clear and distinct language can be shewn in the Code limiting and reducing the powers which those clergy at the time of its enactment possessed under the statutes I have cited, no court can properly read such limitations and restrictions into the Code.

According to my construction of its language, article 129 C.C., confers powers as large as those which existed in the Act of 1861.

The clergy of the Anglican Church certainly did not derive their power to marry from the Act of 1861, though, as a matter of precaution, that Act expressly professed to give and declare the power.

I ask again, as I asked during the argument, where can you find any statute or law from the time of the conquest down to the passing of the Code, which in any way limited the power of the Anglican clergy to marry after licenses or publication of banns any two persons competent to intermarry on the ground of their religious faith or affiliations? If no statute impairing that power can be found then I venture to say it must be maintained unquestioned.

The same question may be put with respect to the clergy of or in communion with the Church of Scotland after the passage of the Act of 1827 conferring upon them express power to marry.

And it may also be put with respect to the clergy of the other Protestant denominations expressly mentioned in the Act of 1861 and in all these cases must receive the same answer that there exists no such statute or law.

Now what are the articles of the Code which control and govern the question we are discussing. They are, in my judgment, articles 128 and 129, and read as follows:—

128. Marriage must be solemnized openly, by a competent officer recognized by law.

129. All priests, rectors, ministers and other officers authorized by law to keep registers of acts of civil status, are competent to solemnize marriage. But none of the officers thus authorized can be compelled to solemnize a marriage to which any impediment exists according to the doctrine and belief of his religion, and the discipline of the church to which he belongs.

There are other articles which have been invoked by counsel on both sides which are important to be considered, namely, articles 57 to 65, article 127 and articles 136 and following relating to "oppositions to marriage." But, as I have said, the two articles 128 and 129 are the controlling ones, and if they are, as I think they are, clear, intelligible and unambiguous, they are, in my opinion, conclusive of the question asked. They provide that a marriage must be solemnized openly, and by a competent officer, and that all priests, rectors, ministers and other officers authorized by law to keep registers of acts of civil status are such competent officers. There is no restriction upon their powers as to the persons whom they may marry beyond the one necessarily implied that such persons must be competent to contract matrimony with each other, nor is there any restriction upon the place where the marriage may be

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solemnized, nor as to the religious views, affiliations or church connection of either or both of the parties.

But article 129 expressly enacts that none of these officers can be "compelled" to solemnize marriage to which any impediment existed according to the doctrine and belief and discipline of the church to which he belonged.

The classes declared to be competent officers to solemnize marriage, embrace, it is conceded, priests and rectors of the Roman and Anglican churches, as well as clergymen of the different Protestant denominations who were, or might be, authorized to register acts of civil status.

The question raised is whether any and what limitations can be read into this 129th article, respecting the powers conferred on these rectors, ministers and other officers authorized by law to keep registers of acts of civil status.

My desire is not to go beyond the question submitted for our opinion. It assumes the competency of the contracting parties to marry each other and invites an opinion simply as to the competency or power of a non-Roman Catholic priest or clergyman to marry or solemnize marriage in the Province of Quebec between two Roman Catholics, or between two persons one of whom is a Roman Catholic.

In my opinion the law does not render either one or other of such marriages so solemnized either illegal or null and void.

The first observation one would naturally make in reading article 129 is that on its face at any rate there is no limitation or restriction upon the competency of the officers who are authorized to solemnize marriage. Its language is as broad and general as it possibly

could be, "all priests, etc., authorized by law to keep registers of acts of civil status are competent to solemnize marriage."

Their authority is general and there is nothing which expressly or impliedly limits their power to marry those persons only who are their own parishioners or members or adherents of their own church or congregation. It extends, in a word, to all persons who, being competent to intermarry, obtain a license authorizing the priest or clergyman to marry them. The second part of the article is for the ease of the conscience of the priest or clergyman and provides that he cannot be *compelled* to solemnize a marriage as to which any impediment exists according to the doctrine and belief of his religion and the discipline of the church to which he belongs.

This conscience clause, as I may call it, is a reasonable, fair and necessary one in view of the unrestricted breadth of the officer's power to marry. No one would think it right to place a priest or clergyman in a position to be compelled to celebrate a marriage which the doctrine, belief and discipline of his church forbade him to celebrate.

The insertion of such a conscience clause in the article is, therefore, in view of the unrestricted power conferred by the first part of the article upon the priest or clergyman a reasonable and proper protection for him. It confirms the view that persons competent to celebrate marriages may receive applications to be married from people of different faiths or religions, and if not prevented from doing so from conscientious reasons arising out of the rules, doctrine, or discipline of their church, such priest or

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clergyman may, under license, legally marry the persons so applying.

It also confirms the view that such officers or clergymen were not restricted in their powers to their own congregations or their own parishioners.

If their functions were restricted to the members of their own churches or to their own congregations, and if article 127 makes the rules of those churches or congregations binding upon their members, there would be no use in this conscience clause at all, because the clergyman manifestly could not be compelled to celebrate a marriage between two members of his own congregation or church the rules and discipline of which prohibited such marriage or created an impediment to its solemnization. If, on the contrary, his power to celebrate as to persons competent to marry each other by law is unrestricted, the clause was a reasonable and necessary one.

Mr. Mignault, however, contended that several limitations had to be read into the clause to make it compatible and consistent with other articles of the Code, and first he contended that not every one who can keep registers of civil status is competent to celebrate marriage, because those who register under article 70 and following religious vows or professions, are not so competent, but the answer is clear that those and those only who are authorized to keep registers of acts of civil status generally can celebrate marriage and not persons authorized merely to keep registers of limited acts such as those of religious professions.

Then, as to the necessity of the marriage being solemnized at the place of the domicile of one or other of the parties, it is sufficient to say that article 63

which begins with this general enacting declaration goes on to make provision that if solemnized elsewhere the person officiating must verify and ascertain the identity of the parties, plainly shewing that the rule was not obligatory or applicable to all cases and that if not observed the only effect would be to throw upon the person officiating the duty of verifying the identity of the parties.

Mr. Mignault took what from his standpoint was the only logical position possible with respect to the powers of solemnizing marriages possessed by non-Roman Catholic clergymen. He contended that they only had the power to marry those who were "members of the church" over which they respectively had spiritual control. Mere adherents of that church, or those who worshipped there regularly or irregularly would, therefore, if not "members of the church" be excluded from those powers. And by his contention, not only one, but both the contracting parties must be members of that church. The consequence would be that apart possibly from the Anglican Church no Protestant clergyman could marry two persons unless they were both members of the same church as that of the clergyman. If this extreme pretension prevailed, and each Protestant clergyman outside of the Anglican Church could marry only those who were "members" of his own particular church or denomination, the consequence, in view of the practice which has hitherto universally prevailed, would be somewhat appalling. Even if the limitation of the powers of the clergyman was extended beyond the "members" of his church so as to include those who were adherents and attendants regular or casual of it, the results would be startling indeed. No Baptist or

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Methodist or Presbyterian or Congregationalist could be legally married except to either a member or an adherent of his or her own denomination, and only members of the same denomination could be legally married who were domiciled or lived in the same place and were either members or adherents of that church. Not only, therefore, would this limitation prevent intermarriage between persons belonging to different denominations, but it would limit intermarriage between persons belonging to the same denomination to those who resided in the same place and were within the special limited jurisdiction of the officiating clergyman. Now, as the clergyman of those different denominations have no "parishes" or other specially limited territorial areas to which their spiritual jurisdiction is confined, it is apparent that the suggested limitation can have no foundation. It is one utterly inapplicable to these Protestant denominations and its attempted application to them would be absurd and deplorable in its results.

Many hundreds of marriages must have taken place since the passage of the Civil Code in 1866 between persons who belonged to different denominations of Protestants or between members of the same denomination who lived in different parts of the province, and every one of them would be invalid. The only good marriages would be those solemnized by a clergyman between two persons both of whom were members of his own congregation and church and were resident in the same locality. Such a result need only to be stated to be repudiated as based upon a totally erroneous construction of article 129 and as imputing to the legislature an intention almost inconceivable.

In addition to what I have said the limited construction put upon the article 129 by Mr. Mignault would leave a large portion of the non-Roman Catholic population of Quebec without any means of being legally married at all. Thousands of immigrants are coming yearly to Quebec. Many of them are not Roman Catholics. Some belong to the Greek Church; some do not belong to any Christian church. If the construction of article 129, which Mr. Mignault is driven logically to contend for, is maintained, none of these people could be married in Quebec at all.

And yet there does not seem to be any halting place between that construction of the article contended for by Mr. Mignault, and the broad construction which I submit is the correct one, and which gives unrestricted power to every priest, rector, minister and other officer authorized by law to keep registers of acts of civil status, to solemnize marriage under license between any two contracting parties not prohibited by law from intermarrying and irrespective of their religious beliefs or connections, or their residences or domiciles. Such marriages need not necessarily be solemnized in a church or chapel of the officiating clergyman. They may be solemnized (as outside of the Roman Catholic and Anglican churches is generally the case) at a private residence or other place and this from the absence of any requirement to the contrary. Those of the Protestant churches, outside of the Anglican, have, as I have said, no defined "parishes" or areas within which alone their jurisdiction extends. The members and adherents and persons who attend their religious services and form part of their congregations do not necessarily come from any particular defined locality.

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They may reside in any part of a city or in its adjacent suburbs. Locality, therefore, as determining the jurisdiction of the clergyman to marry, must be eliminated, and either the broad construction of article 129, which in determining the power and jurisdiction of the clergyman to marry, disregards alike the domicile and the religious opinions or connections of the parties, or the narrower one which confines such jurisdiction to the members of the church of the officiating clergyman, must be adopted. As a matter of fact, I understand that all these marriages by Protestant clergymen outside the Anglican Church and a large number of those within that church also are solemnized under license and not after publication of banns. The only security which the law provides in such marriages, against the existence of legal impediments, lies in the bonds which the applicants for the license are obliged to give before obtaining it.

Objections were raised that this broad construction, placed upon article 129, precluded the invocation or application of many of the articles of the Code providing for "oppositions to marriage." These articles, it was argued, would be without any effect if such a construction prevailed and their object to prevent clandestinity defeated. The short, and to my mind, complete answer to such objections is, first, that they apply equally forcibly to marriages solemnized by Roman Catholic priests under dispensation from the publication of banns by the bishop, and, secondly, that these articles were never intended to apply to marriages solemnized under license.

Their proper application and the only application which, it seems to me, gives them any efficacy and usefulness is with respect to marriages solemnized

after publication of banns in the churches where parishes or other territorial boundaries limiting the clergyman's jurisdiction exists. Proper legal effect can be given to them and the object they were enacted to carry out, if they are held as applicable only to marriages so solemnized.

It was conceded at the argument, as I understand, that there never had been and was not now any doubt as to the validity of a marriage under license by a non-Roman Catholic clergyman, of two competent contracting persons, one of whom only was a Roman Catholic. But if that is so, if such marriages are legal and valid, then the entire force of Mr. Mignault's argument respecting the limited effect to be given to article 129, is destroyed. I am unable to appreciate the force of much of the reasoning against the validity of such marriages where both persons are Roman Catholics. I repeat again, I fail to find any logical resting place between the broad proposition that article 129 authorizes the solemnization of marriages by any of the persons mentioned in the article, between any two persons competent by law to intermarry irrespective altogether of the religious belief or affiliations or connections of either or both, and the one contended for by Mr. Mignault that the contracting parties must both be members of the church of the officiating clergyman and residents within his spiritual jurisdiction. If the non-Roman Catholic clergyman qualified to solemnize marriage under article 129, can legally do so between two persons, one of whom is a Roman Catholic, why can he not do so in the case where both parties are Roman Catholics ?

The language of the article does not, in my opinion, permit of the drawing of any such distinction.

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It would seem to me that either the argument must prevail as to the absence of any limitations upon the power of the clergyman authorized to solemnize marriage beyond the competence of the contracting parties to intermarry, or the contrary one that non-Roman Catholic clergymen can only legally solemnize marriage between two members of the church or congregation of such officiating clergyman. If the latter limitation must be read into article 129, then what becomes of the concession that marriages solemnized by or before a Protestant clergyman between two competent contracting parties, one being a Roman Catholic, are good ?

Article 127 of the Code was invoked as rendering null and void a marriage of two Roman Catholics unless solemnized by a priest of the Roman Catholic Church. But this article, in my judgment, has reference only to impediments to marriage existing in the *parties themselves* and has no reference to the competency of the officiating clergyman who solemnizes the marriage. From what I have already said, it will be apparent that in my judgment the competency of all priests and clergymen authorized by law to keep registers of Acts or civil status is unrestricted with respect to the marriage of all persons competent to intermarry irrespective of their religious faith. Once that conclusion is reached the answer to the question put to us is plain.

Article 127 must be construed, having regard to its place in the Civil Code and its context. We find the article in the chapter headed "Of the Qualities and Conditions necessary for contracting Marriage." And amongst the disabilities in that chapter enumer-

ated are, want of puberty, impotency, minority, affinity and relationship. All disabilities in the parties.

The articles in the chapter previous to article 127, deal with these disabilities. Then article 127 says:—

127. The other impediments recognized according to the different religious persuasions, as resulting from relationship or affinity *or from other causes*, remain subject to the rules hitherto followed in the different churches and religious communities.

These words, "or from other causes," must be confined to those within the purview and scope of that chapter, they must be qualities and conditions existing in the parties themselves and not in the clergyman who may marry them. That whole chapter deals with the competency of the *parties* contemplating matrimony and section 127 must be confined to disabilities of that class. The competency of the officer solemnizing the marriage is dealt with and defined in the succeeding chapter headed, "Of the Formalities Relating to the Solemnization of Marriage." If you construe article 127 as extending in any way to the formalities relating to the solemnization of the marriage, you introduce hopeless confusion. The chapter in which article 127 is found deals with one subject-matter, namely, disabilities in the parties themselves, which now belongs exclusively to the Dominion Parliament to deal with. That in which article 129 is found deals with the subject-matter of the solemnization of marriage, with which the provincial legislature is now alone competent to deal.

I would construe the words "other causes" following relationship or affinity not as *ejusdem generis* with these two disabilities simply, but with all the disabilities of the parties mentioned in the chapter and not as extending to any rules, regulations or decrees of any church relating to the place where the

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marriage should be solemnized or the particular priest or clergyman before whom it should be solemnized. But whatever they may cover beyond the disabilities expressly mentioned in the chapter, they cannot extend to the competency of the officiating clergyman who solemnizes the marriage. That is dealt with exclusively in the next chapter.

To put the construction upon article 127 contended for by Mr. Mignault, would not only do violence to the express language of article 129, but would, in my opinion, radically alter and change the law which up to the passing of the Code existed in Quebec as to the competency of at least Anglican and Church of Scotland clergymen to marry any two competent persons, irrespective of their religious affiliation or connections. To make such a radical change would require the use of clear and definite language which I do not find in the article invoked.

There is no half-way house or halting place between the two contentions. I adopt the broad construction of the article because I think it is a fair and reasonable construction of its language; and that such a construction has been practically adopted and followed ever since the Code was enacted.

If it is held that the language of the article is doubtful and ambiguous and we are driven to ascertain its meaning by reference to the state of the law antecedent to the Code, then as I have attempted to shew there can be no reasonable doubt on that point, and the broad construction of the article ignoring the religious faiths or affiliations of the contracting parties to the marriage must be adopted.

I, therefore, would answer both questions (*a*) and (*b*) in the negative, holding that the law of the

Province of Quebec does not render null and void, unless contracted before a Roman Catholic priest, a marriage that would otherwise be legally binding which takes place in such province,

(*a*) between persons who are both Roman Catholics, or
(*b*) between persons, one of whom, only, is a Roman Catholic.

Third question:—

As I have answered both parts of this second question in the negative my answer to the third question is, perhaps, unnecessary, but to avoid misunderstanding I answer it in the negative.

IDINGTON J.—The questions submitted raise many grave issues. But the conclusions I have reached are such that, though I purpose answering each question, it seems to me my expositions of reason relative thereto will be better understood by my first disposing of sub-section (*a*) of the second question.

That question is as follows:—

2. Does the law of the Province of Quebec render null and void unless contracted before a Roman Catholic priest, a marriage that would otherwise be legally binding, which takes place in such province,

(*a*) between persons who are both Roman Catholics, or,
(*b*) between persons, one of whom, only, is a Roman Catholic.

As I understand the contention set up, all who have been either in infancy or in later life baptized according to the rites of the Roman Catholic Church, fall within the definition in the question.

Men may, and women may, not find themselves honestly able to conform to the faith of those who procured their infant baptism, and yet be averse to and honestly unable to conform to the creed of another church. If the claim made be well founded they can-

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not intermarry; and neither man nor woman so situated can marry one who has conformed to the original faith of their baptism; yet it is suggested he or she so unable to conform may lawfully marry a pagan.

Though the language of the Code seems clear, and I accept the construction thereof contended for by Mr. Lafleur, I think it due to the argument, entirely founded on the law of France at the time of the conquest, put forward by Mr. Mignault, and to the need of clearing away, so far as I can, the misconceptions on which it appears to me to be founded, to deal briefly therewith.

In the articles of the Quebec capitulation, on the 18th September, 1759, the following concession appears:—

> The free exercise of the Roman religion is granted, likewise safeguards to all religious persons as well as to the Bishop, who shall be at liberty to come and exercise freely and with decency, the functions of his office, whenever he shall think proper and until the possession of Canada shall have been decided between their Britannic and Most Christian Majesties.

In the articles of the capitulation of Montreal, on the 8th September, 1760, appears the following:—

> Granted as to the free exercise of their religion; the obligation of paying the tithes to the priests will depend on the King's pleasure.

These were followed by and merged in the Treaty of Paris, 10th February, 1763.

Article 4 ends thus:—

> His Britannic Majesty on his side agrees to grant the liberty of the Catholic religion to the inhabitants of Canada; he will consequently give the most precise and most effectual orders, that his new Roman Catholic subjects may profess the worship of their religion, according to the rites of the Romish Church, as far as the law of Great Britain permit.

How can there be found in such clear and express language anything except the liberty assured thereby

to the inhabitants of Canada, whereby His Majesty's new Roman Catholic subjects "may profess the worship of their religion?"

The last part of the sentence is suggestive of restrictions conflicting with the pretensions set up for an extension of church power, not expressed.

How could it ever enter into the mind of any one that this language giving people individually a liberty to profess a religion, had in fact handed them over to another power or authority to prevent them from exercising the fullest liberty to depart from such profession of faith as and when and under such circumstances as they might, or any one or more of them might, desire and so far as they might desire ?

Yet, in the last analysis the claim made is of a right in some one to deprive descendants of these people, or others coming, no matter whence, into Quebec, who have been baptized by the authority of the Roman Catholic Church here or abroad, of the liberty to intermarry unless in conformity with the rites of that church. Surely that is a claim of dominion which savours not of liberty.

Mr. Mignault answers by an appeal to the general principle relative to the rights of the conquered, as is usually conceded, to enjoy until changed the old law of property and civil rights, and to the effect of the Quebec Act passed in 1774. I will first examine the general principle and such facts as we have to apply it and then return to the consideration of that Act.

The Master of the Rolls, Sir William Grant, in *The Attorney-General* v. *Stewart*(1), is reported as citing, apparently with approval, a passage from Blackstone, vol. 1, page 100.

(1) 2 Mer. 143, at p. 160.

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Lord Mansfield, in the case of *Campbell* v. *Hall* (1), (Lofft's report being preferable, by reason of the arguments in the case given therein, to the report by Cowper), lays down the law broadly

> that the laws of a conquered country continue in force until they are altered by the conqueror,

and again:—

> Neither has it hitherto been controverted that the King might change part or the whole of the law or political form of government of a conquered nation.

In 2 Peere Williams Reports, page 75 (A.D. 1722), is a note of an anonymous case wherein the Master of the Rolls said it was determined by the Lords of the Privy Council, upon an appeal to the King in Council, from the foreign plantations, amongst other things, as follows:—

> 2ndly. Where the King of England conquers a country, it is a different consideration; for there the conqueror, by saving the lives of the people conquered, gains a right and property in such people; in consequence of which he may impose upon them what laws he pleases. But,
>
> 3rdly. Until such laws given by the conquering prince, the laws and customs of the conquered country shall hold place; unless where these are contrary to our religion, or enact anything that is *malum in se* or are silent; for in all such cases the laws of the conquering country shall prevail.

This last form of expression of the opinion of the time commends itself as the most compatible with reason on the subject now in hand. Lord Mansfield had not to deal specifically with the question of religion.

Though in that tolerant spirit, which he had, he incidentally rebukes Coke's intolerance toward conquered infidels, he did not quarrel with the definitions I have quoted, which were before him.

As regards religion, the law of the conquered

(1) Lofft's Reports 655; 1 Cowper 205.

country here in question was not silent, but, as I conceive it, absolutely repugnant to the rights of the conquerors or those they invited there.

Surely, at least that part of the laws of a conquered nation which had been directly aimed at those professing the faith of the conquerors, could not be held to prevail, for an instant, over the conquering people.

Such incompatibility as existed between the respective laws of France and of England at the time in question, in relation to religion and marriage, rendered, I submit, the continuation of the law of the former, as applicable to any but those voluntarily conforming thereto, an impossibility in a free country. It was quite compatible with reason and a proper spirit of toleration to deal with the question as it was dealt with in the Treaty of Paris. The doing so could not imply that the disabling and penal laws of France bearing upon Protestants or others not professing the Roman Catholic religion must continue to operate in Quebec or only be held partially abrogated.

The remarkable development of eighteenth century freedom of thought in both countries might indicate an indifference.

Unfortunately, whatever spirit of toleration was then in fact abroad the laws of each of these countries at that time were essentially repugnant to each other's state religion and despite the influence of learning, literature and philosophy, such laws were maintained. From this condition of things, how can we infer the recognition of the marriage laws of France as being predominant ?

The acts of the conqueror emphasize the contrary thereof.

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The Royal Proclamation of October 7th, 1763, foreshadowed

> a council and assembly of representatives of the people to make laws * * * * for the peace, welfare and good government, as near as may be agreeable to the laws of England * * * * and in the meantime, and until such assemblies can be called as aforesaid, all persons inhabiting in or resorting to our said colonies may confide in our Royal protection for the enjoyment of the benefit of the laws of our realm of England.

In the joint appendix submitted to us, the late Sir John Macdonald in his opinion relative to the power to issue marriage licenses, sets forth the following facts:—

> Express power to issue marriage licenses seems to have been given in every commission of every Governor-General of Canada, or in the instructions accompanying such commission.
>
> In the instructions addressed to the Hon. James Murray, as Captain-General and Governor-in-Chief of the Province of Quebec, dated 7th December, 1763 (the first Governor after the conquest), it is provided in the 37th paragraph, as follows:—
>
> "And to the end that the exclusive jurisdiction of the Lord Bishop of London may take place in our province, under your Government, as far as conveniently may be, we do think fit that you do give all countenance and encouragement to my exercise of the same, excepting only the collating to benefices, granting licenses for marriage and probate of wills, which we have reserved to our Governor and our Commander-in-Chief of our said province for the time being."
>
> All subsequent commissions or instructions seem to contain the same power.

If these acts of His Majesty with whom, on the high authority I have referred to, rested the power to modify the law, do not under the circumstances I have adverted to demonstrate sufficiently that the law of France in regard to marriage was thereby displaced, save what the treaty bound him to observe, I am at a loss to know what would.

We cannot forget in this regard the "Royal Supremacy Act," which, if anything were needed, would

supply the kingly authority and impliedly create a duty which presumably was observed.

The French law, so far as capacity for marriage or provision for its celebration is concerned, had thus been abrogated save so far as the liberty assured by the treaty to those professing the Roman Catholic faith.

The "Quebec Act" of 1774 set aside as of and from the 1st of May, 1775, the Royal Proclamation, the commission and ordinances made thereunder, as inapplicable under the circumstances, but by its terms "for the time being" clearly implied them as valid until said last date.

Then the following sections of said Act define the religious situation thereafter:—

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, hold, and enjoy 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 countries which then did, or thereafter should, belong to the Imperial Crown of this realm; and that the clergy of the said church may hold, receive and enjoy their accustomed dues and rights with respect to such persons only as shall profess the said religion.

6. Provided, nevertheless, that it shall be lawful for His Majesty, his heirs or successors, to make such provision out of the rest of the said accustomed dues and rights, for the encouragement of the Protestant religion, and for the maintenance and support of a Protestant clergy within the said province, as he or they shall from time to time think necessary or expedient.

Section 8 enacted that all His Majesty's Canadian subjects, the religious orders and communities only excepted, might

also hold and enjoy their property and possessions, together with all customs and usages relative thereto, and all others their civil

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rights in as large and ample a manner as if said proclamation * * had not been made, and as may consist with their allegiance to His Majesty * * * and that in all matters of controversy relative to property and civil rights, resort should be had to the laws of Canada as the rule for the decision of the same * * * until varied.

Ordinances touching religion, etc., were not to be in force without His Majesty's approbation, and nothing in the said Act was to prevent His Majesty and his successors from constituting courts of criminal, civil or ecclesiastical jurisdiction.

The "customs and usages" preserved to the people in section eight are relative only to their property.

The Royal supremacy is reserved and the clergy of the Roman Catholic Church are confirmed in their accustomed dues and rights "with respect to such persons only as shall profess the said religion."

The Protestant religion is to be encouraged and the maintenance of a Protestant clergy is provided for.

I fail to understand how, in face of all this, there could ever have been anything implied that would restrict the personal liberty of any one either baptized by the rites of the Roman Catholic religion or even professing same, from being married by any legally constituted authority.

In the treaty it was liberty for those "professing the worship of their religion" that was agreed to.

In sweeping aside the proclamation, etc., it is also clearly expressed that "subjects professing the religion of the Church of Rome" may enjoy the free exercise of their religion. Nobody concerned themselves with those who had merely been baptized and later chose to resort elsewhere for marriage. How can such people be said to be professing the religion

of the Church of Rome ? How can they be heard to set up such a pretension to invalidate their own deliberate act ?

The statement above as to the instructions given the Government of Canada relative to marriage licenses shews that the rights at least of the clergy of the Church of England, authorized by the Crown in regard to marriages, never were suspended; and the facts shew were continuously asserted.

Indeed, may it not be said that a legal duty rested upon them to officiate as witnesses and otherwise so far as necessary to render a proposed marriage valid for those asking it, no matter of what faith ?

In *Davis* v. *Black*(1), Denman C.J. assumes such full right and duty.

The statute of 32 Henry VIII. ch. 38, sec. 2, cited therein says in parenthesis, after referring to marriages of lawful persons ("as by this Act we declare all persons to be lawful that be not prohibited by God's law to marry").

This Act, though repealed as to pre-contracts, is said by some one to stand so far as its declarations relate to other matters.

Others than the clergy of the Roman Catholic Church, impliedly authorized by the terms of the treaty, and of the Church of England, authorized by what I have referred to, might require express authority to solemnize marriages, and such authority was given from time to time in a great many instances.

In 1795, an Act, 35 Geo. III. ch. 4 (L.C.), was passed imposing upon the clergy the duty of keeping registers of baptisms, marriages and burials. This applied equally to the Roman Catholic priest in

(1) (1841) 1 Q.B. 900.

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charge of a parish and to the Protestant clergy doing the parochial or clerical duty of or for a parish or Protestant church or congregation, and revoked an ordinance of April, 1667, of the French King, and a declaration of the 9th April, 1736, of another French King, so far as relates to the registers there in question only.

A uniform system of such registrations and the enforcement thereof upon the clergy in question, thus constituted them all public officers, and, if it was not done before, thereby cut the connection in that regard, between the old law and the Roman Catholic clergy.

It casts no doubt on the right or duty of the Anglican clergy to perform marriage, but rather recognizes it.

From this time till the consolidation of the Lower Canada statutes, in 1860, there were a number of Acts varying in form enabling various Protestant and other churches, or those in charge, to keep the like registers.

In relation to some of those as well as justices of the peace who had performed marriages there were confirmatory Acts passed.

Then, later, as to the Church of Scotland ministers, an Act for removing doubts, 7 Geo. IV. ch. 2 (L.C.), was passed. It not only was confirmatory of past ceremonies, but empowered as to the future as follows:—

> That all marriages which have heretofore been or shall hereafter be celebrated by ministers or clergymen of, or in communion with the Church of Scotland, have been and shall be held to be legal and valid to all intents and purposes whatsoever, anything in the said Acts or in any other Act to the contrary notwithstanding.

Another church, later, gets an Act enabling its minister or his successor to obtain and keep registers

which when kept

shall have the same effect as if it had been kept by any minister in this province of the Established Church of England or Scotland.

As to the Church of England, its clergy were not, since long before the conquest of Quebec, by law restricted from marrying any persons of any creed otherwise eligible to be married. The "Lord Hardwicke Act" never extended beyond England and Wales except so far as introduced by local legislation. The parallel claimed between that Act and the Quebec Code and its relation to the Roman Catholic church there fails sadly. Under the former any one but Jews or Quakers could get married, but under the latter none can, in that church, save those in actual communion with the church.

And the Church of Scotland had by the Act just quoted such comprehensive powers conferred upon its ministers or clergymen that I cannot see any restriction therein or reason for implying any.

Although some of the other enabling Acts are not in as express language as the latter, and the power to marry rests on the implication of the enactment enabling the ministers to keep registers, yet I see no restriction in the language used implying that they cannot register therein marriages of Roman Catholics who choose to apply therefor.

The question submitted does not impose upon us the interpretation of all these Acts.

If any doubt existed before the consolidation of the statutes it seems to have been thereby removed to a very large extent.

And then article 129 of the Code is as follows:—

129. All priests, rectors, ministers and other officers authorized by law to keep registers of acts of civil status, are competent to solemnize marriage.

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But none of the officers thus authorized can be compelled to solemnize a marriage to which any impediment exists according to the doctrine and belief of his religion, and the discipline of the church to which he belongs.

The authority to keep registers is made the basis of action, yet the conscience of him applied to is properly spared from the discharge of a duty which the doctrine or belief of his religion or discipline of his church forbids. The language used dispels all doubt.

I have carefully considered the many suggestions and arguments put forward to cut down this express language, which to my mind is as clear as it is enlightened, but I find no warrant for cutting it down.

So far from the historical argument helping to do so, it seems to effectually destroy any of the pretensions for reading into the Code what is not there.

It would be rather anomalous to find the Parliament of Old Canada sanction, either in the Consolidated Statutes of Lower Canada or the Code, amendments that would cut down the privileges that the liberality of Lower Canada had extended to the Anglican and Presbyterian churches and probably others.

Nor do I think article 127 furnishes ground for doubt.

I may observe that Mr. Mignault's argument that the statutes enabling Protestant clergymen to marry are confined in their operation to marriages between those belonging to the same faith or form of religion as the clergymen so enabled and performing the marriage ceremony, must if well founded lead to remarkable and, I venture to think, undesirable results. If it is correct, then an Anglican cannot be married in Quebec to a Presbyterian woman or *vice versa;* and so on through the whole list of those other churches

of which the ministers or clergy are enabled to perform the ceremony.

The language of those Acts does not, in my opinion save possibly in the case of the Jews and Quakers, warrant any such contention.

Indeed, if correct, what authority would a Roman Catholic priest have to solemnize marriage between a Catholic and a Protestant? It is no answer to say that by the rules of the Roman Catholic Church a dispensation can be had from the church authorities permitting such marriage. The Code, which is the law for all, treats all alike and is the basis of action and limit of authority for each and all.

The Roman Catholic Church may forbid its priests to solemnize marriage in such cases unless in the case of a proper dispensation. That is its right which no one can complain of, but when it so directs and grants a dispensation it does not thereby add to the statutory authority.

Counsel did not argue against the possibility of the marriage of a Catholic and Protestant under the law of Quebec and the sub-question (*b*) of the second question was not argued.

Not only does the Code fail to make any distinction between the powers given each of those authorized to keep registers save in the details leading up to the actual solemnization, but also the declaratory statute of the 14 & 15 Vict. (1851), ch. 175 (Canada), was evidently designed to put an end to discrimination or preference.

As to these disturbing suggestions and their bearing on past marriages, I may refer to the case of *Cattcrall* v. *Sweetman*(1). Dr. Lushington held that

(1) 1 Rob. Ec. R. 304, at pp. 317 and 320.

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as the Act there in question, being a New South Wales Act, much like many of the Acts of Quebec, did not expressly declare a marriage supposed to have taken place under the Act yet not attended with all the formalities prescribed in the Act, null or to be null by reason of such omissions, it could not be held null. See also *Catterall* v. *Catterall*(1).

I have no hesitation in answering the second question in both its sub-divisions in the negative.

Before proceeding to dispose of the first and third questions which I propose treating together as the answers must in the main be founded on the same reasons, I desire to call attention to the nature of the bill submitted. Its brevity may be commendable, but thereby blending too many things in one sentence is very confusing. If a marriage ceremony, as it assumes, has been "duly performed according to such laws" as it refers to, does it need ratification ? Again is the "duly performed" referred to in that phrase to be taken as relating only to the validity of the ceremony itself, notwithstanding the differences in religion, etc. ? Or is it intended to cure any and every want of capacity in the parties ? And is it intended to prevent any questions being raised anent any impediment that may have existed and which, according to the law of the place where the marriage took place, may have rendered the marriage null or voidable, although the ceremony itself may have been perfect so far as mere form is concerned ?

Again the retrospective part of the bill might from some points of view be well maintained; yet the prospective feature of it be quite untenable, and *vice versâ*.

(1) 1 Rob. Ec. R. 580.

The legislative validating of marriages which have been called in question for want of authority in the officer who had performed the ceremony or made the record thereof where ceremony was not required, or for the non-compliance with other details required by law in relation to marriage, has many precedents.

We have examples before us in the Joint Appendix filed herein containing the Acts of 44 Geo. III. (1804), ch. 2 (Lower Canada), and 1 Geo. IV. (1821), ch. 19 (Lower Canada). Each of these avoids some of the objectionable things in this bill.

If there are other existing marriages liable to be called in question for similar wants of form or by reason of any impediment, it may be that Parliament, having assigned to it the exclusive jurisdiction over the subject of marriage, has jurisdiction to declare such marriages good or to be held good. In that sense, part of the bill may be well founded.

There are, however, cogent reasons leading to the conclusion that in order to satisfactorily remedy such a state of things in Canada, concurrent legislation on the part of Parliament and of the local legislature would be the safer plan.

When a question was raised of cutting down the old number necessary to constitute a grand jury, such a course was adopted and some corporations or corporate powers are founded on concurrent legislation.

I may point out further that the bill as framed extends to foreign marriages as well as those which may be supposed to have taken place in Canada. Is it competent for Parliament or for it and a legislature combined thus to interfere ?

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It has been pointed out that the enabling Acts dealing with Jews and Quakers respectively, seem confined to cases of parties of the same faith as the officiating officer performing the marriage ceremony. In such case, clearly the concluding part of the first clause of this bill would hardly be a proper exercise of the power of Parliament unless by way of concurrent legislation such as I have suggested.

The second clause of the bill deals with the rights and duties of the married parties and of their children, the issue of such marriages, in a very sweeping manner. For aught we know, many cases may exist where all the questions involved have been tried out in a competent court and adjudicated upon long ago.

The provincial legislature, it has been said, may take one man's property and give it to another, but Parliament cannot do this except in some way incidental to its execution of a power exclusively assigned to it.

Does not this second clause go too far ?

I cannot, therefore, answer this question by a simple yes or no; nor can I segregate as sub-section (*b*) suggests, the good from the bad. The bill, if passed as it stands, might operate in the North-West Territories, of which nothing was said in argument.

I can only answer by indicating what in my opinion are the limits of the power of Parliament in this regard and leave it for those concerned to decide if any part of this bill falls within same.

The important question raised in argument and by these questions is that of the relative powers given Parliament and the provincial legislatures respecting marriage, the former being assigned the exclusive

legislative authority over "marriage and divorce" and the latter over "the solemnization of marriage."

It seems to me that in order to appreciate clearly the relation of these powers, we must assume, for argument's sake, the Dominion to have exercised all its powers and enacted a Code relative to all the substantial questions involved in marriage and divorce, and then ask ourselves what is in such case implied in the words "solemnization of marriage." Can anything be done, in way of solemnization, after due compliance with everything required or possible to be required, when the former power has been exhausted, to add to the legal strength of the tie thereby formed or change the nature of the obligations thereby incurred or the consequences to flow therefrom ?

If we found such apparently conflicting powers in any other instrument, how should be interpret them ?

At once we should seek for the plain ordinary meaning of the terms "marriage" and "the solemnization of marriage."

If we turn to the Century Dictionary, we find marriage defined, 1st, "the legal union of a man with a woman for life," etc. 2ndly. "The formal declaration or contract by which act a man and a woman join in wedlock." 3rdly. "The celebration of a marriage, a wedding." And again, "civil marriage, a marriage ceremony conducted by officers of the state, as distinguished from one solemnized by a clergyman."

If we turn to Murray, we find, amongst others, this definition, "Entrance into wedlock; the action or an act of marrying; the ceremony or procedure by which two persons are made husband and wife." And if we turn to the "Century" again for the meaning of "solemnization" we find that defined as "The Act of

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solemnizing; celebration." If we turn to the Imperial Dictionary "solemnization" is thus defined:—

> The act of solemnizing; celebration. Soon after followed the *solemnization* of the marriage. Bacon.

The title of 4 Geo. IV. ch. 76, has been referred to as justifying the giving of an extended meaning to the term "solemnization of marriage."

The Century Dictionary refers me to the Book of Common Prayer and quotes therefrom: "The day and time appointed for solemnization of matrimony."

The second section of said 4 Geo. IV. ch. 76, in terms requires the publication of banns for three Sundays preceding "the solemnization of marriage." When banns are replaced by license the latter, as well as the former, I submit, do not necessarily form a part of "the solemnization." It was quite appropriate in a plenary parliament to call such an Act one for solemnization of marriages. It is quite a different thing, when powers are or may be as here divided, to use the name of an Act to supplement the dictionary.

I submit "Lord Hardwicke's Act" also in its recital distinguishes clearly the publication of banns from the solemnization of matrimony.

If we look at any passages incidentally discussing these questions, we find solemnization refers invariably to the ceremony. And one of the best illustrations is, accidentally as it were, supplied by Pollock and Maitland in their chapter on marriage in the history of English law. At foot of page 377, in vol. 2, a case in itself well worth considering is referred to and ends thus: "They preferred the unsolemnized to the solemnized marriage." In the chapter on Marriage Laws of Scotland, in Eversley on Domestic Re-

lations, will be found examples of how other notices may be substituted for banns and the latter may be used in Scotland for a marriage to take place in England.

If we found a party given, for valuable consideration, the comprehensive power, possession or property, indeed the whole, determined to use it and to another assigned the mere right to define the form of asserting such right, of which there were many modes known, and the latter refused to apply either of those that could be satisfactorily used in the exercise of the substantial power, what would we be apt to hold in such case? Would we interpret the instrument so that the power and indeed the purpose thereof would be defeated ? Or would we so hold that he attempting to defeat the whole purpose or convert it into something else, should succeed ?

However that may be, this is not an ordinary instrument. It is but the outline of what was meant to found and form the government for, a great state. And as I have heretofore said, we must in the interpretation of its terms and construction of it as a whole, view it if we can as statesmen should, even if we be not such. We must summon to our aid history and especially constitutional history, and some knowledge of the social structure if we would understand aright how to harmonize the various parts when apparently conflicting, and as here by the literal meaning of the terms, even in actual conflict.

"Marriage and divorce" literally cover the whole field and leave nothing for the words "solemnization of marriage."

We know that those engaged in the formation of this frame of government had first assigned the

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whole field to the Dominion Parliament, and as an historical fact that the power assigned to the provincial legislatures as it stands was the result of representation made by those having a care for religion. We know also as a matter of history that marriage amongst the Romans, it is said even from the time of the twelve tables, might be the result of consent merely, though concurrently therewith for centuries, forms of solemnization were almost universally adopted, and as the use thereof died away mere consent became almost universally, for centuries, the common mode of constituting marriage; that by degrees as the Christian religion gained the ascendancy and its bishops greater control, the sanction of the Christian Church's solemnities was advocated, and in many places added by law or practice in various ways; yet that, outside of England, consensual marriage prevailed over western Europe till the Council of Trent, and thereafter its decrees prevailed directly in some places, indirectly in others, until in modern times men's views so changed that in France and elsewhere the law treated the matter in an entirely different way by substituting the civil officer as the witness and his records as the means of perpetuating the necessary legal evidence of that upon which so much depends.

It is common knowledge that this did not and does not satisfy the hearts and minds of vast numbers of people of Roman Catholic and Protestant churches. Even, of those who care little for the usual religious ordinances, many think the solemnities of a church marriage, or marriage by a clergyman, even if not in a church, tend to add to the strength of the bond of union by the greater sanctity of the occasion and a

degree of sentiment that the coldness of a magistrate's office is destitute of.

The wise men having in charge the formation of our Confederation, tried to satisfy this respectable feeling by inserting the power given the legislatures relative to the solemnization of marriage. It fitted in with the past and no jar was given to the state or to the feelings of any one.

But after all, what does it amount to in law ? The substantial part of the whole field or subject-matter was assigned to the Dominion. And, before going further, let us examine the language so assigning it in section 91 of the "British North America Act."

Parliament is

> to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces; * * * it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated.

Could language more comprehensive be used to give efficiency to the power over the subjects of "marriage and divorce" which are amongst those so enumerated ? And when heed is given to the words "notwithstanding anything in this Act" can there be any doubt that, if a provincial legislature either refused or failed to furnish adequate means of solemnizing any marriage between those Parliament had declared capable of marriage, and of whom in such case it had declared that by their consent they were to be held as married to all intents and purposes, they must be in law by virtue thereof held to be married ? Can there be any doubt in such a case that Parliament would be the only power which

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could, by direct enactment or by decree of any divorce court it had constituted, dissolve such a union as might have been formed by virtue of such legislation? Or can there be any doubt of the competency of Parliament to invoke its exclusive power over the criminal law and to declare that any one so married should on marrying during the life of the other party thereto, unless the tie were dissolved by Parliament or by a divorce court of its creation, be guilty of bigamy? Or can there be any doubt that all the laws that Parliament has enacted or may enact relative to the crime of failing to support a wife or child, would be applicable in such a case?

The word "marriage" is not, as I conceive its use in this Act, to be interpreted as only such form of marriage as the laws of England had deemed marriage, or part of this country at the time of Confederation had deemed such.

It is to be taken for the measuring of the power, in the widest sense that the word can have a meaning in any civilized country, including, for example, the widest sense in which any one of the court engaged in resolving the case of *The Queen* v. *Millis*(1), would have held it to mean; or, for example, in the sense that so long prevailed over Western Europe and up to recent years in Scotland; in short, consensual marriage of any kind.

In *Beamish* v. *Beamish*(2), it was suggested, at page 353, that the ruling in *The Queen* v. *Millis*(1) had not been held to extend to the colonies and is supposed to be left open. And see the case of *McLean* v. *Cristall*(3), there cited, but not in our library. No

(1) 10 Cl. & F. 534. (2) 9 H.L. Cas. 274.
(3) Perry Oriental Cases, 75.

argument was made here, expressly on that point. It may be open to argue that such holding as in the *Millis Case*(1) is not, and that the holding by Sir William Scott in *Dalrymple* v. *Dalrymple*(2), is law in Canada unless where declared otherwise. See also *Lightbody* v. *West et al.*(3). Parliament in such case may not need to regard solemnization as necessary to constitute marriage. It is, however, not necessary to, and, in absence of argument directed thereto, I cannot press that point further than suggestion.

Even if the *Millis Case*(1) is law here, it would, I conceive, be quite competent for Parliament to enact according to the exigencies of each case. It might either enact that a consensual marriage, as indicated above, of such persons as it declared eligible, should be held valid, in cases of the default of the legislature of any province to provide for all those therein found eligible to intermarry, such suitable mode or modes of solemnization of marriage as would adequately enable them to be married; and it might also alternatively enact that such persons so consenting, pursuant to its authority, should be held to be married, upon their conformity with any one of such existing forms of solemnization of marriage as a local legislature might have, by any competent Act required, or might thereafter so require, or by such mode of civil marriage as it might provide.

It might also, if necessary, provide for cases of intermarriage in the cases of parties domiciled in different provinces.

On this head of the conditional legislation by Par-

(1) 10 Cl. & F. 534. (2) 2 Hagg. Cons. R. 54.
(3) (1902) 87 L.T. 138, at p. 141.

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liament, see the case of *The Attorney-General for Ontario* v. *The Attorney-General for the Dominion*(1), and especially at 369, and Cooley on Constitutional Limitations, pp. 164 and 165, and notes thereto. I see strong arguments against the assumption by Parliament of dispensing with local forms of solemnization so long as reasonably provided within what I have no doubt was the original purpose.

There is not, I conceive, any difficulty in working out harmoniously the seemingly conflicting provisions so that the purpose thereof, to which I have adverted above, may meet the views and proper feelings of all, so long as the aspirations of free men are respected and not sought to be controlled by some power or authority free people are entitled to disregard.

I am not implying that there must of necessity be either in Parliament conditional legislation or concurrent legislation therein and in the legislatures. For I have no doubt that in the case of a conflict between the two powers, brought about by any legislature engrafting upon its form of solemnization something in the nature of an impediment or right to dissolve the tie of marriage believed by those concerned to have been constituted, that the power of Parliament should be held to be paramount on this subject of the complete constitution of the legal status of husband and wife.

To hold otherwise, would be to give to the power naming a mere form, the power to swallow up the substantial power given over the whole field. Indeed, that was the attitude in argument to such an extent that it seemed to be thought that to give it validity

(1) [1896] A.C. 348.

marriage must have a provincial form observed and that if the legislature of a province saw fit to attach any such condition as it chose to any form of solemnization it provided it could thereby debar those refusing to comply therewith, from marrying even if such conformity involved the impossible thing of a man honestly professing a faith he had not. It is idle to say that case has not arisen, for it is the very case that elaborate argument in effect says has arisen; indeed, is the root of the whole matter in controversy.

I need not dwell upon the desirability of precautions being taken against secret marriages or the case of those under parental or other guardianship committing youthful folly. I need not elaborate the question of clandestinity. But when we find clandestinity has been given a definition which implies that those once baptized in a certain church must conform to the marriage ceremony of that church and all the regulations thereof, as conditions to be observed preceding the ceremony, or remain unmarried, or if marrying elsewhere, that then such marriage carries in it by virtue of clandestinity an impediment invalidating it, I submit that is *ultra vires* any provincial legislature to enact.

I am glad to say I have found that Quebec never did legislate in any such way or attempt any such things.

But the claim has been made and seems to have been maintained in some cases. Whatever may be the law as to these cases under past legislation, they can be no longer valid once Parliament takes possession of the field assigned to it by the "British North America Act," respecting marriage and divorce.

Once it has exhaustively dealt with the power as-

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signed to it, then it will be clearly incompetent for any local legislature to do more than provide for or require submission to such mode of solemnization, as it sees fit. These modes cannot properly impose any religious test which honest men and women cannot accede to, nor enact any such impediment to marriage, if Parliament see fit to declare otherwise.

It might as well enact that the solemnization forms it prescribed were only to apply or be available in the case of a black-haired man marrying with a fair-haired woman, or a fair-haired man with a black-haired maiden.

Another view is presented for which much can be said. It is this, that while Parliament has the plenary power which the language of the Act is capable of, and it may be held must mean; yet it may be well within the power of the legislature to enact any reasonable mode of solemnization to be observed before the consummation of the marriage and add for default thereof such reasonable sanction in the way of penalties as may be calculated to induce the due observance thereof.

Thus effect is given to all the language used and probably the full effect intended.

It has been assumed such legislative power over solemnization implies of necessity control of all marriage licenses and, indeed, all that precedes and leads to the solemnization. I cannot agree in this. I think it is quite competent for Parliament to provide and insist upon a Dominion license for such cases as it enables a solemnization to be provided for by a provincial legislature, or such other cases as it may constitute a marriage by way of a marriage by consent; not only the idle form that the license has too often

become, but one designed to secure compliance with such set of rules for determining and declaring who, in the judgment of Parliament, can marry, and who must not. Parliament alone has the power to determine all questions relevant thereto, and can debar any provincial license from having any effect unless and until the conditions precedent which Parliament has enacted have been found to have been satisfied or complied with.

Once these Parliamentary conditions have been fulfilled, the province can impose no prohibitive barrier under pretext of providing for solemnization. I do not say that a license required by a province merely as a preliminary to solemnization, would be, as, of course, *ultra vires* a provincial legislature. I need not follow that subject further. I desire only to indicate wherein the assumption heretofore made relative to the question of marriage license as necessarily part of the "solemnization of marriage" within the "British North America Act" leads to error, indeed is, I submit, a misconception involving or resulting from confusion of thought.

In itself, I see nothing of material consequence. I do see, however, that a sanction is sought therein for what seems unwarranted ground taken to give a vitality to the doctrine of clandestinity and thereby constitute it a matter of undue importance and, indeed, an impediment.

By using in argument the accidental application thereof in the Code, counsel seemed to think it might by this means be imported into the interpretation to be given the Act I am now dealing with. We must, if we would clearly apprehend these provisions of the

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"British North America Act," lay aside the Code for a moment.

I think no foundation should be laid by an extension of the minor one of the supposed conflicting claims to create future mischief or make a source of grievance where none should exist. The utmost publicity can be secured by either Parliament or legislature without the local legislature or those resting on its authority creating an impediment and constituting a divorce court to try the question of that impediment.

It seems to me all such things as impediments of any kind and consequence thereof including the judicial power to pass thereon must rest in and be dealt with by the power of Parliament. A clear perception being had of what solemnization of marriage means, and I think it means no more, no less, than it really is, and the rest is clear and the respective spheres of legislative action are then made clear.

If the bill in question were made to cover the whole ground I have indicated as within the power of Parliament, it would assuredly enable people, so long as otherwise eligible, to marry though now possibly by local legal conditions unable to do so. It could be made thereby clear that, notwithstanding any differences in the religious faith of those so marrying and without regard to the religion of the person performing the ceremony they must be held as married.

If the bill in question, as it stands, can be read in any of its parts so as to fall within this power which I have indicated Parliament possesses then such part may be held competent for Parliament to enact.

I need not repeat my difficulties in the way of finding such part.

I assume, however, from the whole submission of the questions before us, that the root of the trouble is to be found in the religion of the parties to be married and the religion of the officer who may be appointed to perform a marriage ceremony differing from those to be married.

I have no hesitation in answering that Parliament can so effectively deal with the matter that there can be no difficulty in Roman Catholics marrying each other or a Roman Catholic and a Protestant marrying each other without resorting to a priest of the Roman Catholic church, appointed by it for the purposes of the marriage service or ceremony, to perform the ceremony of marriage; and hence can remove or dispense with any condition of things, by reason of religion, that may be now supposed in law to debar such marriages. It cannot, however, impose on the clergy of that or of any other church against the will of the church the duty of performing such ceremony.

I apprehend that this answers substantially what questions one and two are in truth aimed at.

I have already indicated how I think the retrospective part of the bill should be dealt with. I may add that in the judgment in *The Attorney-General for Ontario* v. *The Attorney-General for the Dominion*(1), it is stated by Lord Watson that the Dominion Parliament's enactments, so far as within its competency, must override provincial legislation, but that Parliament has no authority conferred upon it to repeal

(1) [1896] A.C. 348, at p. 366.

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directly any provincial statute; and that can only be effected by a repugnancy between its provisions and the enactments of the Dominion.

On this principle the court pronounced therein against the authority of Parliament to repeal, by the "Canada Temperance Act of 1886," the old Provincial Act of 1864, and proceeded to lay down in express terms the limits of authority in this regard as follows:

> It appears to their Lordships, that neither the Parliament of Canada nor the provincial Legislatures have authority to repeal statutes which they could not directly enact.

I am not clear that this part of the bill does not infringe in principle on what is thus laid down, and must be observed in legislating.

I have assumed that though question three is put alternatively I am not entitled to take it for granted that my personal view as to question two will ultimately prevail. Until it does, I presume I am expected to answer the third question and have accordingly done so.

I may be permitted to point out that the condition of the law as existent in any province in relation to these questions of marriage and divorce continues until changed by a competent authority. But it has never, since the "British North America Act" came in force, been competent for any local legislature to change any of these things falling within the subject matter of marriage and divorce.

I may also be permitted to point out that divorce in said Act means and must cover every matter of substance or form that the word implies and is not, in my humble opinion, to be confined to the ordinary divorce bills passed by Parliament.

As to the objections strongly pressed by counsel for Quebec that we should not answer the second question, I may observe that incidentally to dealing with the like questions in a recent reference I assumed that private rights might be touched and urged all I could in the same direction as counsel do now argue as ground of refusal to answer. The Judicial Committee's judgment indicates such objections were hardly worthy of notice. If I understand their Lordships aright, the statute creates this court *pro tanto* an advisory board. They suggest the answers need not bind. But, I respectfully submit, we and the other colonial courts have been told more than once that their Lordships' judgments bind us at least and we follow them. Hence their judgment in this case must bind us and all colonial courts, notwithstanding the large powers of self government, the judgment informs us Canada is possessed of.

I admit this case involves in a two-fold way what I had conceived to be the vicious principle of interrogating judges.

It involves, I respectfully submit, the sweeping aside of the modern constitutional doctrine of separating the judicial, legislative and executive functions of government and I fear imperils private rights in a way that seems to deprive those concerned of trial by due process of law.

The answer is the statute is held by the court above as binding us, and I respectfully submit in such case the duty is clear and I have tried to discharge it, feebly it may be, but as well as I know how. I find no power given therein to remonstrate. I am not, as a Privy Councillor possibly is, entitled by con-

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stitutional law and custom to remonstrate. I have only the limits of a statute to define my duty once the statute is held as it has been not to be *ultra vires* and to be operative despite the indirect results likely to bear on private rights.

The ultimate consequences of this grave change in our mode or form of government the men of later times alone can accurately comprehend and deal with. I fear Quebec is late.

My answers, therefore, are as follows:—

As to the first question; it is an impossible bill as it stands.

If I must answer categorically, then I say as follows:—

The retrospective part would be good as part of a scheme for concurrent legislation by Parliament and Legislatures confirming past marriages which probably neither can effectively do.

The prospective part, so far as possible to make it an effective prohibition of religious tests may be good, but doubtful, and the probable purpose can be reached by a better bill.

As to the second question, I answer "No."

As to the third question, sub-section (*a*) I answer yes, to be concurred in by the respective legislatures of provinces concerned; and to sub-section (*b*) I answer yes, if and when a province fails to provide adequate means of solemnization.

DUFF J.—The first and third questions must, in my opinion, be answered in the negative. I agree generally with the reasons given by my brother Davies in support of this view, but I desire to add two observations. First, I should not wish to express any opin-

ion upon the question of what observances in point of form were necessary or sufficient to constitute a valid marriage in the provinces other than Quebec at the date of the passing of the "British North America Act." The point has not been discussed and in the absence of argument I do not feel qualified to deal with it in a satisfactory manner. Secondly, the doctrine of necessarily incidental powers has never been defined with precision. I do not think it has reached that point of development at which it is safe or wise to attempt to formulate it definitively; and it ought, I think, to be applied only with great caution. It can have no possible application to the question before us. The union effected by the "British North America Act" was the result of a compact among the colonies thereby brought together. The Act itself, in the first two paragraphs of the preamble, expressly recognizes the federal character of the union to be created. With respect to legislative powers, some of the powers possessed by the provinces so united by the Act were assigned to the Dominion, others were specially reserved to the provinces themselves and in Lord Watson's well-known words "in so far as regards those matters which by section 92 are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion and as supreme as it was before the passing of the Act." *Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick* (1).

It has been found in applying the Act that the

(1) [1892] A.C. 437.

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fields of legislative jurisdiction in some cases overlap. In such cases, either authority may legislate and when conflict occurs in the common territory it is settled that the Dominion legislation must prevail. But outside any such common domain, each has exclusive dominion over the field assigned to it; and the failure of a province to legislate, however capricious or unreasonable its conduct may appear, affords no ground or excuse for the invasion by the Dominion of a sphere which is wholly witheld from its jurisdiction. The remedy in such a case does not lie by way of appeal to the Dominion Parliament but rests with the body that in the last resort exercises the political sovereignty of the province itself. The special provisions of sections 93, as Mr. Smith observed, only bring into relief the rigour of the general rule.

Legislation in terms of the proposed bill and any legislation on lines suggested in the third question would, in my judgment, be legislation on the very subject of "Solemnization of Marriage" which, by section 92, is withdrawn from the general subject of marriage and assigned to the provinces exclusively, and such legislation consequently would be *ultra vires* of Parliament.

As to Question 2, which reads as follows:—

2. Does the law of the Province of Quebec render null and void unless contracted before a Roman Catholic priest, a marriage that would otherwise be legally binding, which takes place in such province?

(*a*) between persons who are both Roman Catholics, or

(*b*) between persons one of whom, only, is a Roman Catholic.

Both branches of this question must, in my opinion, be answered in the negative. The question is whether, in the cases mentioned, or either of them,

the requirements of the law in respect of all other matters being duly observed, Catholic priests alone are competent to celebrate marriage. The central provisions of the Civil Code relating to this subject are found in articles 128 and 129. The first of these requires that marriage shall be solemnized openly, and by a competent officer recognized by law.

Article 129 is in the following words:—

> 129. All priests, rectors, ministers and other officers, authorized by law to keep registers of acts of Civil Status, are competent to solemnize marriage.
>
> But none of the officers thus authorized can be compelled to solemnize a marriage to which any impediment exists according to the doctrine and belief of his religion and the discipline of the church to which he belongs.

By chapter 20 of the Consolidated Statutes of Lower Canada, 1860, which was in force at the time the Code became law, the priests and ministers of the Protestant churches or congregations mentioned in sections 16 and 17 of the Act were authorized to keep registers of acts of Civil Status, that is to say, of baptisms, marriages and burials. By the express terms of article 129, therefore, all such priests and ministers are, in respect of the solemnization of marriage, competent officers "recognized by law" within the meaning of article 128. In the case of marriages by the Roman Catholic clergy the marriage must in the absence of a dispensation by the proper authority, be preceded by the publication of banns as required by articles 57, 58 and 130. Protestant ministers are, however, authorized by the provisions of articles 59 and 59(*a*) to solemnize marriage in the absence of banns, where the parties "have obtained and produce" a marriage license under the hand and seal of the Lieutenant-Governor. It is my opinion that ex-

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cept in cases in which there is some specific statutory restriction, a Protestant minister, competent to celebrate marriage by reason of being authorized to keep a register of acts of civil status has, when acting pursuant to such a license, authority to solemnize matrimony between any two persons lawfully capable of contracting marriage together, and that his authority is not in any way restricted by reason of the religious faith or the ecclesiastical affiliations of such persons.

Mr. Mignault's first and principal contention is a general one and it is this: although, he says, according to the words of article 129 read literally, such a minister is competent to celebrate marriage between any two parties capable under the law of entering into that relation with one another, nevertheless, reading that article in connection with other provisions of the Code dealing with the subject and by the light of the history of the law, it must be construed as conferring only a limited authority; and that authority so limited is to solemnize marriage between persons who are, or one of whom is, a member of the communion to which the officiating minister belongs and domiciled in the parish of which he is in charge where that communion has connected with it a parochial system, or between persons who are or one of whom is a member of the communion and of the congregation to which he ministers where there is no such system.

According to this view, a Presbyterian clergyman is incompetent to marry two unbelievers or two Anglicans; and the view it is admitted if accepted must necessarily involve the conclusion that the law of Quebec makes no provision for the marriage of per-

sons who are not connected with any of the religious persuasions whose ministers are specifically authorized by a statute to keep registers of acts of Civil Status. One cannot, of course, bring oneself to adopt a construction having such consequences without examining very critically the reasoning upon which it is based; and it may be observed that we are asked, in adopting it, to refuse to give effect to the words of the articles quoted according to their ordinary meaning, and to arrive at this most extraordinary result by discovering in the law a restriction which the authors of it have left unexpressed. The main argument by which this interpretation is supported, may be stated in this way. It is said that according to the law in force at the time the Civil Code came into effect the jurisdiction of priests and ministers in respect of the solemnization of marriage was limited to persons who were members or one of whom was a member of their respective churches and congregations. It is argued that on this subject of marriage the provisions of the Code were intended to be declaratory of the law as it then existed and that it is only by construing it in the manner now proposed that full effect can be given to its various provisions on this subject.

A brief reference to the history of the law upon the points in controversy is therefore necessary.

The provisions of the law relating to the solemnization of marriage in force in Quebec, at the date of the cession (1763) in so far as we are concerned with them are stated by Pothier (Bugnet's Edition) 6th vol., articles 349, 354 to 360. It was essential to the validity of a marriage that it should be celebrated

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"in facie ecclesiæ" and, in the absence of a dispensation, only after the publication of banns; and the general rule was that the ceremony must be performed by the "proper curé" of the parties; that is to say, by the curé of the parish in which one of the parties was domiciled. It was, however, competent to the bishop, or to a curé acting with the permission of the bishop or with the permission of the "proper curé" of the parties, to perform the ceremony. The law further required the officiating priest to record in an official register a statement of the particulars of each marriage solemnized by him, which was signed by him, by the parties to the marriage, and by at least two witnesses of the ceremony. Under the French Régime the public exercise of the Protestant religion was not tolerated by the law of Canada, and, consequently, the curé within the meaning of this law was necessarily a Roman Catholic priest. The change of sovereignty, which took place in 1763, naturally brought in its train substantial modifications. The conquest was followed by the influx of a considerable Protestant population, coming in part from the United Kingdom and in part from the British colonies to the south. Steps were immediately taken by the Imperial Government (as appears from the Instructions to Governors in 1763, 1768, 1775, and 1786; see Shortt and Doughty, pp. 139, 140, 141, 217, 218, 425-427, 556-559) for the introduction of a beneficed Protestant clergy under the patronage of the Crown and subject to the ecclesiastical jurisdiction of the Bishop of London; and later under the sanction of the "Quebec Act," 1774, and the "Constitutional Act," 1791, and other Imperial legislation, provision was made for their support out of the pub-

lic funds of the colony. It was from the outset assumed that these clergy were competent to solemnize marriage, and it is admitted that from the first, marriages were in fact solemnized by them. No express statutory authority in this behalf was conferred upon the clergymen of the Church of England until 1861; but during the century which had then elapsed since the conquest, various Acts of the Canadian legislatures had conferred authority to celebrate marriage upon the ministers of other Protestant denominations, and these and other statutes shew that the competency of the Anglican clergy in this respect had always been assumed by the legislative authorities; and there can be, I think, no possible question (apart altogether from the implications arising from the change in the sovereignty itself) that a grant of such authority was involved in the provisions to which I have referred, which are found first in the royal instructions to the governors, and afterwards in the Imperial legislation.

From the date of the cession down to the passing of the Quebec Act in 1774, "such laws were in force" (to use the words of Baron Parke, speaking for the Judicial Committee in *Beaumont* v. *Barrett*(1)), "as the King, by his supreme authority, may choose to direct," subject always, of course, to the provisions of the Treaty of Paris, which the King had no constitutional authority to violate. Chitty, Prerogatives, p. 29. There seems to be no reason to doubt that an effective "direction" in this regard might be given, by commission or by instructions under the King's sign manual, as well as by order-in-council:

(1) 1 Moo. P.C. 59, at p. 75.

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Cameron v. *Kyte*(1). The Instructions which accompanied General Murray's Commission contain a sufficient declaration that the royal supremacy in matters ecclesiastical extends to Quebec, and this necessarily involved such alterations in the existing law as might be required to confer on the clergyman appointed to benefices under the authority of the Crown the jurisdiction to solemnize marriages. This jurisdiction was confirmed by the "Quebec Act" which expressly recognizes the royal supremacy as declared by 1 Elizabeth ch. 1.

The contention made by Mr. Mignault is that all grants of authority to marry, made since the cession, whether by express statutory enactment or otherwise, were subject to the condition that one at least of the intended consorts should be a member of the communion and congregation of the minister performing the ceremony. Whether the competence of these ministers in this regard was so limited is altogether a question of the intention of the law making competence. I think there is overwhelming evidence against the existence of an intention so to limit their authority except in those few cases (I think there is only one) in which the restriction is expressly declared.

First, as to the Church of England. In the Instructions to the Governors already referred to, we find repeatedly expressed intentions with regard to the status of the Anglican Church in Canada and with regard to cognate matters, which appear to be incompatible with the view that at that time any idea was entertained of placing any restriction upon the

(1) 3 Knapp 332, at p. 346.

jurisdiction of its clergymen in respect of the celebration of marriage. (See Shortt and Doughty at the pages already referred to.) In 1795, an Act was passed (35 Geo. III. ch. 4) requiring the Protestant clergy in charge of parishes, churches and congregations to register in official registers to be kept by them "all baptisms, marriages and burials as soon as the same shall have been by them performed." (Section 1). There is in this statute no express declaration touching the legal competency to celebrate matrimony of the clergy to whom the Act was intended to apply; their competency in that respect is assumed. There can be no doubt that the Act applied to all clergymen of the Church of England in charge of parishes, churches and congregations; and what is noteworthy for our present purpose is that the Act contains no hint of any limitation upon the authority of the ministers affected by it in respect of the classes of persons who might contract marriage under their ministry. The language of the Act of 1860, ch. 20, Consolidated Statutes of Lower Canada, section 16, is absolutely unqualified.

All regularly ordained priests and ministers of either of the said churches

(meaning churches and congregations in communion with the United Church of England and Ireland or with the Church of Scotland)

have had and shall have authority validly to solemnize marriage in Lower Canada.

The case of the Church of Scotland is equally clear. An Act passed in 1827, 7 Geo. IV. ch. 2, enacts

that all marriages which have heretofore been or shall hereafter be celebrated by ministers or clergymen of or in communion with the

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Church of Scotland, have been and shall be held to be legal and valid to all intents and purposes whatsoever;

and this sweeping declaration is in substance repeated in the provision above quoted from the Act of 1860. With respect to other Protestant denominations, a series of statutes was passed during the period that elapsed between 1829 and 1861, authorizing the ministers of various denominations and communions in charge of churches or congregations to keep registers of baptisms, marriages and burials. In some cases, the authority to solemnize marriage is given expressly; in others, it is given by implication. In one case only, in the Act relating to the Society of Friends, the enabling provisions of the Act are limited in their application to marriages between persons one of whom is a member of the communion according to whose usages the ceremony is to be performed. An intention to create a similar restriction is indicated, although not very clearly expressed, in the Act of 9 & 10 Edw. IV. ch. 75, which relates to persons who profess the Jewish religion. There may be, although our attention has not been called to them, other special cases in which similar restrictions are imposed by special statutes. The existence of such isolated instances is not material to my present purpose, which is to point out that the legislative enactments dealing with this subject of solemnization of marriage by Protestant clergymen and ministers, before the Code came into force, are expressed in such terms as to negative the theory that, as a rule, the authority of such clergymen and ministers in respect of that subject was intended to be or was regarded as affected by any restriction such as that now contended for.

The alteration effected in the law of marriage, as it stood at the time of the cession, by this recognition of the competence of all Protestant ministers to celebrate marriages was fundamental. The law in force under the French Régime pre-supposed two things; a single church in union with the State, and a complete, or at all events, a very extensive parochial system. Given these two things, the application of the law was simple and certain; but to marriages celebrated by the ministers of Protestant denominations, having no parochial organization connected with them, some important requirements of that law became impossible of application. The rule, for example, which in effect limited the jurisdiction of the curé of a given parish to the solemnization of marriage between persons, one of whom was domiciled within his parish, is a rule which utterly fails of application to the matrimonial jurisdiction of the minister of a Protestant church or congregation whose jurisdiction in that behalf has no relation whatsoever to a defined territory or to the connection of the parties with his particular faith or communion.

The theory of the older law, namely, that there is one curé who, for the purposes of celebrating marriage, is the "proper curé" of the parties (or at most two, one of whom is their "proper curé") necessarily falls to the ground where marriages by such an officer are in question. For this reason, I am unable to agree with Mr. Mignault's argument that article 63 of the Civil Code, read together with the provisions of the law relating to oppositions, requires us to hold that the law of Quebec, as it stands to-day, is framed upon the assumption that, with regard to any two intended consorts about to be married in that province,

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there is one person who is solely qualified, or a fixed, limited and ascertained number of persons who are exclusively qualified, to celebrate marriage between them. So to hold would, in my judgment, be tantamount to disregarding the course of legislation on this subject during the century succeeding the conquest.

This view of the powers of the Protestant clergy derived from these various sources is confirmed by the law and practice relating to marriage licenses. It is not disputed that the practice of solemnizing marriages without the publication of banns, and in disregard of any supposed requirement that marriage should be celebrated *in facie ecclesiæ,* under the authority of a license granted by the Crown, became at an early date a general practice among Protestant ministers. Prior to the year 1871 there appears to have been no statutory enactment expressly authorizing the granting of such licenses in Quebec; the granting of them was considered to be a proper exercise of the royal prerogative and the practice received statutory recognition in various enactments,—for example, 35 Geo. III. ch. 4, sec. 4 (which was reproduced in the Consolidated Statutes of Lower Canada, 1860, ch. 20, sec. 6) and article 59 of the Civil Code. Provision was made by ch. 4 of the Consolidated Statutes of Lower Canada, 1860, sec. 1, for the application of the fund derived from these licenses in liquidation of the "Rebellion Losses" debentures, and no doubt appears to have been entertained at any time as to the validity of them or as to their sufficiency in point of law to legitimize marriages solemnized with publication of banns at any time or place when acted upon by a Protestant minister in charge of a church or congregation of any of the various communions where ministers were in-

vested with a general authority to keep registers of acts of Civil Status.

This view is clearly correct. At common law authority in respect of marriage licenses was vested in the King as an incident of the royal supremacy in matters ecclesiastical.

Such licenses, of course, were not confined to dispensations from the publication of banns. Licenses were granted for the solemnization of marriage at any convenient time and place, (Halsbury, Laws of England, "Ecclesiastical Law," par 1388, note (*h*)); and dispensation from observance of the requirement that the marriage should take place *in facie ecclesiæ* was one of the normal objects of a marriage license. The statute of Henry VIII. (25 Hen. VIII. ch. 21), vested a right to grant such dispensations in the Archbishop of Canterbury, but the statute left the Royal Prerogative unimpaired. Chitty, Prerogatives, p. 53. The effect of the Commission and Instructions to the Governors of Quebec between the Treaty of Paris and the "Quebec Act" was, to vest in the Governors the legal authority and possibly even the sole legal authority, (see paragraph 32, Instructions 7th Dec. 1763), to exercise this dispensing power in the colony. The existing law of Quebec was to that extent amended through the exercise of the legislative authority of the Crown as evidenced by the Royal Instructions. The Quebec Act, in recognizing the royal supremacy, recognized the existence of this incident of the Prerogative as part of the law of Quebec, and licenses for the solemnization of marriage without banns, and at any time and place, continued to be issued under the authority of the Governor in professed exercise of the Prerogative down to the enactment of the Civil Code in 1866.

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In granting these licenses the Governors acted under the authority of these Instructions. (Paragraph 37 of the "Instructions to Governor Murray" of 7th December, 1763, is the typical provision.) The following interesting observations are taken from an article by the late Mr. Justice Girouard in 3 Revue Critique, p. 282:—

> La licence n'est pas seulement une dispense de la publication des bans; c'est encore un ordre, un décrêt à tout ministre protestant de marier les parties qui y sont désignées, sans bans, à l'endroit et à l'heure qu'il leur plaira, pourvu qu'il n'y ait pas d'empêchement. Jusqu'à ces dernières années, elle émanait uniquement du Bureau des Prérogatives, *Prerogative Office*, au nom du Gouverneur-Général du Canada, et elle était expédiée par des agents, répandus dans toutes les parties du pays, qui signaient comme *Deputy-Governors*. Dans la pratique, ces licences étaient signées en blanc par le *député gouverneur*, et remises à une foule de gens qui les remplissaient et les vendaient. En voici la formule textuelle:—
>
> "To any Protestant minister of the Gospel. — Whereas there is a mutual purpose of marriage between ———— for which they have desired my license and given bond, upon condition that there is no lawful let or impediment, pre-contract, affinity or consanguinity, to hinder their being joined in the holy bonds of matrimony; these are therefore to authorize and empower you to join the said ———— in the holy bonds of matrimony, and them to pronounce man and wife."
>
> Avant le code, il n'y avait aucune loi dans le pays qui autorisait l'émission de ces licences; néanmoins, le droit n'en a jamais été nié à la couronne, dont il est, paraît-il, une des prérogatives; et c'est parce qu'il est un droit de prérogative royale qu'il existe dans ce pays, sans y avoir été introduit par une législation spéciale.

In 1871 an Act was passed by the Legislature of Quebec (now reproduced in articles 1494 to 1499 of the Revised Statutes of Quebec (1909)), providing that such licenses should be furnished to all persons requiring them who should previously have given a bond in the form prescribed by the statute. The bond is conditioned upon there being no

> lawful let or impediment, pre-contract, affinity or consanguinity, to hinder their being joined in Holy Matrimony and afterwards their living together as man and wife.

In other words, all parties capable of intermarrying are entitled to obtain a license authorizing the marriage of them by any competent Protestant minister without reference to the place of residence or the religious creed of either of them. This seems hardly consistent with the view that, as a rule, the competence of Protestant ministers in respect of the solemnization of marriage is subject to restrictions with reference either to the domicile or to the religious faith of the parties; and, of course, the practice established by this system of granting marriage licenses to all persons competent to intermarry was, and was intended to be, utterly subversive not merely of the letter, but of the principle of the older law by which, as a rule, marriage must be celebrated, *in facie ecclesiæ,* and by the incumbent of the parish of one of the parties.

I think, therefore, that the proposed construction of article 129 cannot be supported. It was freely admitted by Mr. Mignault (and with him I agree) that assuming his construction of that article to be rejected, an affirmative answer to this question if supported at all could only be justified on one of the two following grounds:—

The first of these grounds is that the effect of article 127 is to incapacitate Roman Catholics from contracting a valid marriage in the absence of a Roman Catholic priest.

That article reads as follows:—

127. The other impediments recognized according to the different religious persuasions, as resulting from relationship or affinity or from other causes remain subject to the rules hitherto followed in the different churches and religious communities.

The right, likewise, of granting dispensations from such impediments appertains as heretofore, to those who have hitherto enjoyed it.

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It is asserted, and it is not disputed, that in the eye of the Roman Catholic Church, clandestinity is an impediment; but the question is, is it an impediment within the meaning of this article? I desire to refrain from saying anything as to the effect of the article upon a marriage affected by an impediment within the meaning of it. For the purposes of this opinion, all that it is necessary for me to say is this: article 127 is grouped with other articles in a chapter which professes to deal with impediments arising out of some personal disability which incapacitates two given persons from intermarrying, that is to say, which disqualifies them from intermarrying under the ministry of a clergyman who, if it were not for such disability, would be competent to validly solemnize matrimony between them. That chapter is followed by another which deals with a different subject, namely, the formalities connected with marriage; and in this latter chapter the qualifications of those persons who are competent to celebrate marriage are dealt with. The impediment that, according to the discipline of the Roman Catholic Church, arises out of the absence from the ceremony of a priest of that church is not an impediment arising from incapacity in the parties themselves in the sense of the chapter in which this article occurs; it is, on the other hand, a matter of the class dealt with in the chapter following. It is, therefore, a matter which (in accordance with the scheme of classification adopted by the authors of the Code) would rather fall to be dealt with in the second than in the first chapter. It appears, consequently, to be opposed to principle to construe the general phrase "other causes" found in article 127 as embracing such an objection as we are considering.

This view of article 127 is borne out by a reference to the passage in the codifiers' report referring to this article. That passage leaves little doubt upon one's mind that in framing the article the codifiers had no thought of an objection of the kind referred to in this question. The following is the passage which is on page 179 of the first report of the Commissioners:—

> There are, in the collateral line, as resulting from relationship and affinity, other impediments which are not of a general character, but applicable only to members of churches or religious congregations, which admit them, as forming part of their dogmas or belief; such is the relationship, in the degree of cousins-german and other more distant degrees, in which marriage is forbidden, according to doctrine of the Roman Catholic Church, although not according to that of Protestant churches.
>
> As that species of impediment could not be governed by general provisions, it became necessary to leave it subject to the rules followed up to the present time by the different churches which recognize it.
>
> It was necessary, at the same time, to leave to the authorities, entitled to grant dispensations from such impediments, the power to do so for the future.
>
> These two objects are provided for by article 11*a*, which is new.

The last point made by Mr. Mignault is this: Roman Catholics, he says, are in a special position by reason of the provisions of the Treaty of Paris, and because of that special position ought to be held to be excluded from the jurisdiction of Protestant clergymen in respect of marriage in the absence of some express provision of the law bringing them within that jurisdiction. It is said that by the provisions of that treaty a guarantee was given to the Roman Catholic Church that the exclusive authority which the clergy of that church enjoyed under the French régime to celebrate marriages between per-

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sons who had been received into its communion should be maintained. I cannot agree with this view.

The Instructions to the Governors to which I have already referred, and other contemporary documents as well as the "Quebec Act" itself, shew conclusively that the view taken by those who were charged with the duty of giving effect to the treaty rights was that the "liberty" conserved by the treaty, whatever its extent, was guaranteed to "His Majesty's new subjects" as individuals; and that there was no undertaking to maintain the corporate authority and jurisdiction asserted by the Church as such. These documents afford a *contemporanea expositio* which cannot be ignored; and the construction they suggest appears to accord with the natural reading of the words of the Treaty of Paris themselves.

Some passages in the documents may perhaps be usefully quoted. In a letter dated 13th August, 1763, from Lord Egremont, the Secretary of State, to Mr. Murray, apprising him of his appointment as Governor, the following account is given of the negotiations relating to the 4th article of the Treaty of Paris:—

> For tho' the King has, in the 4th article of the Definitive Treaty, *agreed to grant the Liberty of the Catholick Religion to the Inhabitants of Canada;* and though His Majesty is far from entertaining the most distant thought of restraining *His new Roman Catholick Subjects from professing the Worship of their Religion according to the Rites of the Romish Church*: Yet the conditions, expressed in the same Article, must always be remembered, viz.: *As far as the Laws of Great Britain permit,* which laws prohibit absolutely all Popish Hierarchy in any of the dominions belonging to the Crown of Great Britain, and can only admit of a Toleration of the Exercise of that Religion; This matter was clearly understood in the Negotiation of the Definitive Treaty; the French Ministers proposed to insert the words, *comme ci-devant,* in order that the Romish Religion should continue to be exercised in the same manner as under their Government; and they did not give up the Point, till

they were plainly told that it would be deceiving them to admit those Words, for The King had not the Power to tolerate that Religion in any other Manner, than *as far as the Laws of Great Britain permit.* (Shortt and Doughty, p. 123.)

The 32nd paragraph of the Instructions, dated Dec. 7th, 1763, is in these words:—

You are not to admit any ecclesiastical jurisdiction of the See of Rome or any other foreign ecclesiastical jurisdiction whatsover. in the province under your government. (Shortt and Doughty, p. 139.)

This is repeated in the Instructions to Sir Guy Carleton, in 1768, in paragraph 31, and continued in the Instructions to the Governors as late at least as 1786, (Shortt and Doughty, p. 217).

The Instructions to Sir Guy Carleton, of 1775, contain more elaborate prohibitions against the exercise of any ecclesiastical jurisdiction incompatible with the royal supremacy (which, in the meantime had been expressly recognized by the "Quebec Act") in paragraphs 20 and 21. (Shortt and Doughty, pp. 425, 426, 427). The 2nd clause of the first of these paragraphs is in the following words:—

Secondly, That no Episcopal or Vicarial Powers be exercised within Our said Province by any Person professing the Religion of the Church of Rome, but such only, as are essentially and indispensably necessary to the free exercise of the Romish Religion; and in those cases not without a License and Permission from you under the Seal of Our said Province, for, and during Our Will and Pleasure, and under such other limitations and restrictions as may correspond with the spirit and provision of the Act of Parliament, "for making more effectual provision for the Government of the Province of Quebec;" And no person whatever is to have holy orders conferred upon him, or to have the Cure of Souls without a License for that purpose first had or obtained from you.

And in the 8th clause there is this:—

That such ecclesiasticks as may think fit to enter into the Holy State of Matrimony shall be released from all penalties to which they may have been subjected in such cases by any authority of the See of Rome.

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These clauses are reproduced in the Instructions to Lord Dorchester, of the year 1786. These provisions were not the result of inadvertence; they were passed only after the most careful consideration of all questions of right as well as of policy involved, including of course, as of primary importance, the meaning and effect of the treaty stipulation now relied upon. The following passage from the Report of Sir Alexander Wedderburn, December 6th, 1772 (see Shortt and Doughty, pp. 298 and 299), indicates the principles upon which the Government proceeded in framing the provisions on this subject in the Quebec Act as well as the Instructions of January, 1775:—

> The religion of Canada is a very important part of its political constitution. The 4th article of the Treaty of Paris, grants the liberty of the Catholic religion to the inhabitants of Canada, and provides that His Britannic Majesty should give orders that the Catholic subjects may profess the worship of their religion according to the rites of the Romish Church, as far as the laws of England will permit. This qualification renders the article of so little effect, from the severity with which (though seldom exerted) the laws of England are armed against the exercise of the Romish religion, that the Canadian must depend more upon the benignity and the wisdom of Your Majesty's Government for the protection of his religious rights than upon the provisions of the treaty, and it may be considered as an open question what decree of indulgence true policy will permit to the Catholic subject.
>
> The safety of the State can be the only just motive for imposing any restraint upon men on account of their religious tenets. The principle is just, but it has seldom been justly applied; for experience demonstrates that the public safety has been often endangered by those restraints, and there is no instance of any State that has been overturned by toleration. True policy dictates then that the inhabitants of Canada should be permitted freely to profess the worship of their religion; and it follows, of course, that the ministers of that worship should be protected and a maintenance secured for them.
>
> Beyond this the people of Canada have no claim in regard to their religion, either upon the justice or the humanity of the Crown; and every part of the temporal establishment of the church in Canada, inconsistent with the sovereignty of the King, or the

political government established in the province may justly be abolished.

The exercise of any ecclesiastical jurisdiction under powers derived from the See of Rome is not only contrary to the positive laws of England but is contrary to the principles of government, for it is an invasion of the sovereignty of the King, whose supremacy must extend over all his dominions, nor can His Majesty by any act divest himself of it.

* * * * *

The point then, to which all regulations on the head of religion ought to be directed, is to secure the people the exercise of their worship, and to the Crown a due controul over the clergy.

The first requires that there should be a declaration that all the subjects in Canada may freely profess their religion without being disturbed in the exercise of the same, or subject to any penalties on account thereof, and also that there should be a proper establishment of parochial clergymen to perform the offices of religion.

The present situation of the clergy in Canada, is very fortunate for establishing the power of the Crown over the church. It is stated, in the reports from your Majesty's officers in Canada, that very few have a fixed right in their benefices, but that they are generally kept in a state of dependence, which they dislike, upon the person who takes upon him to act as bishop, who, to preserve his own authority, only appoints temporary vicars to officiate in the several benefices.

It would be proper, therefore, to give the parochial clergy a legal right to their benefices. All presentations either belonging to lay pastors or to the Crown, and the right in both ought to be immediately exercised with due regard to the inclinations of the parishioners in the appointment of a priest. The Governor's license should in every case be the title to the benefice, and the judgment of the temporal courts the only mode of taking it away. This regulation would, in the present moment, attach the parochial clergy to the interests of Government, exclude those of foreign priests, who are now preferred to the Canadians, and retain the clergy in a proper dependence on the Crown. It is necessary, in order to keep up a succession of priests, that there should be some person appointed whose religious character enables him to confer orders, and also to give dispensations for marriages; but this function should not extend to the exercise of a jurisdiction over the people or the clergy; and it might be no difficult matter to make up to him, for the loss of his authority, by emoluments held at the pleasure of the Government.

The maintenance of the clergy of Canada was provided for by the payment of one-thirteenth part of the fruits of the earth in the

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name of tythe, and this payment was enforced by the Spiritual Court. It is just that the same provision should continue, and that a remedy for the recovery of it should be given in the temporal courts; but the case may happen that the land-owner is a Protestant, and it may be doubted whether it would be fit to oblige him to pay tythes to a Catholic priest.

The design was, while allowing the fullest liberty of worship according to the rites of the Church of Rome, to preserve scrupulously the Prerogative of the Sovereign as the head of the Church. This object was strictly observed in the "Quebec Act." The provisions contained in the existing Commission and Instructions were abrogated as from May 1st, 1775, and it was provided that in all matters of controversy relating to property and civil rights resort should be had to the laws of Canada. But the King's supremacy in ecclesiastical matters was also expressly declared, a declaration involving (it may be observed in passing), this consequence, that in such a matter as marriage in which civil rights under the law of Canada had their birth in the exercise of ecclesiastical jurisdiction, the King became the fountain of jurisdiction. This view of the effect of the Act was strictly adhered to in the framing of the Instructions to Governors down, at all events, to the date of the "Constitutional Act." And, indeed, three-quarters of a century after the conquest (as late as the year 1842), the authority of the Crown as head of the Church appears to have been invoked at the instance of the Roman Catholic Bishop of Montreal in respect of the establishment of a Roman Catholic Metropolitan See in British North America. On that occasion the following opinion was given by Sir Frederick Pollock and Sir William Webb Follett (a lawyer second to none of the great lawyers of his time) :—

Sir,—We have the honour to acknowledge the receipt of your letter dated the 16th of October last, stating that the Reverend M. Power having been deputed by the Roman Catholic Bishop of Montreal to submit for the approval of Her Majesty's Government a proposition for dividing the Diocese of Kingston into two distinct sees, and for "the formation of an ecclesiastical province to be composed of all the British North American provinces under one Archbishop or one Metropolitan See;" and further stating, that you had received Lord Stanley's directions to state that, as preliminary to advising Her Majesty as to the course which it might be expedient to take in respect to this application, His Lordship would wish us to report to him our opinion whether, adverting to the "Act of Supremacy," and any other Acts of Parliament relating to the exercise within the Queen's dominions of the religion of the Church of Rome, and also adverting to the terms of the capitulations of Quebec and Montreal, in 1759 and 1760, and to the statutes 14 Geo. III. ch. 83; 31 Geo. III. ch. 31, and 3 & 4 Vict. ch. 35, any authority is vested in the Queen to regulate, or in any manner interfere with, the appointment of Roman Catholic bishops or archbishops in Canada, or to determine what the number or what the character of the ecclesiastical functionaries of the Roman Catholic Church in that province shall be?

In obedience to his Lordship's commands, we have considered the subject referred to us with great care, and beg leave humbly to report that we think, under the terms of the Treaty of Paris of 1763, and of the statute 14 Geo. III. ch. 53, sec. 5, and with reference to the provisions of the statute of 1 Elizabeth, Her Majesty has an authority vested in her to interfere with, and to make regulations respecting, the appointment of Roman Catholic bishops and archbishops in Canada; and with respect to the particular proposal which is mentioned in the letter, we think that the consent of the Crown is properly asked for, and that it may be lawfully given to, the division of the Diocese of Kingston into two sees, if Her Majesty, in her discretion, shall think fit to do so. (Forsyth "Cases and Opinions on Constitutional Law," p. 51.)

* * * * * *

At the date when this opinion was given the Crown no doubt would have abstained from interference in the affairs of the Roman Catholic Church except at the instance of the authorities of that Church themselves. With the progress of modern ideas it may be assumed that, in 1842, English statesmen had learned the wisdom of leaving to each church not only the care of the spiritual welfare of its adherents, but the

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regulation of all matters strictly pertaining to ecclesiastical jurisdiction as well. These documents, however, to which I have referred, shew how repugnant the present proposed construction of the treaty would have been to the ideas of the generation of English statesmen and lawyers who were responsible for carrying its provisions into effect. By the light of history, the argument that in the 4th article the Crown gave bonds to the Hierarchy of the Church of Rome to maintain its ecclesiastical authority over the subjects of the King in Canada, will not bear examination; it falls to pieces in one's hands.

It is proper to observe that in the discussion of this question I have confined myself to the case in which a license has been obtained and the clergymen performing the marriage ceremony acts under the authority of it. In my view of the points in controversy, it is not necessary to consider other cases. I pass no opinion, therefore, upon the question whether, in the absence of a license (and where consequently the publication of banns is a necessary preliminary to the ceremony of marriage) the banns having been published in one church by one priest or minister, the ceremony can, at the discretion of the parties, be validly solemnized at any convenient time or place, and by any priest or minister. The point was discussed, but I express no opinion upon it.

ANGLIN J.—I have already stated my concurrence in the reasons assigned by Mr. Justice Davies for answering the first question submitted in the negative. I am, however, unable to agree in his reasons and conclusions in regard to question No. 2, and must, therefore, express my own views upon it.

Since the majority of the judges of this court are of the opinion that the Dominion Parliament does not possess jurisdiction 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 provincial law dealing with a matter within the exclusive jurisdiction of the provincial Legislatures. I find it almost impossible to believe that it was expected that in the event of this court answering questions Nos. 1 and 3 in the negative it should proceed to answer this second question which would thus have become 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 said:—

> If your Lordships conclude, therefore, 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 bill a different situation is before your Lordships.
>
> * * * * *
>
> If it appears on the reading of this submission that there is in effect one interrogation, that it is divided into clauses having regard to what might follow from the different views which the 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 unnecessary, 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.
>
> * * * * *
>
> The court, in its superior knowledge of the constitution and the working of the laws, may upon the consideration of these questions

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see reason instead of answering categorically to submit points for the consideration of the Government 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 situation created in view of the public agitation and the introduction of this bill.

* * * * *

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 negative?

Mr. Newcombe: If that be the purpose of your Lordship's question I concede immediately that it is a case in which it would be proper for your Lordships if you so consider to submit an inquiry to the Government or to submit any suggestion which your Lordships within the limitation of the Lord Chancellor's judgment may deem proper.

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 the first or the third question being in whole or in part in the affirmative, this second question might properly be answered, a 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 chould be given to the second question, especially if it should not be unanimous, and if the Privy Council should, as seems not improbable, decline to deal with this part of the reference, must have a disturbing 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 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 partes* in which the very point covered by

clause (*a*) of the second question is presented for judicial determination. They further stated that no case has ever come before the courts 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 Ontario, et al.* v. *the Attorney-General for the Dominion of Canada* (1) 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*(2), 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*(1), at page 589, 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, however, 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 when it thinks right so to treat any question that may be put.

Upon carefully weighing all these considerations, it seemed to me to be eminently 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

(1) [1912] A.C. 571. (2) (1898) A.C. 700, at p. 717.

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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.

But a majority of my learned brothers have reached the conclusion that we should answer the second question without making any such representation. In deference to their views I proceed to express my opinion upon it.

Being charged to define and declare the civil law of the Province of Quebec upon this question to the best of our ability, it is, in my opinion, our duty as judicial officers of a Canadian civil tribunal to consider and to give effect to the ecclesiastical law, whether of the Catholic or of any other church, so far, but so far only, as it is found to be incorporated in the common (civil) law or the legislature 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 exercise of its descretion, which, within the ambit of the jurisdiction committed to it by the Imperial Parliament is, for all judges of civil courts in this country, supreme.

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 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 is necessary for the disposition of the questions submitted.

The Civil Code of Lower Canada became 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 qualities and conditions necessary for contracting marriage (*Des qualités et conditions requises pour pouvoir contracter marriage*); the second "Of the formalities relating to the Solemnization of Marriage"; the third "Of opposition to marriage; the fourth "Of actions for annulling marriage."

In the first chapter are grouped a number of articles enumerating various impediments which render persons incapable of validly contracting marriage and stating several conditions precedent the non-observance of which, when applicable, invalidates marriage ; (*vide* articles 148-155 C.C.)

The last article of the first chapter, No. 127, reads as follows:—

> 127. The other impediments recognized according to the different religious persuasions, as resulting from relationship or affinity or from other causes, remain subject to the rules hitherto followed in the different churches and religious communities.
>
> The right likewise of granting dispensations from such impediments, appertains, as heretofore, to those who have hitherto enenjoyed it.

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Inasmuch as "relationship" and "affinity" exhaust the genus to which they belong, it is obvious that the "other causes" referred to in article 127 cannot be restricted to impediments *ejusdem generis* with consanguinity and affinity. That would be to deny any effect to the words "other causes." The other causes are therefore necessarily impediments of another kind "recognized according to, the different religious persuasions"—presumably of the parties. Confining the inquiry to the 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 noted, admittedly was in force in, and was recognized as binding by, the Catholic 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 tribus testibus matrimonium contrahere attentabunt, eos sancta Synodus ad sic contrahendum omnino inhabiles reddit, et hujusmodi contractus irritos et nullos esse discernit, prout eos praesenti decreto irritos facit et annullat.

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, and in the presence of two or three witnesses; the Holy Council renders such persons wholly incapable of contracting 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 Catholic contracted otherwise than in accordance with its requirements is invalid. The impediment thus created is known as clandestinity.

Taken by itself, article 127 would clearly have the effect of giving recognition to this impediment as affecting the civil validity of marriages between Catholics in the province and to do so is, in my opinion, beyond doubt within its purpose.

Apart from the contention that by other facultative statutory provisions every clergyman or minister of religion authorized to keep a marriage register is empowered to solemnize marriage between any man and woman, whatever their religion, with which I shall presently deal, the only objection made at bar to the construction which I have put on article 127 is based upon its collocation. It is asserted that the impediment created by the Tridentine Decree concerns merely the qualification of the person before whom marriage is to be solemnized. 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 *noscuntur 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. It professes to create a veritable *inhabilitatio personarum*. Article 127 C.C. deals

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with "impediments recognized according to the different religious persuasions" * * *"empêchements admis d'après les differentes croyances rèligieuses."* In order to give full effect to these words, it seems to me incontrovertible that we must for the purpose of article 127 regard any impediment defined by a religious body as possessing the character which that body declares it to have and as producing the effects which that body ascribes to it.

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 it is "recognized by the religious persuasion" and as "subject to the rules of the church" it follows that it is properly included under article 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 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 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 * * * if perchance a marriage of this kind be actually contracted there wherein the

Tridentine form has not been observed, or in the future (which may God avert) should happen to be contracted, His Holiness declares that such a marriage, if no other canonical impediments occur, is to be deemed valid, and 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 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 at bar by counsel instructed by the Dominion Government to support an affirmative answer to the second question that the presence of the word "hitherto" in article 127 precludes the inclusion within it of impediments created 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 contracted in that province. Although its meaning would perhaps have been clearer had the word "hitherto" preceded the word "recognized" I think that article 127 fairly read may be given the construction which Mr. Mignault put upon it and which he stated has been universally taken to be correct.

By article 156 C.C. it is provided that:—

156. Every marriage which has not been contracted openly, nor solemnized before a competent officer, may be contested by the parties themselves and by all those who have an existing and

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actual interest, saving the right of the court to decide according to the circumstances.

Having regard to the terms of the Act providing for the codification of the laws of Lower Canada, which directs the commissioners in every case to express the existing law and where they should think proper to suggest an amendment to indicate the same as a suggestion, and to the report of the codifiers which, upon a question as to the purpose of such a provision as that contained in article 156, must, in view of their instructions, be entitled to very great weight(1), there can be no doubt that this article was intended to express the existing law as to the consequences of clandestinity in the solemnization of marriage. As a guide to its interpretation, we are referred by the codifiers to Pothier on Marriage, Nos. 361, 362 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 occasion to shew, is so conclusive that other reference seems unnecessary.

In No. 361, Pothier declares that the penalty of parties who have had their marriage celebrated by an incompetent priest is the nullity of their marriage. In No. 362, he adds that the nullity of marriages celebrated by an incompetent priest is not merely relative but is absolute and can be cured only by a new 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 continued cohabitation, the courts have refused to hear parties who sought to have their marriages

(1) *Symes* v. *Cuvillier*, 5 App. Cas. 138, at p. 158.

avoided on the pretext that they had been celebrated by incompetent priests. The explanation of the judgments in these cases is not, he adds, that the marriage 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 law had been observed and that the priest who had celebrated the marriage had received the 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 obligation 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 reproduce 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 article 156 reserved to the courts. No doubt is thereby cast on the absolute nullity of the marriage not solemnized before a competent officer, which is declared in 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* article 152).

But, although the impediment to the marriage of Catholics otherwise than in accordance with its requirements created by the Tridentine Decree should, because that decree so defines its operation be deemed to affect the capacity of Catholics to contract marriage for the purpose of its inclusion within article 127 C.C., it nevertheless has to do directly with the solemnization of marriage, and the right to

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impose or to remove it as a condition of the civil validity of marriage rests exclusively with the provincial Legislatures for the reasons stated by Mr. Justice Davies in dealing with the first question.

To summarize:—

According to the law of the Catholic Church, the marriage of two Catholics solemnized otherwise than as prescribed by the Tridentine Decree is void. That impediment of the church law is recognized and adopted by article 127 of the Civil Code of Lower Canada, and provision is expressly made for judicially establishing such nullity (article 156). By reason of the exempting clauses of the Benedictine Declaration the marriage of a Catholic with a non-Catholic is not subject 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 independently of any recognition or adoption of the law of the Catholic Church in regard to marriage. This aspect of the question is fully considered by Mr. Justice Jetté in *Laramée* v. *Evans*(1) and by Mr. Justice Lemieux, sitting in the Court of Review, in *Durocher* v. *Degré*(2). I shall not do more than outline my views upon it.

By article 40 of the Ordinance of Blois (1579), provision was made for the publication of banns, the public celebration of marriage in the presence of four witnesses and the registration of the same — the whole subject to the penalties decreed by the church councils.

(1) 25 L.C. Jur. 261. (2) Q.R. 20 S.C. 456, at p. 471.

By article 12 of the Edict of Henry IV., (1606), it was ordained that marriages not entered into and celebrated in the church and with the form and solemnity required by article 40 of the Ordinance of Blois be declared void by the ecclesiastical judges.

By the Declaration of Louis XIII. (1639), which directed that the Ordinance of Blois should be strictly observed, and interpreted it, it was ordained that proclamation of banns should be made by the curé of each of the contracting parties and that at the celebration of the marriage four trustworthy witnesses should assist,

> besides the curé, who shall receive the consent of the parties and shall join them in marriage according to the form practised in the church.

All priests were expressly forbidden to celebrate any marriage except between their true and ordinary parishioners without the written permission of the curés of the parties or of the diocesan bishop; and it was further ordained that a good and faithful register should be kept of the marriages as well as of the publication of banns, or of dispensations and permissions which should have been granted. Pothier in his Treatise on 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 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 parties. The curé of the parties is the curé of the place where they have their ordinary residence (No. 355). Every other priest who has not the permission either of the bishop or of the curé of the parties is incompetent to celebrate it. This is what results from the declaration of 1639 which, after having ordained that the curé must receive the consent of the parties adds: "All priests are forbidden to marry other persons than their true parishioners, without the written permission of the curés of the parties or of the bishop. (No. 360.)"

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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 declaration of 1639, where it is said that the curé will receive the consent of the parties, and will join them in marriage, following the form practised in the church. (No. 350).

See the opinion of Mr. Justice Willes advising the House of Lords in *Beamish* v. *Beamish* (1).

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 conquest.

By subsequent ordinances of the French Kings, notably that of April, 1667, and that of April, 1736, further provision was made for the keeping of registers in all parish churches and for their form and the entries to be made therein.

While there has been some controversy as to the effect upon the foregoing laws of the articles of capitulation of the cities of Quebec and Montreal and of the Treaty of Paris (1763), 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* (2); *Wilcox* v. *Wilcox* (3).

The Anglican Church was not introduced into Canada as an established church. The exclusive authority of Catholic parish priests to celebrate marriage would, however, be held not to extend to the new Protestant inhabitants of Canada and the right of clergymen of the Anglican Church to solemnize marriage between them would be deemed to have been

(1) 9 H.L. Cas. 274, at pp. 317 to 324. (2) (1851) 2 L.C.R. 369.
(3) (1857) 8 L.C.R. 34.

introduced without 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 curé, under the law of the Catholic Church dates only from 1764. This seems to me to be the necessary result of the situation as recognized by their Lordships of the Privy Council in *Brown* v. *Les Curé, etc., de Notre Dame de Montréal*—(The *"Guibord Case"*) (1), and of the doctrine enunciated in *Long* v. *The Bishop of Cape Town* (2).

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 unaffected in this respect by the laws of the country (*Lautour* v. *Teesdale* (3), the latter, nevertheless, as part of the private law (Salmond on Jurisprudence, p. 484; Holland on Jurisprudence, p. 168), govern the inhabitants until altered by the competent jurisdiction of the new sovereignty. Halleck on International Law (4th ed.) Vol. 2, p. 516; Blackstone (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

(1) L.R. 6 P.C. 157, at pp. 206-7.
(2) 1 Moo. P.C. (N.S.) 411, at p. 461.
(3) 8 Taun. 830.

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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 Imperial 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 said Province of Quebec, and the Commission 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 relative to the civil government and the administration of justice in the said province * * * be and the same are hereby revoked, annulled and made void from and after the first day of May, 1775.

Sections 5 and 8 of the "Quebec Act" are as follows—

> 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 countries which then did, or thereafter should, belong to the Imperial Crown of this realm; and that the clergy of the said church may hold, receive, and enjoy their accustomed dues and rights with respect to such persons only as shall profess the said religion.
>
> 8. And be it further enacted by the authority aforesaid, that all His Majesty's Canadian subjects within the Province of Quebec, the religious orders and communities only excepted, may also hold and enjoy their property and possessions, together with all customs 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 Instruments had not been made, and as may consist with their allegiance to His Majesty, and subjection to the Crown and Parliament 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 property and rights be determined agreably 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-Governor or Commander-in-Chief for the time being, by and with the advice and consent of the legislative council of the same, to be appointed in manner hereinafter mentioned.

No new provisions had been made for the keeping of the registers of baptisms, deaths and marriages in Canada between the date of the cession and the year 1795, when the statute 35 Geo. III., ch. 4 (L.C.) was passed. In section 1 it enacts:—

That from and after the first day of January, which will be in the year subsequent to the passing of this Act, in each parish church of the Roman Catholic 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 evidence in all courts of justice, in each of which the said rector, curate, vicar or other priest or minister, doing the parochial or clerical duty of such parish or such Protestant church or congregation, shall be held to enregister regularly and successively all baptisms, marriages and burials so soon as the same shall have been by them performed.

Section 10 declares that certain registers of the Protestant congregation of 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 province.

Section 11 contains a similar provision in regard to other defective registers; and section 15 of the same statute is as follows:—

15. And be it further enacted by the authority aforesaid, 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 six hundred and sixty-seven, and of a declaration of his most Christian Majesty of the ninth of April, one thousand seven hun-

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dred and thirty-six, which relates to the form and manner in which the registers of baptisms, marriages and burials are to be numbered, authenticated or *paraphé*, kept and deposited and the penalties thereby imposed on persons refusing or neglecting to conform to the provisions of said 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 registers. Chief Justice Sewell, in *Ex parte Spratte*(1), decided in 1816, says:—

> The British statute, 14 Geo. III., ch. 83, commonly called the "Quebec Act" declared the law of Canada, as it stood at the conquest, to be the rule of decision in all matters of controversy and civil rights.

He adds, at page 96, that:—

> The right of keeping a register of baptisms, marriages and sepultures, with the power of rendering the entries thus made *actes authentiques*, or records, which by the twentieth title of the Edict 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 they were by law the acknowledged public officers of the temporal government * * * Under the Ordinance of 1667, which was the law antecedent to the statute 35 Geo. III. ch. 4, the keeping of registers was entrusted to the curés 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 public officers in their respective stations. The late provincial statute (1795) does not change the character or qualifications of the persons to whom the keeping of registers is now to be 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" who must

(1) Stu. K.B. 90.

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 character.

The learned Chief Justice, of whom Mr. Justice Lemieux rightly observed that he

has left a great name in the jurisprudence 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 England were recognized by law as equally entitled to solemnize and to keep registers of marriage, the former for Catholics and the latter for Protestants, and that the "Quebec Act" was declaratory of this right, which was further recognized by the provincial Act of 1795.

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 inevitable that, as a result of the reservation in the articles of capitulation of their rights and privileges, and the free exercise of their religion to the inhabitants of Quebec and Montreal, the assurances in section 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 of section 8 that His Majesty's Canadian subjects within the Province of Quebec should hold and enjoy all their civil rights, and the

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continuation of the laws of Canada as the rule for the decision of all matters of controversy relative to property and civil rights — the respective rights of the Catholic clergy and laity *inter se* as they existed at the time of the cession in regard to marriage were preserved.

The French law, so far as it could be applied, governed the keeping of registers by the Anglican clergymen, as the Act of 1795 establishes.

The criminal law of England was, by the Quebec Act, expressly declared to be the law of the province. Commercial and maritime laws of England were subsequently 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 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 of the foregoing provisions, there can be no reasonable doubt that that law in Lower Canada has been since the conquest, as is declared by Chief Justice Sewell, the civil law which was in force at the time of the conquest. In *Citizens Insurance Co.* v. *Parsons*(1), Sir Montague Smith in delivering the judgment of the Privy Council, at pp. 110-111, 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 Canada and not the English law which prevails in the other provinces * * *
>
> It is to be observed that the same words "civil rights" are employed in the Act of 14 Geo. III. ch. 83, which made provision for the government of the Province of Quebec. Section 8 of that Act en-

(1) 7 App. Cas. 96.

acted that Mis 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.

Under the civil law of Quebec at and after the conquest the marriage of two Catholics could only take place in the presence of the curé of the contracting parties or of a priest authorized by him or by the bishop, and all priests were forbidden without such permission to celebrate any marriage other than between their true and ordinary parishioners. (Declaration of Louis XIII., 1639.)

In 1804 and again in 1821 statutes were passed validating marriages which had been theretofore solemnized before Protestant dissenting ministers and justices of the peace. In each of these Acts it is expressly provided that they shall not extend to any future marriages.

As is very clearly pointed out by Mr. Justice Jetté in *Laramée* v. *Evans*(1), the Act of 1827, authorizing clergymen of the Church of Scotland to keep marriage registers and to solemnize marriages, and the subsequent Acts authorizing the ministers of various dissenting bodies to keep registers of baptisms, marriages and burials were all procured, not with a view of affecting the position and rights of the Catholic Church and its clergy and laity, but because of the opinion maintained by Chief Justice Sewell, and generally asserted by the Anglican body that clergymen of that church were alone competent to marry Protestants. The purpose of the legislation would

(1) 25 L.C. Jur. 261.

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appear to have been to relieve dissenting Protestant bodies from that disability by giving to the ministers of those denominations the legal right to keep registers and to solemnize marriage primarily if not solely for the purposes of their respective congregations.

In 1860 these Acts were consolidated in chapter 20 of the Revised Statutes of Lower Canada. Sections 16 and 17 of that Act are as follows:—

16. The Protestant churches or congregations intended in the first section of this Act, are all churches and congregations in communion with the United Church of England and Ireland or with the Church of Scotland, and all regularly ordained priests and ministers of either of the said churches have had and shall have authority validly to solemnize marriage in Lower Canada, and are and shall be subject to all the provisions of this Act. 35 Geo. III., ch. 4; 7 Geo. IV., ch. 2, sec. 2.

17. This Act extends also to the several religious communities and denominations in Lower Canada, mentioned in this section, and to the priests or ministers thereof, who may validly solemnize marriage, and may obtain and keep registers under this Act, subject to the provisions of the Acts mentioned with reference to each of them respectively, and to all the requirements, penalties and provisions of this Act, as if the said communities and denominations were named in the first section of this Act.

There follows a list of the various dissenting bodies which had obtained special statutes.

I read these provisions as declaratory of the right of the ministers of the several religious bodies therein named (Anglican, Scotch and Dissenting) to solemnize within the limits of the territory for which they are authorized to keep registers, all marriages (subject to article 63 C.C. and to the special limitation in the case of Quakers imposed by 23 Vict. ch. 11) except those which the law by other provisions renders them incompetent to solemnize. This, in my opinion, meets the objection so much insisted on at bar that, if the

argument presented by Mr. Mignault should prevail, there would be no provision in the Quebec law for the solemnization of marriages between dissenting Protestants of different religious beliefs or for the marriage of infidels or pagans, or of persons attached to no particular religious denomination.

With matters in this position, the legislature appointed the Commission for the codification of the civil law with instructions to express in the Code the existing law. The report of these commissioners upon the portion of the Civil Code which deals with the subject of marriage contains the following passages:—

> With the object of preserving to everybody the enjoyment of his own usages and practices according to which the celebration of marriage is entrusted to the ministers of the worship to which he belongs several provisions are inserted in this title which although new in form nevertheless have their source and *raison d'être* in the spirit, if not in the letter, of our legislation. * * * Since a change such as that operated by the Code Napoleon, which has secularized marriage and has entrusted the celebration of it as well as the keeping of the registers to officers of a purely civil character without any intervention being required on the part of religious authorities, seems in no wise desirable in this country it has become necessary to renounce the idea of establishing here in regard to the formalities of marriage uniform and detailed rules.

The majority of the Commissioners thus express their opinion:—

> The publicity required by the first part of article 128 is with the object of preventing clandestine marriages which are with good reason condemned by every system of law. An Act so important which interests many others besides the parties themselves should not be kept secret and the best method of preventing that happening is to render obligatory the publicity of the celebration. The word "openly" (*publiquement*) has a certain elasticity which makes it preferable to any other; being susceptible of a greater or less extension it has been employed in order that it may lend itself to the different interpretations which the different churches and religious congregations in the province require to give it according to their customs and usages and the rules which are peculiar to them

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from which it is desired in no way to derogate. All that has been sought is to prevent clandestine marriages. Thus, those marriages which shall have been celebrated in an open manner and in the place where they are ordinarily celebrated according to the usages of the church to which the parties belong are reputed to have taken place openly (*publiquement*).

Taking up the Code and reading it, as it must be read, in the light of the foregoing facts, we find the following provisions which call for consideration in dealing with the question submitted:—

128. Marriages must be solemnized openly, by a competent officer recognized by law.

This is the fundamental provision designed to prevent clandestinity.

Of almost equal importance, having the same object, and being the natural sequence of the provisions enacted for the same purpose, regarding the publication of banns in the church or churches to which the parties belong (articles 130-3 and 57-8 C.C.) is article 63, which says:—

63. The marriage is solemnized at the place of the domicile of one or other of the parties. If solemnized elsewhere, the person officiating is obliged to verify and ascertain the identity of the parties.

The latter sentence obviously provides for such exceptional cases as those of persons having no fixed residence (*vagi*) or no residence in the province. The form in which the article is expressed would be inexplicable if it were not thereby intended to prescribe that as a general rule marriage must take place at the domicile of one of the parties. I see no reason why this provision should not apply to Protestants as well as Catholics. The policy which underlies it so requires.

"Domicile" in this article means place of residence (1), and, in the case of Catholics, and probably of Anglicans, who have parochial organization, it means the parish in which the parties, or one of them resides. In the case of a person belonging to a religious body having neither parochial organization nor its equivalent, or of a person belonging to no church, domicile would probably mean the municipality in which he resides. The Catholic parish in Quebec is legally recognized. See R.S.Q., 1909, arts. 4296 *et seq.* It is in the parish church, private chapel, or mission, and for the territory attached to it that the registers are kept (article 42 C.C.). It is the proper curé of the parties, *i.e.*, the parish priest, who is authorized to solemnize the marriage. It is at the church and within the territory for which he is authorized to keep registers that he is empowered to officiate. While in country places the parish and the municipality are coterminous, such cities as Montreal and Quebec are divided into many parishes of which the territorial limits are well defined, and only within them is the curé authorized to discharge his functions and to exercise his rights as parish priest. Every consideration points to his parish being for the purpose of article 63 the domicile of the Catholic at all events.

Publication of banns in the church to which the parties belong, marriage at the domicile and solemnization by a competent officer are the great safeguards provided by the Code against clandestinity. In all countries where the civil law prevails, territorial limitation of the jurisdiction to solemnize marriage appears to have been established for that pur-

(1) *McMullen* v. *Wadsworth*, 14 App. Cas. 631, at p. 636.

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pose — a policy inspired, no doubt, by the Tridentine Decree.

To further ensure obedience to the legal prohibitions in respect to consanguinity, pre-contract and minority, the non-observance of which clandestinity too often serves to cloak, the Code has provided (articles 136 *et seq.*) for formal oppositions being made to marriages by interested persons. The efficacy of these provisions depends upon the restrictions imposed as to the place, time and publicity of solemnization by the articles to which allusion has just been made. Article 1107 of the Code of Civil Procedure, which must be read with the provisions of the Civil Code (article 144 C.C.) requires that the opposition shall be served "upon the functionary called upon to solemnize the marriage," and article 61 C.C. directs that the disallowance of an opposition shall be "notified to the officer charged with the solemnization of the marriage." (See also article 1109 C.P.Q.) By article 65 C.C. the "Act of Marriage" which the celebrant is required to prepare and sign, must *inter alia* state "that there has been no opposition or that any opposition has been disallowed." These provisions accord only with the view that in the ordinary case and as a general rule there must be some one, or at most two defined and ascertainable functionaries charged with the celebration of a marriage and that the jurisdiction of the competent officer mentioned in article 128 is necessarily territorially restricted as indicated in article 63; and that is the only logical outcome of the provisions of articles 130 *et seq.* The purpose of such provisions and their efficacy to attain the object sought by the Legislature — the prevention of clandestine marriages, incestuous marri-

ages, bigamous marriages and marriages between minors without the consent of parents — are well stated by Mr. Justice Lemieux in *Durocher* v. *Degré* (1), at pp. 488 *et seq.* To hold, as is maintained by those who contend for a negative answer to both branches of the second question, that every officer authorized to keep a marriage register is competent to solemnize the marriage of any two persons who come before him, whatever their residence and whatever their religion, provided only they produce to him a license from the Crown, is to destroy at once and completely all the elaborate safeguards which the Legislature has provided to prevent those manifest evils. As put by Mr. Justice Lemieux:—

> Can it be supposed for an instant that the codifiers, after having ordained the publication of marriage (*a*) in the church of the parties; (*b*) before a public officer belonging to the worship of the parties; (*c*) by their curés; (*d*) and after having left to the religious authorities to whom the parties are subject the discretion of granting or of refusing the dispensation of such publication would, after providing for all this series of formalities to be carried out by the curé and the religious authorities in the church of the parties, have left persons after all free to contract marriage before no matter what minister and of a different religion. The idea seems to us neither reasonable nor probable.

Articles 42, 44 and 45 now call for attention:—

> 42. Acts of civil status are inscribed in two registers of the same tenor, kept for each Roman Catholic parish church, private chapel or mission, and for each Protestant church or congregation or other religious community, entitled by law to keep such registers, each of which is authentic, and has in law equal authority.
>
> 44. The registers are kept by the rector, curate, priest, or minister having charge of the churches, congregations, or religious communities or by any other officer entitled so to do.
>
> In the case of Roman Catholic churches, private chapels or missions, they are kept by any priest authorized by competent

(1) Q.R. 20 S.C. 456.

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ecclesiastical authority to celebrate marriages or administer baptism and perform the rites of burial.

45. In the case of Roman Catholic churches, private chapels or missions, the register must be granted under the name mentioned in the certificate of authorization by the bishop, the ordinary of the diocese, the vicar general, or the administrator; and the priest on presenting the register for authentication must exhibit the certificate of authorization.

In these articles the Code expressly recognizes the power of the Catholic bishop to appoint priests for the solemnization of marriage and to confer upon them the requisite authority. Their right to keep civil registers is made to depend upon this authorization of the bishop and their competence to solemnize marriage for civil purposes is in turn made to depend upon their being so authorized to keep registers. (Article 129.)

This latter article, which reads as follows,

129. All priests, rectors, ministers and other officers authorized by law to keep registers of acts of civil status, are competent to solemnize marriage.

But none of the officers thus authorized can be compelled to solemnize a marriage to which any impediment exists according to the doctrine and belief of his religion and the discipline of the church to which he belongs,

is the sheet-anchor of those who contend that every officer authorized to keep a marriage register is competent to solemnize any and every marriage. It is, on its face, not a facultative provision. It is declaratory of a legal competence already existing — which in the case of ministers of dissenting bodies had been conferred by the statutes consolidated in the C.S.L.C., 1860, ch. 20, and by subsequent similar acts. It is necessarily general in its terms. It must, as must every provision of the Code, be read with the other articles and be so construed that their efficacy shall

not be destroyed. It is consistent with the limitations which the provisions above discussed necessarily entail. Having regard to the facts that solemnization by their proper curé or by a priest acting with his authority or that of the ordinary, was an essential condition of the validity of marriage by the civil law of Canada at the time of the conquest, that this continued to be the law in respect to Catholics after the conquest, that the instructions to the codifiers were to express the existing law, that in their report they say their object has been to preserve to everybody

> the enjoyment of his customs and practices according to which the celebration of marriage is entrusted to the ministers of the worship to which he belongs,

and that they inserted numerous provisions in the Code compatible only with that intention, I have not the slightest doubt that, upon a proper construction, article 129 cannot be read as conferring the general and indiscriminate power to solemnize marriage which Mr. Lafleur felt compelled to contend for and which would inevitably entail upon the province the very evils which the whole tenor of its enactments in regard to marriage makes it clear it was the purpose of the Legislature of Quebec to obviate.

I am of the opinion that under the various provisions of the Civil Code, quite apart from any impediment created by the laws of the Catholic Church, it is essential to the validity of the marriage of two Catholics in the Province of Quebec that the celebrant should be the parish priest of one or other of them or a priest acting with his permission or with that of the bishop. Since the marriage may be solemnized at the domicile of either party (article 63) this require-

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ment of the civil law seems to be inapplicable to the marriage of a Catholic with a non-Catholic. The effect of the other articles of the Civil Code relating to marriage, which reproduced the provisions of the civil law as it stood at the conquest with some subsequent legislative modifications, therefore harmonizes with that of article 127 C.C., which recognizes and adopts for Catholics the law of the Catholic Church as it stood in 1866 in regard to impediments to marriage other than those enumerated in the preceding articles of the first chapter of the title on marriage. On no other construction of the various articles of the Code dealing with marriage can the obvious policy of the legislature be carried out or can due effect be given to them all. This conclusion is in accord with the great weight of the jurisprudence of the Province of Quebec. In addition to *Laramée* v. *Evans*(1), and *Durocher* v. *Degré*(2), already cited, I may refer to *Globensky* v. *Wilson*(3); *Vaillancourt* v. *Lafontaine*(4); and *Valade* v. *Cousineau*(5).

Against the view supported by these authorities there are only the decisions of two judges of first instance — one in *Delpit* v. *Coté*(6), in effect overruled within two months by the Court of Review in *Durocher* v. *Degré*(2), and the other in *Hébert* v. *Clouâtre* (7).

The effect of the provisions of the statutes and of the Code in regard to marriage licenses must still be considered. Although addressed "to any Protestant minister of the Gospel," the license does not confer

(1) 24 L.C.J. 235; 25 L.C.J. 261.
(2) Q.R. 20 S.C. 456.
(3) M.L.R. 2 S.C. 174.
(4) 11 L.C.Jur. 305.
(5) Q.R. 2 S.C. 523
(6) Q.R. 20 S.C. 338.
(7) Q.R. 41 S.C. 249.

upon him the power or authority to solemnize marriage. (Articles 128 and 129.) That is derived from the law in the case of Protestant clergymen and in the case of Catholic priests from the bishop, whose authorization to solemnize marriage carried with it by law the right to keep marriage registers for civil purposes (articles 44 and 45 C.C.), that right in turn involving the civil competence of the priests so authorized to solemnize marriage. (Article 129 C.C.)

In the Catholic Church the bishop has the power to dispense with the publication of banns. The French law in force in Lower Canada recognized that right for civil purposes, and by articles 59 and 134 C.C. it is continued. The license issued by the Crown is nothing more than a substitute or an equivalent in the case of Protestants for the bishop's dispensation from the publication of banns, which Catholics must obtain if they wish to be married without such publication, and probably also from the obligation of marriage in the church. It is urged that it also does away with the requirement of marriage at the domicile, but I more than doubt that.

Article 57 prescribes that:—

> before solemnizing a marriage, the officer who is to perform the ceremony must be furnished with a certificate establishing that the publication of banns required by law has been duly made; unless he has published them himself, in which case such certificate is not necessary.

By article 59(*a*) it is provided that:—

> In so far as regards the solemnization of marriage by Protestant ministers of the Gospel marriage licenses are issued by the department of the provincial secretary under the hand and seal of the Lientenant-Governor, who, for the purposes thereof, is the competent authority under the preceding article.

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The issue of a license to a minister to solemnize a projected marriage does not confer on him the requisite power to do so. It is an authority to the minister to be chosen, if he be competent by law, to proceed with the marriage without proof of the publication of banns and probably elsewhere than in his church. If the minister be otherwise incompetent to solemnize the marriage, the license has no greater validating effect upon it than it would have if the parties were legally incompetent to contract marriage. The minister is personally protected from any action or liability for damages by reason of any legal impediment of which he was not aware, article 59 (*a*); but beyond that the license has no saving force.

That marriage licenses issued by the Crown are intended solely for Protestants is made clear by a reference to article 59(*a*) and to the R.S.Q. (1909), arts. 1494, 1495, 1497, 1498 and 2943. The provisions for licenses are confined to the solemnization of marriage by Protestant ministers and the fees derived from them are by law devoted to Protestant superior education.

There is nothing, therefore, in the provisions of the law regarding licenses inconsistent with the view that a marriage between Catholics in the Province of Quebec can be validly solemnized only by the curé of one of the parties or by a priest authorized by him or by the bishop.

I express no opinion as to what persons should, for civil purposes, be deemed subject as Catholics to the impediment which has been under discussion. That question has not been asked.

Before concluding this opinion I think it right to

direct attention to the important, but too often overlooked, provisions of articles 163 and 164 of the Civil Code, which are as follows:—

163. A marriage although declared null, produces civil effects, as well with regard to the husband and wife as with regard to the children if contracted in good faith.

164. If good faith exist on the part of one of the parties only, the marriage produces civil effects in favour of such party alone and in favour of the children issue of the marriage.

My conclusions in regard to the second question are that in the Province of Quebec marriages between persons who are both Catholics solemnized before a Protestant clergyman or minister are civilly invalid; marriages between persons one of whom only is a Catholic, commonly called mixed marriages, which would otherwise be legally binding, are civilly valid whether solemnized before a Catholic or a Protestant clergyman or minister. These results flow from the provisions of the civil law of that province taken by themselves; and also from the law of the Catholic Church, so far as it is given civil effect by article 127 of the Civil Code. The recent decree known as *"Ne Temere"* I understand not to be within article 127 C.C. It has not received any other legislative recognition and has, therefore, no civil effect.

I would answer the second question submitted, as to clause (*a*) in the affirmative, and as to clause (*b*) in the negative.

I answer the third question in the negative for the reasons which Mr. Justice Davies has assigned in support of the negative answer to the first question.

As was so aptly pointed out by Mr. Smith, the special and unique provision made by section 93 of the "British North America Act" for federal remedial

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legislation, intended as a protection to religious minorities in educational matters, precludes the idea that, in regard to other subjects assigned to the exclusive jurisdiction of provincial legislatures any general overriding legislative power is vested in the Dominion Parliament.

I would, in addition, merely direct attention to the omission of the Province of Quebec from the 94th section of the "British North America Act," which provides for Dominion legislation for uniformity in the laws of Ontario, Nova Scotia and New Brunswick as to property and civil rights, subject to the approval of the provincial legislatures, as affording another argument of some cogency in support of the negative answer to the third question. "The Province of Quebec is omitted from this section," says Sir Montague Smith, speaking for the Privy Council in *Citizens' Insurance Co.* v. *Parsons*(1), "for the obvious reason that the law which governs property and civil rights is in the main the French law as it existed at the time of the cession of Canada and not the English law which prevails in the other provinces."

There cannot be the slightest doubt that the representatives of Lower Canada insisted that, from the subject of "marriage," which, in the original draft of the confederation pact, was given in its entirety to the Dominion Parliament, should be taken out and assigned to the exclusive legislative jurisdiction of the province, "the solemnization of marriage," in order that the complete control of the Legislature of the Province of Quebec over all that appertains to that subject should be assured and that there should be a

(1) 7 App. Cas. 96, at p. 110.

constitutional guarantee against federal interference with the provisions of its civil law, carefully framed to suit local conditions, in a matter so vital to civil rights.

The following announcement was made by the Chief Justice with respect to the Reference:—

To both branches of the first question, the Chief Justice, Mr. Justice Davies, Mr. Justice Duff, and Mr. Justice Anglin answer "No."

The answer of Mr. Justice Idington is:—

"It is an impossible bill as it stands. If I must answer categorically, then I say as follows: The retrospective part would be good as part of a scheme for concurrent legislation by Parliament and Legislatures confirming past marriages which probably neither can effectively do. The prospective part so far as possible to make it an effective prohibition of religious tests may be good, but doubtful, and the probable purpose can be reached by a better bill."

To the second question—the Chief Justice asks permission to decline to answer the first branch of this question, for the reasons given in the attached memorandum. (See p. 335 *ante.*)

To the first branch of the question — Mr. Justice Davies, Mr. Justice Idington and Mr. Justice Duff answer "No." To that first branch the answer of Mr. Justice Anglin is "Yes."

To the second branch of question No. 2 — the Chief Justice, Mr. Justice Davies, Mr. Justice Idington, Mr. Justice Duff and Mr. Justice Anglin, answer "No."

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To the third question—The Chief Justice, Mr. Justice Davies, Mr. Justice Duff and Mr. Justice Anglin answer "No."

Mr. Justice Idington's answer is:—

"As to the third question, sub-section (*a*) I answer "yes" to be concurred in by the respective Legislatures of provinces concerned and as to sub-section (*b*) I answer "yes" if and when a province fails to provide adequate means of solemnization."