

Mr. HOPKINS: No, none that I know of. There is no Supreme Court case which has decided the hard constitutional problem. The grounds for divorce are exclusively federal. Procedures in the court might be covered federally, but are conceded to the provinces by the B.N.A. Act. The in-between areas, the *terra incognita*, of alimony, custody of children and maintenance—that is a different matter. I have neither the courage nor the capacity to predict what the Supreme Court of Canada would say about these.

Mr. PETERS: Not being a lawyer and not understanding all these terms, I would like to know if that means the answer to Senator Croll's question—would an appeal by someone who was charged damages, whatever the phrase is, where a man had to pay alimony and custody, if he had opposed this under the federal divorce legislation would this be the kind of case you have in mind?

Mr. HOPKINS: That would raise the issues very nicely. But I know of no case which has reached the Supreme Court, which is the only final court we have to settle the matter to anybody's real satisfaction.

Now, I will deal with the position in the United Kingdom including a summary of the case law relating to the added grounds for divorce; namely, cruelty, desertion and unsoundness of mind, and here I must disqualify myself as an expert witness—

Senator ASELTINE: Do these rules also cover avoidance? You remember the bill in 1938 and again in 1955 in which I was interested? Could you deal with that?

Mr. HOPKINS: I will indeed a little later. The grounds for divorce in England remained unchanged for the eighty years following the Matrimonial Causes Act of 1867. However, the Matrimonial Causes Act of 1937 (sometimes referred to as the "Herbert legislation" because of its advocacy by Sir Alan P. Herbert, author of *Holy Deadlock* and *Cases in the Uncommon Law*, and Member of Parliament for Oxford University)—and it so happened that I was a student at the time and I had a sort of nodding acquaintance with him—extended the pre-existing grounds so as include cruelty, desertion and unsoundness of mind. It also—and this deals with what Senator Aseltine was referring to—introduced certain new grounds for nullity; i.e., wilful refusal to consummate the marriage; that either party was at the time of the marriage of unsound mind or a mental defective or subject to recurrent fits of insanity or epilepsy; that the respondent was at the time of the marriage suffering from venereal disease of a communicable form, or was pregnant by some person other than the petitioner. The statutes relating to matrimonial causes were consolidated in the Matrimonial Causes Act, 1950. Attached to this brief as Appendix 4 is the text of the last-mentioned Act, and of certain other relevant statutes in force in the United Kingdom.

Presumably, in view of its terms of reference—and the terms of reference of this committee, as I understand them, do not seem to extend to nullity, if I may say so, and as I read them they seem to be limited to divorce—the committee will be particularly interested in the added grounds for divorce in England as of 1937, and I have attempted to summarize the English case law on these three grounds. None of these was defined in the Acts of 1937 or 1950—and I think this is important, and at some point in your deliberations undoubtedly you will be giving consideration to whether or not these terms might usefully be defined. My own opinion is that they should not be defined, and I point out now that they were not defined in England, and despite the fact they were not, a considerable body of jurisprudence has grown up as to what these expressions mean. As I said, none of these was defined in any English act, although some guidance was provided by the earlier use of the terms "cruelty" and "desertion" in connection with other matrimonial offences, but since 1937 a considerable body of jurisprudence has grown up in England as to the meanings to be assigned thereto.