

APPENDIX "E"

DECEMBER 12, 1963.

Mr. Chairman, Honourable Senators:

I have been asked by the Committee for my opinion as to the constitutionality of Bill S-32, An Act to amend the Marriage and Divorce Act. The bill contains only one clause, which reads as follows:—

1. The *Marriage and Divorce Act* is amended by adding, immediately after section 1 thereof, the following section:—

“1A. Married women shall have the same rights as unmarried women for the sale and alienation of immoveable property.”

It is simple in form and recites a proposition which has been accepted in principle in the common law provinces. However, it is appreciated that the implications of the bill are serious and that its enactment, if it is constitutional, would have an important impact on a number of provisions in the law of the province of Quebec. In this instance, I take it from the letter of the Deputy Minister of Justice to Mr. Bedard, which forms part of the record, we are not to be accorded the assistance of the Department of Justice. I would be equally happy, at this stage of a busy session, to escape responsibility in this matter. However, it is my official duty to respond to the Committee's request, and I do so now. I simply say, with particular reference to what follows, that I am not an entire Department of Government, but an individual officer of the Senate and that my views are not binding on any one.

The constitutionality of the bill depends, in my opinion, on the construction to be placed on the word “Marriage” as that word appears in Head 26 of section 91 of the British North America Act, 1867. That provision declares, *inter alia*, that “the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated: that is to say,—

26. Marriage and Divorce.”

And it is added at the end of the said section 91 that

“any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.”

Thus it seems, and here I entirely agree with Senator Pouliot, that federal legislation in respect of any class of subject enumerated in section 91 is paramount. As Lord Watson stated in *Tennant v. Union Bank* (1894) A.C. 31, the legislative powers of the Parliament of Canada “depend upon section 91, and the powers to legislate conferred by that clause may be fully exercised, although with the effect of modifying civil rights within the province”.

On the other hand, section 92 of the same Act provides that in each Province the Legislature “may exclusively make laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated: that is to say,—

12. The Solemnization of Marriage in the Province.