otherwise relaxes the law to allow marriage between persons who are related as uncle and niece or as aunt and nephew.

In the case of persons related by marriage, it clarifies the law by providing that a person whose marriage has been dissolved by divorce may marry the brother or sister, nephew or niece, uncle or aunt of the divorced spouse. The bill would also allow a person to marry the uncle or aunt of a deceased spouse, something that is not now permitted under the law.

Finally, in the case of persons related by adoption, it generally confirms that a relationship by adoption is no prohibition to marriage. However, in the case of a lineal adoptive relationship, the bill creates a new prohibition. Thus, for example, a man may not marry his adopted daughter or granddaughter.

Honourable senators, there are two brief matters I would like to point out. First, so much of the work that was done in covering this matter on at least two previous occasions under Bill S-2 and Bill S-13, several Parliaments ago, was done by the Standing Senate Committee on Legal and Constitutional Affairs, under the able chairmanship of Senator Neiman. In fact, in this chamber on December 18, 1985, Senator Neiman, in addressing Bill S-2, covered the long history that this matter has had.

To my recollection, it was through the initiative of Senator Flynn, Senator Asselin and others that we found that every couple of years we were dealing with a series of bills asking for an exemption from the general law. Those senators stood at that time and said the general law needed so many exceptions that it was obvious something was wrong with the general law.

● (1500)

We then proceeded, as I recall, with Bill S-13 during 1983-84, and in 1985 with Bill S-2, both of which died on the order paper. Bill S-2 was at that time before the House of Commons, but when the session was prorogued last October, that ended the life of that bill.

I am sure all honourable senators are familiar with the provisions of section 91 and section 92 of the British North America Act of 1867, and in particular with subsection 26 of section 91, which says that the federal government has exclusive jurisdiction to legislate with respect to marriage and, more specifically, with respect to the capacity to marry. Section 92 provides that the provinces have exclusive jurisdiction with respect to the solemnization of marriages.

With one minor exception, the federal government has not legislated in this field; it has merely adopted the law on capacity to marry which was in force at the time of Confederation, and those laws were also in place in the various provinces that formed Canada in 1867. I might say that Quebec was governed by the Civil Code. The Civil Code at that time was, in substance, the same as what was in existence in Upper Canada at that time.

The committee, in its very lengthy deliberations, heard from numerous authorities touching on both the religious and civil aspects of capacity to marry. As Senator Neiman pointed out in her excellent presentation on December 18, 1985, the practice of barring marriages between persons having certain relationships, whether by blood or otherwise, is part of the old Judaic religious law, and Christians, in turn, adopted and adapted similar prohibitions.

Over the centuries, the list of prohibitions was extended and contracted from time to time. Some time after King Henry VIII separated himself and his country from the Holy Roman Church, he asked for some codification, I assume because of some of his own problems—

Senator Flynn: Or solutions to his problems.

Senator Nurgitz: Yes, as Senator Flynn has said, or solutions to his own problems. The Ecclesiastical Court of that day then actually pronounced certain laws which ultimately found their way into the Anglican Book of Common Prayer and became the foundation on which the common law that Canada acquired at Confederation was based. For those honourable senators who may have studied the topic of domestic relations at law school, that is how we were taught that subject: The laws dealing with the prohibitions of consanguinity and affinity as were contained in the Anglican Book of Common Prayer.

Senator Frith: A very good book, indeed!

Senator Nurgitz: To each his own.

Senator Frith: Have you read it?

Senator Nurgitz: Not completely.

The law at the time of Henry VIII was, and now is, that no person may marry another person of the opposite sex who is within three degrees of blood relationship or affinity. That means it extends literally to grandparents and grandchildren. It does not include great grandparents and great grandchildren. It also extends to aunts and uncles, as well as to siblings.

As Senator Neiman pointed out, there is one other common law prohibition, and that is between step-parents and step-children. However, there is no prohibition against siblings of such step-parents marrying one another.

Confusion further enters the picture when one considers, or attempts to consider, the effect of legal adoption. I am sure it is familiar to most senators that adoption was for many, many years a practice and not a legal matter. If one looks at most child welfare legislation, one will see that adoption did not come into force in some provinces until the 1920s and 1930s. So, formal adoption is basically a 20th century concept. The adopted child has the same status as a natural-born child.

While some statutes dealt with adoption before the turn of this century, as I have said, most of those came about somewhat later.

It is interesting to note that in 1978, before my time in the Senate, an application was made for an exemption from the general law by a brother and sister by adoption. I see Senator Flynn nodding; he was on the committee at that time. The opinion of the committee was that those people did not need a parliamentary bill, because there was no act of Parliament prohibiting adopted brothers and sisters from marrying. So their application was not dealt with.

Senator Frith: Would that be prohibited by this bill?