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First Session—Twenty-seventh Parliament

1966-67

PROCEEDINGS OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON

DIVORCE

No. 14

THURSDAY, FEBRUARY 9, 1967

Joint Chairmen

The Honourable A. W. Roebuck, Q.C.

and

A. J. P. Cameron, Q.C., M.P.

WITNESSES:

The Presbyterian Church in Canada: Reverend Wayne A. Smith, B.A., B.D.; Reverend A. J. Gowland, M.A.; Reverend W. L. Young, B.A.; Reverend Fred H. Cromey, B.A.

The Canadian Psychiatric Association: J. B. Boulanger, M.D., Director; F. C. R. Chalke, M.D., Director.

APPENDICES:

33.—Brief by Marcel Naud, Montreal.
34.—Canadian Jewish Congress.
35.—The Family Bureau of Greater Winnipeg.
36.—The County of York Law Association.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1967

25435—1

MEMBERS OF THE

SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS

ON DIVORCE

FOR THE SENATE

Hon. A. W. Roebuck, Q.C., Joint Chairman

The Honourable Senators

Aseltine	Connolly (*Halifax North*)	Flynn
Baird	Croll	Gershaw
Belisle	Denis	Haig
Burchill	Fergusson	Roebuck—(12).

FOR THE HOUSE OF COMMONS

A. J. P. Cameron, Q.C., (*High Park*), Joint Chairman

Members of the House of Commons

Aiken	Forest	McQuaid
Baldwin	Goyer	Otto
Brewin	Honey	Peters
Cameron (*High Park*)	Laflamme	Ryan
Cantin	Langlois (*Mégantic*)	Stanbury
Choquette	MacEwan	Trudeau
Chrétien	Mandziuk	Wahn
Fairweather	McCleave	Woolliams—(24).

(Quorum 7)

ORDERS OF REFERENCE

Extracts from the *Votes and Proceedings* of the House of Commons: March 15, 1966:

"On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—that a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as many be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee."

"By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19, An Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bills be referred to the Joint Committee of the Senate and the House of Commons on Divorce".

March 16, 1966:

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce".

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"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce."

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Goyer, Honey, Laflamme, Langlois (*Mégantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn, and Woolliams."

LÉON-J. RAYMOND,
Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate and House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative."

March 29, 1966:

"With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, namely, the Honourable Senators Aseltine, Baird, Belisle, Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig, and Roebuck; and

That a Message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—

Resolved in the affirmative."

May 10, 1966:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19, intituled; "An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief".

The question being put on the motion—

In amendment, the Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative."

J. F. MacNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

THURSDAY, February 9, 1967.

Pursuant to adjournment and notice, the Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3:30 p.m.

Present: For the Senate: The Honourable Senators Roebuck (*Joint Chairman*), Aseltine, Baird, Belisle, Burchill, Fergusson, Gershaw and Haig—8.

For the House of Commons: Messrs: Cameron (*High Park*) (*Joint Chairman*), Aiken, Honey, McCleave, Stanbury and Wahn—6.

In attendance: Peter J. King, Ph. D., Special Assistant.

The following witnesses were heard:

The Presbyterian Church in Canada:

Reverend Wayne A. Smith, B.A., B.D.
Reverend A. J. Gowland, M.A.
Reverend W. L. Young, B.A.
Reverend Fred H. Cromey, B.A.

The Canadian Psychiatric Association:

J. B. Boulanger, M.D., Director.
F. C. R. Chalke, M.D., Director.

Briefs submitted by the following are printed as Appendices:

33.—Marcel Naud, Montreal.

34.—Canadian Jewish Congress.

35.—The Family Bureau of Greater Winnipeg.

36.—The County of York Law Association.

At 5.45 p.m. the Committee adjourned until Tuesday next, February 14, 1967 at 3:30 p.m.

Attest.

Patrick J. Savoie,
Clerk of the Committee.

THE SENATE

SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

EVIDENCE

OTTAWA, Thursday, February 9, 1967.

The Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3.30 p.m.

Senator Arthur A. Roebuck and Mr. A. J. P. Cameron (*High Park*), Co-Chairmen.

The CO-CHAIRMAN (*Senator Roebuck*): Honourable senators, members of the House of Commons: We have a quorum and I think we should get down to the business of the day without any delay.

I must explain that our program has been changed since we were last together. I told you that Mr. James P. Trotter, Q.C., was to appear before us today on behalf on the Liberal Caucus of the Legislature of the Province of Ontario, but just a few days ago there appeared in the Speech from the Throne in the Legislature some reference to the subject of divorce and I understand that the provincial Government, or perhaps the Legislature itself, has appointed a committee for the purpose of studying the subject. Therefore, Mr. Trotter felt that until this committee reported it would be a little out of place for him to come down here and assume some authority for the caucus. I thoroughly appreciated his reason, and so he will not be here. On the other hand, we have a delegation from the Presbyterian Church in Canada and we have also got a delegation from the Canadian Psychiatric Association, about whom I shall have more to say later on.

Our first witnesses are men of great experience in the matter we are discussing, since they represent one of the great churches of Canada. We are very fortunate indeed in having them with us. There are four witnesses. The first one I propose to introduce is the Rev. Wayne A. Smith, chairman of the delegation.

Mr. Smith obtained his B.D. degree in 1954. He has had congregations at Port Carling, Torrance, Hamilton and Paris, Ontario. Beginning March 1, 1967, he will be the Assistant Secretary of the Board of Evangelism and Social Action of the Presbyterian Church in Canada. In his role as pastor he has engaged in pastoral and marital couselling which has enabled him to see the need for the widening of the grounds for divorce. He has also been a member, and for the past two years the chairman, of our Committee on Family Life. This is the committee of the Presbyterian Church in Canada that makes a study of questions pertaining to marriage, divorce, remarriage, etc., and recommends policy in these areas to the General Assembly, the highest court of the Presbyterian Church in Canada.

Mr. Smith shared in the writing of a commentary entitled, *Marriage, Divorce and Remarriage*. We have all had copies of that, and I assure you I read it through carefully.

Mr. Smith, the audience is yours.

The Rev. Wayne A. Smith, B.A., B.D., (*Chairman of the Delegation representing the Presbyterian Church in Canada*): Mr. Chairman, honourable senators, and members of the House of Commons, we wish to extend our sincere thanks for this invitation to appear before you this afternoon.

In the month of November you had read into the record a resolution passed by the General Assembly of the Presbyterian Church in Canada reflecting the attitude of our denomination to the grounds for divorce in Canada. At that time you seemed to think that perhaps the Presbyterian Church would make no further submissions. On our part, we felt we should explain our position a little more in terms of the document you have before you containing supportive reasons why we thought the ground should be broadened to some extent, and since your committee has graciously invited us to speak to you this afternoon we are prepared to do so.

We did not prepare a lengthy brief because we knew that other denominations had made representations to you. The United Church of Canada had submitted to you a document of considerable length, and having seen press reports of it, which we read in detail, we felt, as the first press reports came through, that we were in agreement with that document and so we did not think it worth while to repeat.

We did deem it necessary, however, to give supportive reasons for the position which we have taken and which appears in the brief that is in your hands.

Ours basically is a theological paper. It does not go into the legal aspects of the subject, or make specific recommendations; it simply points out the theological principles involved, as we in our communion understand them.

It is noteworthy that the Presbyterian Church has had as its doctrine for three hundred years that the grounds of divorce are adultery plus wilful desertion of such a kind as cannot be remedied by the Church or the Civil Magistrate; and our Church has now recognized that the grounds of divorce dictated by our doctrine are broader than the grounds now appearing in the Statutes of the Dominion of Canada.

We have been able to secure acceptance in our Church of the position we have tried to state in this brief. We think this is notable because our Church has been regarded traditionally as conservative on theological and moral issues; but there does seem to be a real temper in our Church which corresponds to a great extent to this submission and, I am sure, many others of the submissions your committee has received over the past few months.

What we desire to do is to make two points: first of all that there are other things besides adultery that kill marriage; there is wilful desertion, according to our doctrine. Our doctrine is based primarily on the Scriptures, and supportively on the Westminster Confession of Faith; and it is the Westminster Confession of Faith that gives the two grounds of adultery and wilful desertion.

The second of the two points I have mentioned is that our Church is not in favour of easy divorce. We believe that society as a whole and the Christian Church in particular have a reponsibility to safeguard the institution of marriage, and as well the souls of the people who are involved in the breakdown of marriage, and those of their children.

We feel that the Church as a whole and society as a whole ought to be doing all it can to preserve the institution of marriage, and all the benefits that flow from it, and those are the two points which we desire to make. Would it be your wish that I should now read the brief, Mr. Chairman?

The CO-CHAIRMAN (*Senator Roebuck*): Yes, Mr. Smith, if you please.

Mr. SMITH: This is the brief as we have prepared it:

A BRIEF CONCERNING CANADIAN LEGISLATION ON DIVORCE

To the Joint Committee of the Senate and House of Commons on Divorce.

The Board of Evangelism and Social Action of the Presbyterian Church in Canada has already informed the joint committee of the position taken by the General Assembly of the Presbyterian Church in Canada with respect to the grounds for divorce. This position was taken in June 1963 when the General Assembly adopted the following recommendation from its Board of Evangelism and Social Action: "Whereas the teaching of the Westminster Confession of Faith re Marriage and Divorce (chapter 24, section 6) is that 'although the corruption of man be such as is to study arguments, unduly to put asunder those whom God hath joined together in marriage; yet nothing but adultery, or such wilful desertion as can no way be remedied by the Church or the Civil Magistrate, is cause sufficient of dissolving the bond of marriage: wherein a public and orderly course of proceeding is to be observed, and the persons concerned in it not left to their own wills and discretion in their own case'; we, therefore, recommend that the General Assembly urge the federal Government to appoint a Royal Commission on Divorce to consider such grounds for divorce in addition to adultery as 'Wilful desertion as can no way be remedied by the Church or Civil Magistrate'."

It is therefore the stated position of the Presbyterian Church in Canada that other grounds for divorce exist alongside the grounds of adultery. These additional grounds are called "Wilful Desertion" in the Westminster Confession of Faith. This document forms the subordinate standard of our Church's doctrine, in that we find it agreeable to the Word of God.

It is the purpose of this brief to present supportive reasons why present law on divorce ought to be amended so as to include such additional grounds as are here called "Wilful *Desertion*".

Supportive Reasons

I. The Break-down of Marriage.

The bible understands marriage as an indissoluble union between a consenting man and woman, for their mutual help, the raising up of legitimate issue and for the good ordering of family life and society. The bible thinks of marriage as a wedding of the soul and body of a man and woman of such a profound kind that "they become one flesh".

Thus the Christian Church has always believed that God's Will is that marriage be permanent.

But the bible and Christian tradition are completely realistic in acknowledging the capacity of man, in his sin and weakness, to frustrate the purpose of God. Sin or weakness (or both) is apt to destroy relationships between God and man, between man and his neighbour, between a man and his wife. It is thus possible for a marriage to die, and death may result from other causes besides adultery.

II. The Nature of Wilful Desertion.

It is necessary to ascertain, if we can, what the authors of the Westminster Confession of Faith meant by the expression "Wilful Desertion". The Rev. Dr. L. H. Fowler who has studied this matter is of the opinion that wilful desertion meant the rejection of the one flesh relationship. He says: "Desertion is not a matter of geography, but one of not continuing to consummate the marriage. A wilful geographic separation is desertion, but there can be the same desertion

while the parties occupy the same house and the same room. In other words, the Westminster Confession of Faith teaches that desertion is adultery in reverse. The Confession of Faith indicates that transgression against the bond (adultery) or denying the bond (desertion) breaks the bond itself."

Thus the expression "Wilful Desertion" may have several meanings today. In the first place it may mean non-support in an economic sense. It may also mean the refusal of one or both partners to continue in the one flesh relationship, that is to say, refusal of physical intercourse. Wilful desertion may also be interpreted in the sense of emotional non-support. Thus, mental cruelty might come under the category of wilful desertion.

III. Where There is No Remedy.

The Westminster Confession of Faith would warn us, however, that divorce must be regarded as a last resort. We are discouraged from favouring any measure which would make divorce quick and easy, and are to favour only those measures which will help families in real distress.

The foregoing quotation from the Westminster Confession of Faith would only admit as grounds for divorce "Such wilful desertion as can no way be remedied by the Church or Civil Magistrate". And when divorce proceedings are undertaken we are urged to see that "A public and orderly course of proceeding is to be observed, and the persons concerned in it not left to their own wills and discretion in their own case".

The Church and the Civil Magistrate are both urged to remedy sick marriages and to refrain from allowing couples to exercise their own wills and discretion.

Thus, our Church does not hold that divorce is the natural consequence even of proved adultery or wilful desertion. There is an obligation placed upon Church and Society to explore every means of reconciling the partners in a sick marriage to the end that their marriage may be rehabilitated and preserved. Where there is the slightest spark of mutual love and concern, there is hope. Divorce belongs only where a marriage has died.

Respectfully submitted,

The Executive of
The Board of Evangelism and Social Action,
The Presbyterian Church in Canada.

Mr. Chairman, from a procedural point of view I would ask whether your committee would be interested to hear further about certain studies that the Family Life Committee of our Church has undertaken with regard to the whole matter of grounds for divorce, and also about remarriage.

We have mentioned that we had prepared this commentary on *Marriage, Divorce and Remarriage*, which I believe your committee now has on hand. The Rev. Arthur Gowland would be pleased to speak to this. It has not the same standing as the resolution on page 1, but it has received general approval throughout the Church.

The CO-CHAIRMAN (*Senator Roebuck*): We are in your hands rather than you in ours. Shall we ask you some questions now, or shall we hear the other members of your delegation and then have a question period?

Mr. SMITH: If the committee so wishes, questions can be asked about the brief I have just read and we could deal with the subject generally afterwards.

The CO-CHAIRMAN (*Senator Roebuck*): I think that would be a good course to follow.

Senator HAIG: Referring to the words "yet nothing but adultery, or such wilful desertion as can no way be remedied": in what way can the Church or the civil authorities remedy such a breakdown of marriage?

Mr. SMITH: It is possible for the Church to undertake certain counselling procedures; and our committee has also discussed the role the courts could play in the matter of conciliation or reconciliation to rectify sick marriages before the breakdown actually takes place. We realize there is a very real limit placed on society at this point having regard to the functions of social workers, family courts, and so on; but we would hope the day might come when it would be possible for society to say to a couple: Your marriage is sick, you need a waiting period, you need time for counselling with other persons; and we should make provision to deal with these varied problems before divorce proceedings are entered into on a large scale.

The CO-CHAIRMAN (*Senator Roebuck*): Would you give the court authority to say: Come back in six months and we will talk to you again.

Mr. SMITH: There are other members of our committee who have been discussing this aspect recently.

Senator HAIG: The brief also says: "...wherein a public and orderly course of proceeding is to be observed, and the persons concerned in it are not left to their own wills and discretion in their own case". What do you mean by "a public and orderly course of proceeding is to be observed"?

Mr. SMITH: The language of this document which is quoted is of seventeenth century vintage when the powers of the Church and the Civil Magistrate were otherwise than they are today. I would understand by these words, as applied to a temporary situation, that couples should not be left to their own decision to say: We desire a divorce, and we consent to a divorce.

The CO-CHAIRMAN (*Senator Roebuck*): You are not in favour of divorce by consent?

Mr. SMITH: That is right.

Senator BELISLE: Towards the end of the first paragraph the brief says: "we, therefore, recommend that the General Assembly urge the federal Government to appoint a Royal Commission on Divorce." Are we to understand that you would rather have a royal commission than this committee?

Mr. SMITH: This resolution was placed before our General Assembly in 1963 before your committee was set up. I am sure the Church in Canada is indeed delighted with the manner in which this Parliamentary Committee has proceeded in this matter.

Senator BELISLE: That is a very diplomatic answer.

Mr. SMITH: We are used to that in the Presbyterian Church.

Mr. MCCLEAVE: And we are used to giving such answers here.

Mr. SMITH: The resolution holds official status in our Church at the present time. No similar statements have been authorized by the General Assembly since 1963.

Mr. GOWLAND: Our Church has been concerned about this for a good many years.

Senator BELISLE: Last Tuesday we heard an eminent jurist from Nova Scotia who told us his thinking was, not for the committee to recommend a widening of the grounds for divorce but to consider the advisability of having a family court which would be less expensive to the parties seeking divorce, with authority to deal with such cases without going through the superior courts. It was suggested that this would facilitate proceedings.

Mr. SMITH: The point being made is that we should proceed by way of family courts rather than as at the present time, with an extension of the legal grounds for divorce.

Senator BELISLE: He was speaking of local family courts.

Mr. SMITH: I am sure our Church would take very much the same view. What we are concerned with is marriage breakdown. This is an expression which I know has been used before your committee by other denominations and other groups. Our Church arrived at pretty much the same point of view, that there is a distinction between marital offence and marriage breakdown; and, by far, a better understanding of what happens is "marriage breakdown.

Senator BELISLE: Desertion, in your brief, would indicate marriage breakdown?

Mr. SMITH: Yes. It is a symptom of the disease, and so is adultery.

The CO-CHAIRMAN (*Mr. Cameron*): Does your thinking indicate that the Presbyterian Church would favour the theory of compulsory or enforced desertion as, for example, where a person is serving a long prison term, or becomes insane with no reasonable expectation of regaining sanity? Would your Church regard that as falling within the ambit of "wilful desertion"?

Mr. SMITH: Our view of legal desertion is stated in the terms I have already outlined. We have made explicit the possibility of wilful desertion including non-support emotionally, physically and financially. Once again, the document from which we have drawn our doctrine is now three hundred years old, so that the distinction which we are accustomed to making today between things which are wilful and things which are compulsory was not so finely drawn then. I presume the climate in our Church would be such as to conduce to a more compassionate point of view, such as our sister denominations evidently have, so as to permit of the inclusion of mental illness and some forms of imprisonment as coming within the so-called grounds.

The CO-CHAIRMAN (*Senator Roebuck*): I believe you have a question you wish to ask, Mr. Stanbury?

Mr. STANBURY: May I say to the Rev. Mr. Smith that for a body which is traditionally conservative the Presbyterian Church in Canada seems to be very liberal in the position it is taking on this subject, and I am glad to see it, as a member of the Church. I am interested to know whether any of you gentlemen have knowledge of the redrafting or updating of the Westminister Confession of Faith that has taken place in the United States, and whether or not any of these issues have been clarified in that updating process.

Mr. GOWLAND: This statement of Faith that Mr. Stanbury is talking about does not deal with this question of marriage and divorce. It may be dealt with in some other place but not in the particular statement that Mr. Stanbury refers to.

Mr. SMITH: The two major Presbyterian denominations in the United States did revise the Westminster Confession of Faith rather radically fifteen years ago, and I believe our committee has seen the chapter on marriage and divorce, but I am afraid I cannot remember the details of the report.

Mr. STANBURY: May I ask one other question. Have you envisaged any requirement in the law whereby some sort of counselling procedure, with a view to reconciliation, should be complied with before dissolution of marriage takes place.

Mr. SMITH: I would suggest that either Mr. Young or Mr. Cromey reply.

The CO-CHAIRMAN (*Mr. Cameron*): May I ask Mr. Stanbury to be good enough to allow his question to remain unanswered for a moment or two so that I may ask this question. On page 2 I see mental cruelty mentioned as within the definition of wilful desertion: that is to say, if a marriage has broken down by reason of mental cruelty it is really the same thing as desertion. Would you also include physical cruelty?

Mr. SMITH: I would say so, sir, inasmuch as what underlies our philosophy here is desertion of responsibility, desertion of what the bible calls the one-flesh relationship, and the point we are making is that these are manifestations. We recognize these.

The CO-CHAIRMAN (*Senator Roebuck*): My Co-Chairman has asked you whether you would include involuntary separations such, for instance, as prolonged illness which makes impossible the continuation of the real marriage estate; a long sentence in one of the penitentiaries, illness such as we run into a number of times, of a mental character; or perhaps just involuntary separation where the husband disappears without any fault on any person's part and the marriage is gone. Would you recognize that as desertion? Mr. Gowland, would you take in my question at the same time? I would like to have the answer on the record so that those who read it will be influenced by the person who is speaking.

May I say for the record that the Rev. A. J. Gowland has his B.A. and M.A. from the University of Toronto and graduated from Knox College in 1937; he also took post-graduate studies in New College, Edinburgh. Before his appointment as Secretary of the Board of Evangelism and Social Action of the Presbyterian Church in Canada he was a minister in congregations in Oakville, St. Mary's and Toronto, Ontario, and Calgary, Alberta. As in the case of Mr. Smith, he had the opportunity as a pastor to counsel people in all aspects of family life. He has been Secretary of the Committee on Family Life from its beginning and shared in the writing of the commentary entitled *Marriage, Divorce and Remarriage.*

The Rev. A. J. Gowland: Mr. Chairman, with reference to your question whether the conditions you have indicated could be included in our understanding of the term "wilful desertion," I believe they could, for the reason that the Westminster Confession of Faith indicates that the primary purpose of marriage is the mutual help of husband and wife. If we believe that this is the primary purpose of marriage, then, if a man by reason of imprisonment is separated from his partner for a period of 15 to 20 years, such separation has really destroyed the primary purpose of the marriage, and so I believe this could be included.

CO-CHAIRMAN (*Senator Roebuck*): With no prospect of change.

Mr. GOWLAND: With no prospect of change.

CO-CHAIRMAN (*Senator Roebuck*): Thank you for that answer, Mr. Gowland.

Mr. HONEY: We have had some evidence and submissions before us dealing with the matter of separation as a ground for dissolving marriage, and some of the people who have appeared have indicated that separation by mutual consent, even if for two or three years, should be a ground of divorce. In other words, if the parties are not able to live together in harmony, that might be considered a proper ground. Would it be your view that this would not be acceptable as a ground for divorce if the separation were by mutual consent?

Mr. SMITH: I return to our view that persons should not be left to their own discretion and desire in this matter. We believe that what is at stake is not only the pleasure of the couple but the whole fabric of marriage, and I would doubt that our Church as a whole would look favourably on this as an additional ground for divorce.

Mr. MCCLEAVE: Just as a follow-up question, there might be a refusal of either or of both parties, and if there is only a one-flesh relationship that refusal to have physical intercourse would be broad enough to cover voluntary separation in the sense that if it were mutual both would have refused to live in the one-flesh relationship.

CO-CHAIRMAN (*Senator Roebuck*): What about the case where only one refuses?

Mr. MCCLEAVE: I am following up the idea of voluntary separation and I thought my question was proper. I hate to sound as if I were cross-examining, or as if I were niggling, but one sentence refutes what the witness said in answer to Mr. Honey's question.

Mr. SMITH: I do not believe we would be able to carry our Church along with an interpretation that would simply leave matters to a decision to be taken by a couple that they now wish to live separately and that after a certain lapse of time they could have their divorce recognized.

CO-CHAIRMAN (*Senator Roebuck*): Mr. McCleave himself at a previous hearing where this same subject was discussed put this problem to a witness. He said: Here is a man who marries a woman. They have some children and he deserts her, does not support her, and at the end of three years he comes back and against her will asks for a divorce. Would you give it to him?

Mr. SMITH: What was the former witness' reply to that question?

CO-CHAIRMAN (*Senator Roebuck*): He said yes. He was supporting a theory. What would you say, Mr. Smith?

Mr. SMITH: One of the beauties of the Presbyterian system, Mr. Chairman, is that we can refer things back to Church courts where they may be talked about at some length, and I probably would refer this question back to the Church court.

Senator HAIG: Another diplomatic answer.

Mr. MCCLEAVE: You disagree with divorce by consent, I take it. One of the Christian virtues is forgiveness. Now suppose one of the parties found the other had been guilty of adultery and, despite the offence, said: I will forgive you and perhaps the marriage can be resumed. That is one way in which the matter could be settled. But suppose that person were to say: I believe you are guilty of adultery and I am going to take action against you in court, and for the purpose I will use the very skimpy motel or hotel evidence which, where there is no defence, generally enables a divorce to be granted. There you have another way of settling the matter. Obviously divorce by consent can be looked at in two different ways. In one case the offending party and the innocent party have in effect agreed that because of the sin of the one the marriage shall be dissolved; and in the other case they in effect agree that the marriage be resumed. I suggest that you might wish to qualify your answer on divorce by consent, bearing that in mind.

Mr. SMITH: At the bottom of page 2 of our brief we make somewhat the same approach. We say: "Thus, our Church does not hold that divorce is the natural consequence even of proved adultery or wilful desertion." That is to say, we certainly regard it as being more in accordance with the essence and true meaning of marriage to approach marital problems from the point of view of confession and forgiveness than to put the main emphasis on legal requirement and to say that once this is violated the marriage is at an end.

Mr. MCCLEAVE: May I ask one final question? One of the great difficulties is in the field of reconciliation. It is the conviction of many of us that once these matters find their way into legal offices the lawyers cannot get the parties to go back. I am sure any barrister worth his salt would try to keep a marriage together; but once writs or petitions are issued reconciliation at that stage is impossible. Can you suggest any solution to this difficulty that faces us in trying to bring about reconciliation? To be specific, perhaps we could start at some level before the matter gets to the legal office.

Mr. SMITH: I suggest that Mr. Young could deal with that.

The CO-CHAIRMAN (*Senator Roebuck*): I suggest that at this stage we should hear the other members of the delegation and then resume the question period if we have time. Mr. Gowland, have you anything further to say to us?

Mr. GOWLAND: I will not take too much time, but Mr. Smith suggested that I might indicate some of the features of the commentary on *Marriage, Divorce and Remarriage.*

In this document you have in your hands we have discussed the question of adultery as a ground for divorce and emphasized the fact that even if adultery is committed by one of the parties to the marriage it should be looked upon as permissive and not normative: it does not necessarily lead to divorce and there should be an element of reconciliation.

On the whole question of divorce, we underline the fact that divorce is something required of necessity, which was not in the original purpose of God, and we have discussed this question of what we mean by wilful desertion. But we did discuss also, in the commentary, the status of the innocent party in a divorce action, and it was the consensus of our committee that it is a very difficult thing to determine who is the guilty party. There may be more fault on one side than on the other, but in many instances there is some fault on both sides. It is therefore not practical to designate one party as the innocent party, for both share in responsibility.

The CO-CHAIRMAN (*Senator Roebuck*): You would not say that is always so? There is in English law a principle that a person is presumed innocent until at least something is shown of guilt.

Mr. GOWLAND: We recognize that this could be; but our view is that it is a very difficult thing for anyone outside to know who the innocent party is or who the guilty party is.

We were looking at this question from the point of view of the minister who is called upon to officiate at a remarriage of persons who had been respectively divorced. How is the minister to know who the innocent party is? And this is a problem that confronts every minister of the Gospel.

The CO-CHAIRMAN (*Senator Roebuck*): But that is aside from the question before us. We are thinking of the court: what answer shall the court give when one person asks for a divorce?

Mr. SMITH: At the present time our delegation sees a difficulty with this distinction between innocent party and guilty party; because, in the counselling that takes place very often where the marriage is breaking or has broken, we discover that the man has been driven to drink or adultery—or the woman, on the other hand—and this creates a difficulty. The distinction that the law makes between innocence and guilt may be necessary in the present procedures, but it is not necessarily something we can look at uncritically and take for granted in a situation of remarriage.

When, however, it comes to dealing with the psychological and emotional impact that is made on an individual, whether that person is regarded as innocent or guilty in a degree, I am sure we would favour the kind of submissions your committee has been receiving, in the hope that the problems of divorce would be considered from the point of view of marriage breakdown rather than in terms of marital offence.

Mr. HONEY: I would like to say this. It seems to me, with respect, that you are taking a paradoxical position here. I agree with the theory that we should not try to assess the guilt of either party, we should endeavour to avoid that if possible; but though apparently you would not like to accept divorce by mutual consent you do assert the doctrine of wilful desertion, in which case your

position is that in such a situation there must be, before an action can be instituted, a guilty party. There must be someone who has deserted someone else; because I take it from what you have said that in the case of wilful desertion, the husband deserting the wife, let us say, she would be entitled to sue for divorce, but only as the innocent party: if she were a guilty party she could not sue. In other words, the determination of innocence would have to be made under your theory of wilful desertion.

Mr. SMITH: I would regard both adultery and desertion as symptoms of a relationship that has been broken; and it is in this sense that I say it is not helpful to say that one party is innocent and the other guilty. We know that some things happen to disrupt the relationship, and often it takes two to bring that about.

Mr. HONEY: In the case of the husband, there might sometimes be good reasons for his deserting, but unless you explored the reasons you could not permit him to institute action for divorce under the thesis you have put forward.

Mr. SMITH: The answer to that is that before divorce proceedings were begun there should be investigation with a view to rehabilitating the marriage to find out what the reason was for the breakdown.

In regard to everything we have to say in this brief it must be taken for granted that there has been this prior investigation looking to the rehabilitation of the marriage.

Mr. STANBURY: A short while ago I asked whether these gentlemen felt that the law should prescribe some procedure that would have to be gone through before dissolution, or perhaps before the commencement of proceedings for dissolution, there being provision for a certain waiting period to give the parties a proper opportunity to decide.

Mr. SMITH: The consensus of our commentary and brief would add up to this: that State and Church should take some action and not leave it to the individuals themselves.

Mr. MCCLEAVE: I suggest, Mr. Chairman, that the next member of the delegation be introduced. He could answer my question about reconciliation.

The CO-CHAIRMAN (*Senator Roebuck*): May I introduce Mr. Young. He was born in Port Elgin, Ontario, and received his B.A. degree from the University of Toronto, and is a graduate of Knox Theological College, Toronto, Ontario. He has been a minister of Presbyterian congregations in Pictou, N.S., Collingwood, Ontario, and is at present the minister at St. Andrew's Presbyterian Church, Hamilton, Ontario. As a pastor in the aforementioned congregations he has had wide experience in pastoral and marriage counselling. He is also the Chairman of the Board of Evangelism and Social Action of the Presbyterian Church in Canada. Mr. Young.

The Rev. YOUNG: I would like to preface the answer I will attempt to make to the question raised by Mr. Stanbury, Mr. McCleave and an honourable senator whose name I missed. In the matter of counselling, either voluntarily or as a requirement of law, I would offer this comment from the standpoint of a minister in a pastoral situation confronted by couples wishing to be married, where one at least has had a previous divorce.

In some ways the present law on divorce makes divorce too easy. This may sound rather strange in that we are trying to widen the grounds of divorce; but divorce is too easy in this sense. If adultery is proven, whether it be adultery *de facto* or adultery that is trumped up, the time involved is really not very long, so that it is possible for a person to be asking to be remarried within, say, 18 months of the time when the previous marriage ceased, or the parties ceased to

live together, and application was made for divorce. As soon as they have the final decree they can obtain a licence and present themselves to a minister.

The minister, from his point of view, seriously questions whether this person is ready for remarriage. There should be a longer waiting period before they can get a licence and be remarried. This is all related to the question that has been asked, and in answering the question I would like to restate it: whether the court should require counselling, and how it should be undertaken.

When a couple decide that the only answer to their impasse is a divorce, if they were to make application to the court, the court might say to them: All right, but you must wait a reasonable length of time, during which period you will be obliged to undergo some competent counselling, to the end that your marriage may be saved. And the report of the counselling proceedings will then be brought before this court if and when, after a reasonable period of time, you wish to continue the proceedings.

When I say "reasonable length of time" I suggest eighteen months after the application has been filed: provided it can be shown that for at least eighteen months previous to the filing of the application the marriage was in a very serious state—in fact, a state of incompatibility.

This makes a total of three years, but not three years after the application; there could be a retroactive element. In this way, I believe, we would serve the parties to the marriage, the community as a whole, the Church and its ministers, in requiring counselling.

Co-Chairman Senator ROEBUCK: Would you give that authority to the minister?

Mr. YOUNG: Do you mean the clergy?

Co-Chairman Senator ROEBUCK: Yes.

Mr. YOUNG: Well, the clergyman, of course, has this opportunity now if they come to him voluntarily. Do I take it your question is: Would the court refer the parties to the minister?

Co-Chairman Senator ROEBUCK: You are talking about remarriage and the question is whether you would give that authority to the minister to say "I will marry you in six months' time, or a year and six months".

Mr. YOUNG: My concern is that the divorce itself be delayed.

Co-Chairman Senator ROEBUCK: Would you give that discretion to the judge to say: We will adjourn this case for six months or a year and a half in order that you people may counsel with some competent person.

Mr. YOUNG: Yes; and perhaps the judge would direct them to some social or counselling agency, maybe a minster if they have a church relationship, and require that the report of these counselling sessions be transmitted to him.

Senator HAIG: Isn't that similar to what Judge O Hearn said the other day? The Family Court would have facilities and counselling—provision would be made for counselling and reconciliation if possible. But what happens if the two parties do not agree to counselling and are determined to get the divorce. Then either they get the divorce or they enter into a common-law relationship. What happens? How can you prevent the provincial government granting a licence to two parties who are of the right age and are perfectly able to get married?

Mr. SMITH: You can lead a horse to water, of course. And yet, I would imagine, there would be many couples involved in a very serious marital problem, whose scope is limited to discuss things between themselves. They get to the point where they can no longer sanely and wisely discuss these matters, and either from lack of contact or through embarrassment they do not seek anyone to counsel with.

Senator HAIG: Of course, as regards counsel service before divorce, there should be an adjournment for six months; but after divorce is granted I do not see how you can get two individuals or four individuals to agree to counsel service for another six months. I agree with counselling before application. The application might be delayed six months.

Mr. YOUNG: I was misunderstood in my remarks because the waiting period I was advocating was before the granting of divorce, not after.

Senator HAIG: Thank you.

Co-Chairman Senator ROEBUCK: I think perhaps it was my error in the way I framed my question. The witness has made that clear from the very first that he was talking about the time prior to the divorce and not afterwards.

Mr. WAHN: Let us assume a situation where one spouse has been guilty of adultery, and this investigation which has been referred to is made and the conclusion reached that despite the adultery the marriage is not irretrievably lost, and that if the divorce is refused there is the chance that the marriage can be rehabilitated. Would you permit divorce in such circumstances where adultery is proved? What is the view of your Church on that—that the divorce be permitted? Adultery is proved, but on investigation it is believed that the marriage can nevertheless be saved. What is the result?

Mr. GOWLAND: This is the point I made as a result of a study by the Committee on Family Life: that even if adultery has been proved it does not necessarily lead to divorce. It is permissive, not normative.

Mr. WAHN: Would you refuse the divorce if a study indicated that the marriage could be saved even though adultery had been proved?

Mr. GOWLAND: Yes; and that is in harmony with the doctrine of the Church.

Mr. WAHN: If you look at the Westminster Confession you will observe it indicates that adultery is the basis for divorce, "or such wilful desertion as can no way be remedied by the Church or the Civil Magistrate". Those words are made applicable not to adultery but to the other cause. I gather, however, supposing adultery is proved, that if as a result of investigation it is determined that the marriage can be saved you would be in favour of refusing the divorce on the ground of adultery?

Mr. GOWLAND: That was the consensus of our committee. We felt that this was the teaching of our Church on this subject.

Co-Chairman Senator ROEBUCK: We have not heard from Mr. Cromey and so I will introduce him to the members of the committee and to the record. Mr. Cromey was born in the North of Ireland. He received his B.A. degree from Queen's University and is a graduate of the Assemblies Theological College in Belfast, Ireland. After graduation from the Assemblies College, Mr. Cromey spent seven years as a missionary in India. On his return from India he was minister in the Presbyterian Church in Northern Ireland for three years. He came to Canada ten years ago and has been a minister of Presbyterian Churches in Galt and Kincardine and is at present the minister of St. Andrew's Church, Markham, Ontario, and St. James Church, Stouffville, Ontario. Like the other members of the delegation, he has had wide experience in pastoral and marriage counselling and for the past three years has been a member of the Committee on Family Llife of the Presbyterian Church in Canada. Mr. Cromey, may we hear from you.

The Rev. Fred H. Cromey: I appreciate the privilege that has been accorded us of presenting this cause to your committee who are considering the problems of marriage and divorce. The subject is dear to our heart as a Church be-

cause—and I believe I speak not only for myself but for the Church—we put great emphasis on the love of God towards men, and the understanding of God, and we strive to work the problem out in delicate situations resulting from strained family relationships.

I can say that in my own expreience I have found that time has healed many wounds and brought the members of a family together, not only parents but children. Wounds have been healed and time has been of the essence in many of the problems that we have encountered, and our experience has been that many marriages have been saved by making time an almost compulsory element.

Mention has been made of a period of a year and a half or two years. In the car coming up to Ottawa we recalled an instance where a man did leave his family and after three years discovered what a fool he had been and was reunited with his wife and children, and they lived happily ever after, as the story goes.

This phase of our work is woven into the brief in the third section, where we say: "Our Church does not hold that divorce is the natural consequence even of proved adultery or wilful desertion. There is an obligation placed upon church and society to explore every means of reconciling the partners in a sick marriage to the end that their marriage may be rehabilitated and preserved." That has been brought out, and I repeat it by way of emphasis.

Co-Chairman Senator ROEBUCK: Have you considered the matter from the standpoint of the children? From the standpoint of partners and public we have heard evidence. But what about the children? We have been told there are 50,000 common-law marriages in Canada and there are barbarous laws with regard to illegitimacy. It means therefore that a very large number of children come into the world as bastards. I am not inventing the word, but it is a nasty word, and many children start life with two strikes against them as a result of it.

Have you studied the question of compulsory delays, having regard to the right of children to be born within the married state of their parents rather than from this common-law union, so called, about which there is nothing common and nothing of law. The children have rights, have they not?

Mr. CROMEY: Unquestionably.

The CO-CHAIRMAN (*Senator Roebuck*): My question is: Have you considered the possibility of there being still more illicit relationships and more illegitimate children as a result of any compulsory delays, certainly after the divorce has been granted if not during the time in which it is being considered?

Mr. CROMEY: This is certainly a very grave problem, but I feel that during this period of consultation there is every reason to hope that the mere fact that the case is being considered would serve as a deterrent to an illicit relationship with somebody else. So long as interested persons are discussing the matter, so long as hope is held out of reconciliation, we have reason to believe that the parties will be thinking back to the former state instead of thinking of seeking the gratification of their present desires. That is one factor to which I would call attention.

The CO-CHAIRMAN (*Senator Roebuck*): You think it would be a factor in some cases?

Mr. CROMEY: Yes.

The CO-CHAIRMAN (*Senator Roebuck*): But not in all cases?

Mr. CROMEY: No.

The CO-CHAIRMAN (*Senator Roebuck*): So that specific compulsory delays are to be considered in the light of their danger to the children of illicit marriages?

Mr. CROMEY: Yes.

The CO-CHAIRMAN (*Senator Roebuck*): We have reached about the limit of our time and I would like to hear from my Co-Chairman Mr. Cameron. Have you something to say, Mr. Cameron?

The CO-CHAIRMAN (*Mr. Cameron*): Senator Roebuck and members of the committee, it is a great pleasure for me, as a member of the Presbyterian Church and an Elder of that Church, and having been brought up in the Westminster Confession of Faith, to listen to this presentation today. I believe I understand pretty throughly the rationale of Presbyterian thinking, and what has been outlined here, in my opinion, covers the ground in a very wide way. It is a matter of common sense. The last speaker realizes that in dealing with divorce you are dealing with all types of persons, and what may be applicable to one may not be applicable to another. However, I do not wish to discuss my Presbyterian background. I simply wish to assure the gentlemen of the delegation that, having heard their presentation, we are much impressed with the manner in which they have conveyed their point of view and the point of view of the Presbyterian Church. We wish to thank you, gentlemen, very sincerely for your appearance here today.

Mr. SMITH: On behalf of the delegation I thank you and the members of the committee for your cordial hearing and the privilege of appearing before you to present the view of our Church on the subject.

The CO-CHAIRMAN (*Senator Roebuck*): Gentlemen, we have a second distinguished delegation before us, namely The Canadian Psychiatric Association, which is the national medical association for physicians who specialize in psychiatry. The association was incorporated under Part II of the Companies Act. Letters Patent were issued by the Secretary of State for Canada on June 1, 1951. The membership is approximately 1,300 in January 1967. The Canadian Psychiatric Association has been affiliated with The Canadian Medical Association since 1954. Nine provincial psychiatric associations are affiliated with the national body.

We have before us two prominent members of that association, the first of whom to address you will be Dr. Jean Baptiste Boulanger, born August 24, 1922. His degrees are: B.A., M.A., L.Ps., D.I.P. (Paris) M.D., F.R.C.F. Dr. Boulanger is Associate Professor of Psychiatry, Faculty of Medicine, University of Montreal. Consultant in Psychiatry, Institut Albert Prevost, the General Hospital of Verdun, Lakeshore General Hospital. Consultant in Child Psychiatry and Director of Group Psychotherapy, Hospital Ste. Justine. Chairman of the Committee on Psychiatry and the Law, Canadian Psychiatric Association. Director, Canadian Psychiatric Association; Director, Quebec Psychiatric Association; Past President, Canadian Psychoanalytic Society; Past Director and Member of the Training Committee, Canadian Institute of Psychoanalysis. Dr. Boulanger is Associate Editor of the Canadian Psychiatric Association Journal. We shall be glad to hear from our witness.

Dr. Jean Baptiste Boulanger (The Canadian Psychiatric Association): Mr. Chairman, I wish to thank the committee for its invitation, even though we were a bit late in applying for it. This is not to be taken as evidence of a lack of interest on our part, for we were quite aware of the fact that the general situation which gave rise to the creation of this committee was under discussion in Parliament.

I would like to make it clear that we endorse the brief that has been submitted by the Canadian Mental Health Association. In fact, we sent a telegram endorsing it. But this is an independent recommendation of the Canadian

Psychiatric Association, which is the national association of physicians specializing in psychiatry and having affiliated provincial organizations of psychiatrists across Canada.

A Committee on Psychiatry and the Law was established at the 1966 Annual General Meeting of the Canadian Psychiatric Association held in Edmonton, Alberta, with the following terms of reference as defined by the Board of Directors: "To recommend policy to the Board of Directors regarding existing legislation of concern to psychiatry and proposed amendments thereto."

According to the usual procedure in our Association, a chairman for this committee was appointed and he in turn selected members in his own geographical area to serve on the committee. The members of the nucleus group were: Dr. J. B. Boulanger, chairman, and Drs. Bruno Cormier, Alan Mann and Lucien Panaccio. Corresponding members from all across Canada were invited to join our committee, and we have in all 10 representatives of the 10 provinces plus the four members of the nucleus committee.

This committee met twice, on July 20 and July 22, and a draft was circulated to all corresponding members, and after the receipt of their answers, a final draft was drawn on December 19 and presented as a report to a meeting of the Board of Directors held in Toronto on the 26th January of this year.

I emphasize the fact that the section concerning mental illness as a ground for divorce was circulated on July 29, 1966, independently and was unanimously accepted by all corresponding members and also unanimously endorsed as a recommendation by the Board of Directors of our Association. It represents, therefore, the official position of the Canadian Psychiatric Association. It was also the expression of opinion of the Association at large, that the present divorce procedure in the Canadian Parliament needs considerable improvement. There are quite a few Roman Catholic members in the committee and in the Association and there was no dissident opinion about the need for a revision of the divorce law.

The committee and the Association feel that grounds for divorce obtainable through private bill, should not differ, essentially, from the grounds accepted for legal separation.

The Association is opposed to the extension of grounds for divorce to illness in general, and the Canadian Medical Association will be asked to support this stand. If, however, Parliament decided otherwise, the committee and the Association would disapprove of the discrimination against mental illness. We have reviewed the legislation in the United States permitting divorce for chronic mental illness. Three conditions are variously applied: (a) The concept of incurable insanity. (b) Length of commitment, which may vary from 18 months to five years. (c) Expert opinion, which may be that of an executive officer, or the consensus of five qualified psychiatrists. None of the statutes examined was found satisfactory and psychiatrically defensible.

In trying to be fair to both parties, the mentally ill and the mentally sound, of the marriage, the committee also rejects the provisions of the French "Code civil" on divorce. In France, any court litigation is prohibited while the respondent is committed, and mental illness is considered as an "excuse absolutoire": the jurisprudence including insanity, neurasthenia, nervous disorders, idiocy and epilepsy under "demence".

We have tried to be fair to both parties, the mentally sound and the mentally ill.

CO-CHAIRMAN (*Senator Roebuck*): You do not hold with the French "Code civil"?

Dr. BOULANGER: No. In conclusion, this is what we recommend. It is the resolution which has been adopted officially by the Association as received from the committee:

Resolution
Passed by The Canadian Psychiatric
Association
Board of Directors
January 26, 1967

> The Canadian Psychiatric Association is of the opinion that mental illness should not be legally introduced as ground for divorce or as a defence in a divorce case. The court would be asked to appreciate the behavior of the respondent without reference to its etiology and could grant a divorce on the grounds that the respondent's behavior is incompatible with the fulfilment of marital duties and parental responsibilities. The Association therefore opposes Bills C-133, C-79, C-58, C-55, C-44, C-19, C-16 and S-19, which provide for divorce on the basis of mental illness and are presently tabled in Parliament.

In a word, in our opinion mental illness should not be mentioned at all. What should be tried by the court, what should be left to the court, in our view, is whether the behavior of one or other of the parties is compatible with married life and the education of the children.

It is our opinion that a man or a woman can make life impossible in the home, whether that person is hallucinating or drunk, or whether he is just a nasty individual.

Another important aspect we would stress concerns the legal concept of guilt which has been very often mentioned. It is our opinion that married life is a shared responsibility; and when one knows, as a psychiatrist knows, what goes on, there is no such thing as lily-white innocence or unmitigated guilt.

If the concept of mental illness is to be introduced, we would have to obtain a unanimous criterion on the etiology and the diagnosis of such disease; and, as some of you know from court experience, it is difficult to find two psychiatrists who would agree on criteria.

We do not believe there is such a thing as incurable mental disease. We do not believe that diagnosis in itself entails any precise prognosis: in other words, the condition in a severe psychotic diagnosis may be cured in a few days whereas the condition with a rather benign diagnosis may entail for years, because in some patients there are great personal difficulties.

One last thing I would bring out is the question of a "privilege", which as you know is not protected in cases of divorce. We feel that it is extremely difficult for a patient to confide in a psychiatrist and really trust the psychiatrist if he or she is exposed to betrayal by the psychiatrist in a court action concerning his or her family life.

CO-CHAIRMAN (*Senator Roebuck*): Such betrayal has never taken place in any Parliamentary divorce. No psychiatrist ever appeared before a committee of Parliament who was required to answer any question that would necessitate a betrayal of confidence. I do not know what the ordinary courts do. Have you had any experience with courts that permitted a psychiatrist to be driven into divulging what he felt to be a confidence?

Senator HAIG: Do I understand you would not allow a court to grant a decree declaring a person mentally incompetent?

Dr. BOULANGER: The law does have some provisions about being mentally incompetent.

Senator HAIG: You have to get an order of the court, supported by affidavits of psychiatrists, and the court declares the person mentally incompetent.

Dr. BOULANGER: Yes; that would be incapacity. I agree that a person can be declared incompetent and committed for mental illness; but what we are dis-

cussing here is whether evidence should be brought, implying mental illness as grounds for divorce.

Mr. AIKEN: You would however permit a "mental condition," or a "condition of mind" properly defined, to be used as a ground of divorce.

Dr. BOULANGER: No. I would ask Dr. Chalke to answer that.

The CO-CHAIRMAN (*Senator Roebuck*): Shall we introduce Dr. Chalke?

Mr. AIKEN: The answer I get, then, is that under no circumstances would mental illness or a mental condition or any condition of mind be considered a ground for divorce?

Dr. BOULANGER: No. On the other hand, the behavior of the person could be examined by the court and the court would decide whether or not that behavior was compatible with the fulfilment of marital duties and family responsibilities.

Mr. AIKEN: This would open up a tremendous ground beyond a mental condition.

Dr. BOULANGER: If a man beats his wife every day, he may be doing it because he is hallucinating a voice, or because he is drunk, or because he is a nasty person or a psychopath or anything; but what is to be considered is the fact that it is impossible for his wife and children to live with him.

Mr. AIKEN: In the example you have cited it would be cruelty and not a question of mental disability; and you take the view that any other condition that might bring about grounds for divorce should be direct grounds and not the indirect grounds of mental illness?

Dr. BOULANGER: Yes.

Senator HAIG: Suppose a man or his wife is committed under a court order as mentally incompetent: are you suggesting to us that these two people could never get a divorce? We have a court order declaring a woman mentally incompetent, and after five years she is still in an institution; and you suggest that the husband cannot get a divorce?

Dr. BOULANGER: Dr. Chalke will answer that question.

The CO-CHAIRMAN (*Senator Roebuck*): I had better introduce Dr. Chalke: He is F. C. R. Chalke, M.D., University of Manitoba, 1943; M.Sc., Queen's University, 1948; F.A.P.A., 1959. Certified in Psychiatry, Royal College of Physicians & Surgeons (Can. 1950). Presently: Professor and Head, Department of Psychiatry, University of Ottawa,1959. Associate Dean, Faculty of Medicine, University of Ottawa, 1966. Chairman, Medical Advisory Board, Ontario Mental Health Foundation, 1962. Editor-in-Chief and Founder, Canadian Psychiatric Association Journal, 1955. Director, Canadian Psychiatric Association, 1966. Chairman, Committee on Law and Mental Disorder of the National Scientific Planning Council, Canadian Mental Health Association. Consultant in Psychiatry-Surgeon General, Canadian Forces Medical Service. Consultant in Psychiatry, Canadian Pensions Commission. Chairman, Panel on Psychiatric Research, Defence Research Board. Formerly: Medical Officer, Canadian Army, 1943-46. Senior Psychiatrist, Canadian Army, 1947-53. Private Practice of Psychiatry 1953-58. President, Ontario Psychiatric Association 1966-67. President, Canadian Association of Professors of Psychiatry 1965-66.

Our witness has had a most remarkable experience in psychiatry and medicine, and I have great pleasure in introducing Dr. Chalke.

Dr. F. C. R. Chalke, Professor and Head, Department of Psychiatry, University of Ottawa: Would you like me to reply director, Mr. Chairman?

Co-Chairman Senator ROEBUCK: Yes.

Dr. CHALKE: I think the problem that has been raised is one that should have received an answer thirty or forty years ago, at the time when moral judgments were all either black or white. This or that person was declared mentally ill by court order, and that even in the case of non-criminal offences, and the philosophy that prevails is one that dates back to the last century: that once you were mentally ill you were irremediably ill.

This philosophy has been completely abandoned by the medical profession. In the first place, the whole movement is to reduce the number of people admitted by court order, and this has been successfully done in some provinces of Canada and in Great Britain so that less than from 8 to 5 per cent need commitment; and we are pushing very hard to get people to stay voluntarily in hospital, though they can leave whenever they like. This is being done more and more, and there are fewer and fewer legal commitments. This reduces the number of people who are held against their will.

There is also a separation now of mental incompetency in relation to the management of business estates from unwilling hospital commital. There are people who are not mentally competent who are not in hospital—people who are mentally incompetent in regard to their property—but they are not incarcerated by any court order. To be delcared incompetent does not really mean you cannot manage your marital situation.

If a person is committed against his will, this of course creates a problem of being incarcerated the same as being in a penitentiary, and if it goes on and that person cannot get out, the impediment to marriage is the fact that he is, wilfully or unwillingly, separated. This is the impediment, not mental illness *per se*.

Senator HAIG: You are speaking now of certain degrees of incompetence.

Dr. CHALKE: Yes; and this brings us back to some statements that appear in some of the bills that have come before the House of Commons and the Senate. The terms "of unsound mind" and "mentally ill" are meaningless to anyone who is professionally expert in this field. Mental illness is not simply one particular illness any more than the term "physically sick" denotes one particular physical disorder. It ranges from a mental sprained ankle, as it were, to mental cancer, so that if you put an expert on the stand and asked him: "Is this person mentally ill—yes or no?" you are putting to him a question that opens up to him a very wide range to choose from.

I suggest therefore that the question is meaningless. And the same is true of "unsound mind". With all due respect to you, honourable senators and members of the House of Commons, I say that none of us is physically sound and none of us is mentally sound. I, for one, am not physically sound because I have to adjust my vision; and none of us is one hundred percent mentally sound. So, if the question is asked—Is this person of sound mind?—no one can answer, no matter how hard he tries.

This is the basic reason for our problem about incarceration. The practice is dying out, and unwilling incarceration will disappear from the scene except for people who are held during Her Majesty's pleasure under warrant because of certain acts.

To the question whether someone is of sound or unsound mind we cannot give an answer. We would go along with the Canadian Mental Health Association, that Dr. Boulanger has spoken about, whose view is that what makes a marriage work, or hinders its working, is behavior, which takes any one of three or four forms, such as for example pathological jealousy, where one of the parties harbours the belief, without any reasonable ground for it, that the other is unfaithful. This creates a situation which makes marriage intolerable.

Mr. AIKEN: Where would you put that in as a ground for divorce? This is a question that bothers me with the conditions that you have mentioned. We have

never had the proposal that a person's behaviour be a ground for divorce, except for cruelty.

Dr. BOULANGER: But after all, adultery, which is one of the main grounds for divorce, is a matter of behaviour, is it not? Is not one of the parties saying, by his—or her—behaviour that the marriage does not exist either in his mind or in his heart? So that anything that severely breaks the marriage is behaviour of one kind or another.

Mr. AIKEN: Our witnesses are solving their problem but not doing anything to solve ours. If you do not include any condition of mental illness as a ground for divorce, I would like to follow the matter up by asking: Where would you put these cases where a person, through lack of comprehension, will never recover his ability to lead a normal life? Where do you put that, under the head "Desertion"? Or would you put it under "cruelty"? I do not think either would be a voluntary act. I do not see where all these cases, which the members of this committee are concerned about, are to be put. I do not know where you will put them.

Co-Chairman Senator ROEBUCK: May I say something? I think we are worried about distinctions that do not exist. There is a principle of British law that a man's thinking cannot be probed. We have granted in Parliamentary divorce a good many nullities and I have in mind one case where a chap married a girl; they went through the ceremony; then outside the church he kissed her good-bye and took the next boat to England. We gave her the divorce on the ground that he was crazy, not because we had examined his head but simply by his actions. A man's thoughts are read by his actions, so that what the witness is telling us is nothing new in either practice or theory. Call it mental illmess if you like, or very extraordinary and objectionable conduct, you arrive at the same place.

Mr. MCCLEAVE: The plight we are in puts me in mind of the two psychiatrists. One said to the other: You are fine. How am I? The other answered: I think so.

Co-Chairman Senator ROEBUCK: You heard about the fellow who said to his wife: All the world's queer but thee and me, and thee is a bit queer.

Mr. MCCLEAVE: They would not like to see incorporated in the law anything that would make expert testimony completely unworkable in many cases; but we can solve the dilemma with the theory that divorce would be granted on the basis of illness that would make the marriage completely broken down, whether you define the illness as mental or physical. Isn't that what the Canadian Medical Association recommended, and what you yourselves recommend?

Dr. CHALKE: If it is the will of the Canadian people, that illness that makes the continuance of a marriage impossible, constitutes an impediment, that amounts to a ground for divorce.—We can be of help to you if that is the line of argument, as long as it is not solely mental. If somebody has a stroke and is confined to bed and can only mumble, and if that is a ground for divorce, we can do the same with mental illness. There are neurological diseases in which people may have a cardiac arrest, leading to a condition from which they do not recover in time, so that they become vegetables: they cannot recognize anyone and do not know the nature of contracts they had assumed years before. Because of the marriage contract binding the parties "in sickness and in health," ill health has never been a ground, so you will find yourself in the dilemma of the "quantity" of ill health that makes living together impossible.

Diabetics sometimes become impotent. Will this be a ground for divorce?

Mr. MCCLEAVE: Mere physical incapacity is a ground for annulment.

Dr. BOULANGER: In that case, would you enact in the law that a person could be divorced, because he was a diabetic, or because he was impotent? There is a distinction between saying that because of mental illness a person should be divorced, and saying, whatever the illness may be: "Because this person cannot fulfil the conditions that constitute married life, the marriage has broken down." But that does not say that you are going to specify either diabetes or impotence in the law.

Mr. MCCLEAVE: The witness has posed a very interesting question. One may be able to carry on a part of the functions of married life, such as bringing up children, even though one is a diabetic and becomes impotent. The approach we have taken is that the illness be of such a nature that the marriage is gone for all practical purposes, as for example where a person is in an institution and is incapable of playing the part of a helpmate in bringing up the children or anything of that sort.

Dr. CHALKE: If you like you can go back to the days when a person was either sane or insane. But there are different degrees of competence in the management of one's business, carrying on one's profession, and so on, and we run into all sorts of problems. There are various mental requirements in law, for being married, for being a Member of Parliament, for being a doctor. There is a difference between the skill required for driving a motor vehicle, and the knowledge for making a will.

There are many forms of "mental illness" or mental disorders that do not render a person ill in a medical sense, and this is really the problem. Suppose I am put on the witness stand and am told: The petitioner maintains that she should be divorced because her husband is mentally ill. Is he or is he not mentally ill? He might have some illness but this would not be an impediment to marriage, not necessarily; and that is what we are afraid of in the use of blanket terms.

Dr. BOULANGER: Often the diagnosis does not give the degree of compatibility or incompatibility. One could make a rather grave diagnosis and yet the patient might be a good husband or wife and parent; on the other hand you might have a patient with a minor psychiatric diagnosis, who could not be committed for that disorder, and yet his or her behaviour might be such as to make life impossible for the family.

I would say this. If a person has been in a mental institution for, let us say, ten years and shows no improvement, this in my opinion could be similar to the kind of impediment that keeps the couple apart where one is in prison and is therefore unable to fulfil the obligations of a spouse. That is why we oppose the French attitude, which does not permit of divorce as long as a person is committed.

The whole essence of the marriage lies in the relationship between the parties. Some husbands will accept a disabled partner and care for her; others will not. The party who wants a divorce will create the cause, even fictitious adultery, to get it; and there are those who have many grounds for divorce, yet will not ask for it because they do not want it, and you cannot force it upon them.

Mr. MCCLEAVE: What in your opinion would be an acceptable descriptive term in legislation—illness or disability or what?

The CO-CHAIRMAN (*Senator Roebuck*): Marriage breakdown, incompatibility of the partners, inability of one or other to maintain the marriage?

Mr. MCCLEAVE: Suppose one is disabled mentally or physically: would you use the word illness in the legislation as the cause leading to the breakdown of the marriage? What word would you use?

Dr. CHALKE: It would have to be illness leading to behaviour, rather than wilful or malicious. It would be something arising out of illness, but it would be the same kind of behaviour that would make the marriage incompatible if it were from sin or wilfulness. I submit this definition—and it was written, may I say, by a lawyer who was intimately involved in writing mental health legislation in this country. He was a member of the CMHA Committee on Legislation and Mental Disorder, to which I referred in my introduction. He was taking exception as a lawyer to the Canadian Bar Association's statement, which you may have had before you. He would recommend, from the doctor's point of view, some such wording as this: Disorder or illness to an extent that renders the afflicted spouse incapable of appreciating the marriage contract, and where the spouse has been in an institution as an invalid—and this means in any hospital, presumably including any mental hospital—for a period of at least five years preceding the commencement of proceedings, and there is no likelihood of a resumption of cohabitation and the issue of a decree will not prove unduly harsh or oppressive to the dependant spouse.

Mr. MCCLEAVE: Thank you.

Mr. STANBURY: I think Dr. Chalke has answered part of my question by reading the last paragraph drafted by a lawyer working with the Canadian Mental Health Association. At the same time, Dr. Chalke's use of the word "behaviour" is at once too wide and too narrow. It is too wide bcause it does not impose any quantitative limitation on the kind of behaviour contemplated: Behaviour over what period of time? Behaviour how long ago? You do not deal, Dr. Chalke, with any criterion in the definition you suggested at first in what seemed to me to be a complete solution. Really, you fairly well answered my question except that I would be interested to know whether you would enlarge on the reference to behaviour by indicating the quantity of the behaviour or the time element which would be regarded as affording an adequate ground for divorce.

Dr. BOULANGER: That is something that is always more or less a matter for the Court to decide.

Mr. STANBURY: If it is your intention to give the court complete discretion I understand what you are proposing. But that would be quite revolutionary.

Dr. BOULANGER: It is like mental cruelty. Would you say there was mental cruelty if the husband used filthy words?

Mr. STANBURY: The courts define cruelty but not behaviour.

Dr. BOULANGER: But cruelty is behaviour.

Mr. STANBURY: Yes: so is adultery behaviour. But if you are going to use the word behaviour in a loose way you will present quite a problem to the courts. Other terms have been defined over the years.

Dr. BOULANGER: It is a matter of incompatibility.

Mr. STANBURY: Is it for a year or three years or what?

Dr. BOULANGER: It is for the court to decide whether the manifestations of the disorder are such that the afflicted person is incapable of fulfilling his or her obligations.

Mr. STANBURY: You would leave that to the court?

Dr. BOULANGER: Yes.

Dr. CHALKE: We are not suggesting that the word "behaviour" should be introduced into legislation; rather, we are concerned with different modes of behaviour—desertion, cruelty and so on—which would make the marriage

incompatible. We are not proposing the abstract term "behaviour," but it should be in behavioral terms—cruelty, sodomy, and so on.

Mr. STANBURY: I am sympathetic there; but in using the word behaviour you left out a large area which you then only partly filled in with your definition, because sometimes, one might say, there is almost a lack of behaviour.

Dr. BOULANGER: The manifestations, the actions, are not necessarily linked with a specific etiology or illness, and that is why we are not in favour of the idea of introducing illness as such. It is the manifestations that cause disruption and not the illness itself.

Co-CHAIRMAN (*Senator Roebuck*): We have pretty well plumbed the principles involved and it is time to call it a day. I would like to hear from my Co-Chairman.

Co-CHAIRMAN Mr. CAMERON: We have been privileged in having two very distinguished psychiatrists give testimony before the committee today, in the person of Dr. Boulanger and Dr. Chalke, and on your behalf I wish to thank the witnesses for having opened many avenues of thought for us. At times it seemed to be a little over my depth, but I believe I have now a fair appreciation of the approach of these two gentlemen to the problem. What the have told us will be very useful when we come to draft our ideas of the law relating to the severance of the marriage tie, so far as Canada is concerned. I thank both distinguished gentlemen for their evidence.

The committee adjourned.

APPENDICE "33"

Brief to the Special Joint Committee of the Senate and House of Commons on Divorce by

Marcel Naud, 11925, rue Valmont, Montreal, P.Q.

Montreal, November 8, 1966

Gentlemen of the Committee,

After reading and examining the two reports from your Committee, I wish to inform you of the following observations so that henceforth all citizens affected by the subject may enjoy, as any free person does, the greatest and most inviolable of *existential* possessions: JUSTICE and LIBERTY founded on TRUTH.

Before any divorce is granted there must be PROOF OF A PERMANENT RUPTURE IN THE MATRIMONIAL BOND and hence THE PROOF OF THE INEXISTENCE OF THE MATRIMONIAL BOND BETWEEN TWO PERSONS BELIEVED TO BE UNITED BY SUCH A BOND. If this principle is established as the basis for divorce, some general indications may be given for the enlightenment of the legislator which are characteristic of the inexistence of matrimonial bonds, but which could not be considered exhaustive because reality and existence make such an inventory impossible.

In fact, if the marriage no longer exists in SPIRIT, why should we strive so hard to preserve it, as we do at the present time, if it has no REAL MEANING?

Why punish one or two people because a union which they believed possible has become impossible for them?

Why punish one or two people throughout their lives because they are incapable of living together or of tolerating each other? It is all the more unjust because no positive science can assist people who decide to get married.

When two people who once formed a couple refuse to prolong their life together, why does the State not ratify their desire, without condemning both of them or one of them to the benefit of the other by compelling him to support the other?

When does a divorce exist? Whenever a married couple are spiritually separated and in profound disagreement. That is real divorce: spiritual divorce. When can the State ratify such a spiritual divorce and consent to the annulment of all bonds and all responsibilities of one partner towards the other? When there is a definite proof that a husband and wife find it impossible to go on living together. It is simple but it is *true*.

The granting of divorce by the State should henceforth be based on the principle set forth above.

The trained professionals we already possess: *psychiatrists*; *psychologists and socialogists* should, as soon as possible, be *Commissioned by the State* to carry out these investigations for the purpose of enlightening those who will later be responsible for legislating on someone's DIVORCE.

The practice of wrecking the lives of thousands and thousands of citizens because divorce is impossible for them should cease.

The practice of consenting to separation of bed and board based on the over-simplified criterion of incompatibility of character, condemning the person who works to pay separate maintenance should cease. That is a degree of servitude which is inacceptable nowadays.

May it please the members of the committee on divorce to decide in favour of the principle stated above so that all citizens may enjoy the PEACE and FREEDOM to which they are entitled in life.

Yours truly,

Marcel Naud,
11925, rue Valmont,
Montréal, P.Q.

APPENDIX "34"

BRIEF

PRESENTED TO

SPECAIL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS

ON DIVORCE

by

CANADIAN JEWISH CONGRESS

Submitted by:

Rabbi S. M. Zambrowsky, Chairman, National Religious Affairs Committee

Rabbi H. J. Stern, Vice-Chairman, National Religious Affairs Committee

Louis Herman, Q.C., Chairman, National Joint Community Relations Committee

Saul Hayes, Q.C., Executive Vice-President

Samuel Lewin, Secretary, Religious Affairs Committee

January 26th, 1967.

BRIEF
SUBMITTED BY
CANADIAN JEWISH CONGRESS
TO
SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

(a) Laws governing the divorce procedures which recognize adultery as the sole ground of divorce are completely inadequate. In many cases there is outright promotion of immorality by the assertion of it as the sine qua non of divorce proceedings.

(b) The proceedings, as presently constituted, too often, breed disrespect for the law and lead to a situation where subterfuge, collusion and perjury have to replace honest efforts to abide by the law.

(c) A marriage should be dissolved by law only after it is clearly demonstrated that it has no hopes for viability.

(d) Provisions of granting divorce by resolution of the Senate be abolished and jurisdiction of divorce procedures by vested with competent courts.

(e) Only the judgment of the constituted courts should authorize a dissolution of marriage.

(f) Divorce procedings ought to include conciliation procedures, without which divorce courts will not be empowered to dissolve a marriage.

(g) A divorce ought to be obtainable wherever a marriage has been irretrievably broken and domestic harmony manifestly ruptured in the judgment of the court.

(h) Conciliation procedures, which will form an integral part of divorce proceedings, ought to take cognizance of the need for a religious Bill of Divorce in case one or both parties recognize the need for such a religious act.

(i) No divorce be granted unless and until provisions were made for the welfare of minor children.

(j) The costs of obtaining a divorce ruling be either completely eliminated or substantially reduced.

1. *Interest in Proceedings*

The Canadian Jewish Congress welcomes the opportunity of presenting to the Special Joint Committee of the Senate and of the House of Commons on Divorce the views of the Jewish community on divorce procedures presently obtaining and to advance recommendations for changes in these procedures.

The Canadian Jewish Congress is an organization fully representative of the Jewish community through the election of its delegates from organizations and the public at large by democratic processes. Founded in 1919 and reorganized in 1934, it has been the acknowledged spokesman of the Jewish community on public issues and in this capacity, has been recognized by municipal, provincial, federal and international authorities as the authoritative body of the Jewish community.

2. *Jewish Community of Canada*

While the Jewish community is not monolithic, it is perfectly unanimous in its firm belief in the necessity of the preservation of its identity as a group for its very survival.

In the Canadian census, the Jews are identified by religion and by ethnic origin and its predominant characteristic is its religious affiliation. In 1961, the number of those who were recorded as Jews by religious affiliation exceeded substantially the number of those identified by ethnic origin and the respective figures were as follows: Jews by religion—254,368; Jews by ethnic origin—173,344.

The Jewish population is in the unique position that questions with regard to religion and with regard to ethnic origin may be answered in the same way by simply saying that the person is Jewish. With regard to any other group of the population the answers must be different. This may perhaps account partially for the large disparity between the two figures.

3. *Religious Structure of Jewish Community*

The Jewish religion does not have an established hierarchy but the inner community discipline in Canada is such that in matters of religious import there is virtually an unanimous acceptance of the National Religious Affairs Committee of the Canadian Jewish Congress as being truly representative of all segments within the Jewish Community.

The views expressed in this brief have been approved unanimously by the Religious Affairs Committee of the Canadian Jewish Congress and thus reflect the concerted opinions of all groups within the Jewish community, orthodox, conservative and reform. It is authorized to convey this submission on behalf of the Canadian Jewish Congress.

4. *General Principles*

We respectfully submit that insofar as the Jewish community is concerned, there is no conflict between the religious and secular views on divorce.

The Jewish concept of marriage has always been that while the marriage bond is expected to be inviolable, it is not indissoluble. Rabbinic writ also makes it abundantly clear that divorce can only be a last resort for the relief of the parties when marriage has been irretrievably broken down in line with the Talmudic maxim that "the very altar weeps for one who divorces the wife of his youth".

The sanctity of the home and the family, as a source of strength and the transmitter of the Jewish heritage, permeates the teachings of Judaism. Ours is a family-oriented religion, where the stability and strength of the family unit was and is intimately tied up with our faith and our history.

Yet, while every effort is made to encourage and assure a sound family life, Judaism recognizes that occasions do arise when two persons are unable to live together as husband and wfe. To demand that they do so, in spite of their antagonisms to each other, often leads to subterfuge, conflict, hostility, hatred, extra-marital associations, and ultimately the destruction of the very foundation of family stability.

While it is true that the Talmud and other Biblical commentaries offer moral and religious reasons against the indiscreet practice of divorce, no Biblical or Talmudic law ever went so far as to advocate total prohibition against divorce. The rabbis of old pointed out that when the relationship between husband and wife has deteriorated to an empty, meaningless arrangement, the marriage is no longer moral or holy. The epitome of the Judaic concept is found in the authoritative rabbinic interpretations of Biblical references which call for a Bill of Divorce in all cases where domestic harmony is manifestly ruptured.

5. *Inadequacy of Present Law*

Although the interest of the Canadian Jewish Congress in this subject stems from our religious tradition and concern, it is by no means intended to indicate that the Canadian Jewish Congress supports revision of the divorce laws in order to make the laws conform to Jewish tenets or, for that matter, to any religious tenets. We consider revision of these laws as necessary social legislation, and we support it because of our commitment to the preservation of democratic values which include (a) respect for the law, (b) belief that laws must not discriminate against those who are financially unable to obtain redress, and (c) belief that the laws must be instruments of social justice.

It is in this context that we view the laws governing the divorce procedures in most of the Canadian provinces, which recognize adultery as the sole ground of divorce, as being in conflict with each of these values, completely inadequate and, in a sense, promoting immorality by making immorality itself or the assertion of it through trumped up evidence as necessary in divorce proceedings.

The general picture is only slightly changed by recognition of cruelty as an additional ground of divorce in Nova Scotia and certain forms of perversion as grounds in some of the provinces.

We submit that the procedures, as presently constituted, breed disrespect for the law and have led to a situation where subterfuge, collusion and perjury have replaced honest efforts to abide by the law. Any law, which has resulted in inducing the interested parties to stage cases of adultery in order to obtain the divorce, has no place on the books of a nation that prides itself of its commitment to justice and fair play.

It is, moreover, socially unrealistic to make adultery the only grounds for divorce. In a majority of cases adultery is not the cause for which divorce is sought. In fact, surveys indicate that it rates less than one-tenth among the five leading causes for divorce, including cruelty, desertion, drunkenness, neglect, and others.

6. *Conciliation Procedures*

Society which views marriage as a life-long union has certainly a vital stake in the stability of marriage. We do not subscribe to the concept of divorce by consent, which would imply that marriage is a private contractual arrangement. A marriage should be dissolved by law and only after it is clearly demonstrated that it has no hopes for viability. Thus, dissolution of marriage ought to require an exercise of judgment by a court which would be properly delegated and which would have a final decision whether or not a marriage ought to be dissolved.

7. *Jewish Religious Requirements*

In Jewish law, a divorce is a religious act involving compliance with a number of requirements and has to be executed by a competent ecclesiastical tribunal of three rabbis.

We do not suggest that a religious requirement ought to be enforced by law. We would, however, recommend that conciliation procedures, by a properly designated court, the conditio sine qua non of a divorce, should take this requirement into consideration and on failure to reconcile the parties and where they or one of them observe these religious requirements, the settlement arrangements also recognize the need for such a religious divorce.

8. *Divorce Courts*

We oppose the present provisions of granting divorce by resolution of the Senate. One cannot expect a legislative body to exercise the necessary judicial functions required in divorce action and we therefore recommend that these provisions be changed and that jurisdiction of divorce procedures be in the hands of competent courts.

We also recommend that the high cost involved in obtaining a divorce ruling be either completely eliminated or substantially reduced.

9. *Welfare of Children*

It is obvious that, in the course of the conciliation procedures which would have to precede the granting of a divorce, full consideration be given to the needs and welfare of the children involved and that it be mandatory for a divorce ruling to adequately protect the welfare of the children.

10. *Conclusion*

We respectfully submit that our goal ought to be the creation of a sound and sensible divorce law designed for the prime purpose of saving a marriage, where there is hope that it can be saved or otherwise dissolving it with the least possible turmoil, with the fewest obstacles and with the least expense. Such laws, must, moreover be designed in a fashion as to provide the maximum protection of minor children.

APPENDIX "35"

BRIEF SUBMITTED TO
SPECIAL JOINT COMMITTEE OF THE SENATE AND
HOUSE OF COMMONS ON DIVORCE
by
THE FAMILY BUREAU OF GREATER WINNIPEG
264 EDMONTON STREET
WINNIPEG 1, MANITOBA

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

From 30 years of experience as a family service agency, in direct work with troubled families, the Family Bureau of Greater Winnipeg submits that:

1. The basis of Canada's existing divorce legislation is unsound. The legislation views divorce as relief given to an innocent party because of an offence committed by a guilty one. It is submitted that:

(a) If marriages are to be dissolved because of the commission of a "matrimonial offence", our experience indicates that adultery, in most provinces the sole offence so recognized, is only one of a number of kinds of behavior which may undermine a marriage, and is no more central to the destruction of marriage than are many other forms of behavior.

(b) Responsibility for the failure of a marriage is usually shared by both partners. Recognition of this fact is common among the partners themselves, yet existing law seems to require them to present to the courts a distorted selection of the relevant facts.

(c) Many situations commonly recognized as creating serious hardship and often leading to the establishment of common-law unions do not involve any 'offence'—eg long term mental illness of a marriage partner.

(d) There are wide variations in seriousness within any particular category of 'offence'. The agency knows of marriages which have successfully survived each type of 'offence' in the sense of a triable issue, in fact ended without any 'offence' in the sense of a triable issue, having been committed.

(e) The adversary procedure which is associated with the present law tends to increase bitterness and antagonism, having harmful effects both on the parties themselves and on children involved.

2. The Family Bureau of Greater Winnipeg supports, as a valid alternative for a divorce law, the concept that divorce should be the legal recognition of a marriage breakdown which has already occurred.

3. The agency recognizes that a law and procedure based on the marriage breakdown concept requires the development of valid tests of marriage breakdown. For the immediate future we believe that such tests will need to involve a substantial period of separation to establish the permanency of the breakdown. Such period could be reduced in some instances by other supporting evidence. We believe that in time the necessary expertise can be developed to reduce the length of period of separation necessary for valid testing.

4. The agency submits that when a family is broken by divorce, children of the family are parties directly and vitally affected by the action, and their interests should be represented and considered. The agency recommends that no decree of divorce shall be granted where children are involved until the court has received and assessed an independent report concerning plans for care, custody and maintenance of the children.

5. The agency is aware in many instances of serious inequities and obstacles to the granting of divorce, which have no relation to the validity of the grounds on which the divorce may be sought. It believes that these inequities should be removed:

(a) It recommends that Canada should be considered as one domiciliary unit for purposes of divorce.

(b) It recommends that efforts be made to remove economic obstacles to the granting of divorces for which there are valid grounds.

6. The Family Bureau of Greater Winnipeg respects and shares the concern for the stability of marriage which has led many to oppose change in the divorce law. It considers, however, that opposing urgently necessary reform of a law which bears little relation to social realities is a misguided expression of a concern which is in itself valid. It urges that such concern should instead find positive expression through development on a wide scale throughout Canada of pre-marriage and marriage guidance and counselling services, education for family living, and other social provisions to strengthen families.

BACKGROUND OF THE BRIEF; PURPOSE, FUNCTION, AND EXPERIENCE OF THE FAMILY BUREAU OF GREATER WINNIPEG

The Family Bureau of Greater Winnipeg is a private family service agency which was established in 1936, its first stated objective being "to foster the development of wholesome family life in this community."[1] This objective is forwarded chiefly through service to individual families who are under stress from a variety of social and personal problems, but it is also part of the planned activity of the agency "to take a part in the program of the community for social betterment, seeking in counsel with other organizations or individuals, to lessen such abuses in society as may be factors in undermining the well-being of individuals and families."[2]

The agency is non-sectarian. Among the Board of Directors, staff and clientele is represented a variety of faiths and personal philosophies. As individuals, some members of Board and staff hold marriage to be indissoluble except by death. However, while holding this belief as binding upon themselves, they do not believe that in a multi-religious, multi-cultural society, the law should attempt to impose on all members of society a standard of conduct which is binding on the conscience of some, unless such standard is demonstrably required for the 'peace, order and good government' of the total community.

The agency is united in recognizing the value of marriage and of the family as a means of providing continuity and stability in relationships, as sources of happiness, emotional support and well being to the marriage partners, and as providing for close, continuous and stable relationships for the rearing of children. Over the thirty years it has been in existence, the agency has acquired a wealth of experience concerning families and family living. We work with

[1] Excerpt from bylaws of Family Bureau of Greater Winnipeg.
[2] Ibid.

married couples concerning problems in their own relationship, problems of other relationships within the family group and problems which confront the family group as a whole. We also work with many separated, divorced or widowed parents, to help them support the values of family living even though their families are incomplete. We work also with many couples and families living together in common law unions. Many of these unions are stable and offer to their members the essential supports of family living. Often however, the parents of these unions and sometimes the children, are guilty and troubled because the union does not have a recognized and respected status in the community.

The majority of married couples who come to us concerning problems in their relationship do so because they desire to improve this relationship and maintain the existence of the family, and we offer help towards this end. In some instances however, the antagonisms and strains within the family are so serious and the unhappiness engendered so acute that it is recognized as best for all concerned if a separation or a divorce takes place. The agency is well aware from these experiences of the difficulties and strains of marriage breakup and of the subsequent difficulties of incomplete families. Thus it does not take an easy or superficial view of marriage breakup. Its experience, however, supports the fact that some families have found greater peace and happiness through dissolution of a marriage than had previously been attainable to them. In a number of instances, new unions have been formed successfully; while it is true, as frequently alleged, that some individuals repeat their mistakes through a series of marriages or common-law unions, it is also true that other individuals learn from their mistakes, and are able to achieve a stable and satisfying relationship with a different partner.

The Family Bureau of Greater Winnipeg welcomes the establishment by the Parliament of Canada of the Special Joint Committee on Divorce. It commends the attention now being given to the problems presented by our existing divorce law, and to the difficult task of formulating recommendations for divorce legislation which will better promote the social good. The agency is following with interest the considerations of the Committee through its published proceedings; we are aware that the Committee has before it a great deal of information and has available to it a variety of informed legal and social opinion. The agency will therefore confine its comments to those matters relating most closely to its own experience in work with troubled families.

CRITICISM OF BASIS OF EXISTING DIVORCE LAW

Our first major comment concerns the inadequacy of the basis of the present law. The present law treats divorce as a benefit conferred upon an injured party, who is himself innocent, because of a specific "offence" committed by a guilty one. With minor exceptions in some provinces, the sole "offence" which is recognized in Canada as grounds for dissolution of marriage through divorce is that of adultery. If the concept of dissolution because of "matrimonial offence" is maintained, our experience suggests that there are many other "matrimonial offences" which contribute at least as seriously and frequently to the destruction of marriage as does adultery. Some of these are in the area of sexual relationship, for example, sadistic sexual behavior or continued refusal of marital intercourse. Other "offences" operate in different areas of marriage and family relationships, such as physical cruelty to spouse or children, continuous hostility and undermining of the partner or other family members, or withdrawal from the marriage relationship, sometimes culminating in physical desertion.

However, while recognizing that "matrimonial offences", of various types do occur, we find great difficulty in accepting the existence of these, established

through the adversary system, as constituting valid grounds for dissolution of marriage. We shall outline our major reasons for this.

First, each of the major "offence" categories which may be considered contains a wide variety of types of situations. We submit that there is a substantive difference between an isolated, impulsive act or brief episode of adultery, and a continuing series of "affairs" or an established extra-marital liaison which is used to taunt and depreciate the spouse. Similarly, the difference is great between blows struck in anger and under provocation, and the presence of a continuing attitude of hostility and anger, which may express itself in recurrent physical abuse, or in continuous undermining and depreciating of the spouse and/or children, and in verbal attacks which are essentially as cruel as physical attacks.

Desertion also, as we have implied, can be a matter of degree, as certainly the affection and emotional support, even significant communication, which we would consider to be of the essence of the marriage relationship, can be withdrawn although partners continue under the same roof. Further, examination of circumstances existing prior to an actual desertion has indicated to us in many instances that the party finally leaving the other is not necessarily the more "guilty" party, or the one more responsible for the breakdown of the marriage. This is also true, we submit, in relation to other matrimonial offences.

Our very use of the term "more responsible for the breakdown of the marriage" indicates a concept of shared responsibility which is foreign to the present law, althçugh in our opinion it is much more typical and representative of the facts of marriage breakdown than is the assumption of the present law. The concept of a "guilty" and an "innocent" party in marriage breakdown has drama, but rarely accuracy.

It is our experience that when marriage partners themselves discuss the causes of marital difficulty or breakdown, they may frequently make angry accusations against one another, but they nevertheless almost invariably show some recognition of a shared responsibility for the difficulty or breakdown. In discussing divorce they show considerable discomfort at the law's requirements, which seem to lead them to a distorted representation of the facts. An extreme instance of this is the type of situation in which a marriage has been broken by separation or desertion and both parties have thereafter formed stable common-law unions. Yet a divorce which would make possible the legalizing of these unions and legitimation of children born to them, has been attainable only if the court was kept uninformed of one half of the true facts. We recognize that there are other situations in both the civil and criminal law requiring difficult and discriminating judgments in the assessment of responsibility, but we suggest that none present such difficulties as the complex personal interaction, much of it private and properly unavailable to the courts, which is represented in a marriage relationship.

A further serious area of difficulty in considering divorce on the basis of matrimonial offence is the considerable number of marriages which are broken in fact though not in law, by occurrences which cannot properly be considered as offences. The most striking example of this is presented by severe long-term mental illness of one of the partners. The Canadian Mental Health Association in its brief to this Joint Committee has, we believe, ably presented the relevant factors here. In particular, we believe the Association established clearly that mental illness is in fact illness, comparable to physical illness, which may also be long-term, and vitally affect the marriage relationship. We believe that it is revolting to both sense and conscience that illness should be considered an "offence", or that it should, in itself be grounds for divorce. The existence of spouse and children, and the relationships with them, may be factors contributing significantly to the improvement or recovery of the patient. On the other hand, the existence of an unhappy marriage relationship may have been a factor

in the development of the illness, and the stresses of family relationships may operate against recovery. From the viewpoint of the other spouse, however, there is little doubt that a situation of serious hardship may be created by the illness. On grounds of compassion and the relief of social hardship, certain situations among this group should, we suggest, have priority in considerations of reform of the divorce law; yet this could hardly be done on grounds of the illness alone, and in view of recent changes in medical practice, "permanent" institutionalization does not offer the clear grounds it once appeared to do.

We should also like to point out the close parallel which exists between the marriage situation involving long-term mental illness and institutionalization and that of the marriage situation where one partner is involved in criminal activities and has been imprisoned for long periods, perhaps for life. While there may be a difference in that "offence" of some nature is involved here, it is not necessarily or typically a matrimonial offence. Here again, the existence of family ties in many instances is a factor influencing towards rehabilitation; in other instances family difficulties may have been a factor contributing to the criminal activity. Again, there are cases where the spouse has a strong claim on the compassion of the community for legal release from a marriage which has in fact ended. Yet as with the group of similar cases involving a severely deteriorated mentally ill spouse, if divorce is to be granted, it must be on grounds other than those of a matrimonial offence.

Another factor which contributes to our difficulty in accepting the matrimonial offence concept as a valid base for divorce law is the fact that our agency knows of marriages which have survived successfully each type of specific "matrimonial offence" outlined. On the other hand we know of other marriages which have clearly ended in fact without any specific offence, certainly in the sense of a triable issue, having been committed.

There is one further serious criticism of the "offence" approach and the adversary system accompanying it, which our agency wishes to make, namely its tendency to increase bitterness and antagonism between the parties. This we see as harmful to the parties themselves, hindering their ability to make a mature and fair assessment of their experience in a way which will enable them to avoid making similar mistakes in future. Such bitterness and antagonism also impose heavy strains on any children who are involved, who in the majority of instances are already torn by conflicting loyalties.

RECOMMENDATIONS CONCERNING ALTERNATE BASIS FOR DIVORCE LAW

For the above reasons, the Family Bureau of Greater Winnipeg supports an alternative approach to divorce, which suggests that it be considered as essentially the legal recognition of a marriage breakdown which has already occurred. This point of view has already been presented before before the Joint Committee by several different groups, and considerable argument and information has been given which we do not intend to repeat. We would like to comment however, that we see this approach as differing from the concept of simple "divorce by consent" primarily by maintaining the role of the state as an active and vitally concerned party.

As previously indicated, the Family Bureau of Greater Winnipeg is strongly committed to belief in the importance of marriage and family living to the well being of society, and therefore believes that laws should be planned towards creating conditions under which the family may best perform its essential function. The agency recognizes for instance, that the ease with which marriages may be dissolved can be presumed to exert significant effect on the attitudes and expectations of persons entering marriage. Our experience strongly supports the

belief that marriage should be undertaken seriously, after consideration, and with the intention of establishing a stable and permanent union.

Unfortunately, valid concerns for the stability of marriage have too often been advanced as reasons for refusing to examine the serious faults in our existing law and practice concerning divorce, so that social reality has come so far out of line with legal structure as to seriously undermine the law and the respect in which it is held. Our agency believes that there are other ways in which concern for the stability of marriage may find valid expression, and will have suggestions to make concerning these later. Here, we merely wish to underline our belief that the social importance of marriage requires that the state should, through its legislative and judicial functions, exert significant control.

IMPLICATIONS OF CHANGE IN BASIS OF DIVORCE LAW

In supporting the marriage breakdown concept of divorce, we recognize that it represents a marked break with legal tradition. While it maintains the judicial function of weighing evidence and making judgment, the evidence and the judgment will be of differing nature from those required in the past. This in turn implies changes in court procedure, and in the development of expertise, either within or available to the court.

The crux of the problem presented by a transfer from law and procedure based on the matrimonial offence concept to law and procedure based on the marriage breakdown concept is, we believe, the question of developing adequate tests of marriage breakdown. The accuracy of such tests is clearly central to the effectiveness of the law in practice. In addition, since the ill effects of existence in the "no man's land" between the married and the unmarried state form some of the most cogent reasons for reform of our present law and procedure, it is clearly desirable also that such tests involve no unnecessary delay.

As an agency with a considerable body of knowledge and experience in marriage counselling, we are convinced that it is entirely feasible for society to develop the necessary expertise on which such judgments may be based. We are also keenly aware, however, of the still-developing stage of knowledge in this as in other areas of human behavior and relationships, and of the present serious shortage of adequately trained and experienced personnel. We know that the development of needed personnel and the refining of skills and judgment will under the best of circumstances require time, and we are emphatically of the opinion that urgent reforms should not wait upon the development of these. Typically, change in procedures, and necessary personnel to implement them, follow changes in the law.

It is our opinion, therefore, that for the immediate future such tests of breakdown must involve a time factor—a waiting period by which the finality of the breakdown may in large part be measured. It is possible that in certain necessary situations the waiting period may be shortened by evidence establishing the existence of a matrimonial offence of serious proportion which would support the probability of permanent breakdown having occurred.

For purposes of illustration, we quote a proposed draft section of divorce legislation prepared by Mr. Douglas F. Fitch of Calgary, who participated in earlier presentations to the Joint Committee in which it is suggested that:

> "Permanent breakdown of the marriage shall be proven by evidence that either:
>
> (a) the petitioner and defendant have separated and thereafter have lived separately and apart for a continuous period (except for a period of cohabitation of not more than two months that has reconciliation as a prime purpose) of not less than three years immediately

preceding the date of the granting of the decree, and there are no reasonable grounds for believing that there will be a reconciliation, or

(b) (i) the petitioner and the defendant have separated and thereafter have lived separately and apart for a continuous period of not less than one year immediately preceding the date of the granting of the decree, and there are no reasonable grounds for believing that there will be a reconciliation, and

(ii) the defendant has committed adultery or has, during a period of not less than one year, habitually been guilty of extreme cruelty."*

We submit that there are a number of possible ways in which the existing divorce law may be reformed to provide relief for some of the situations of extreme hardship now existing, while still falling short of what we, and other proponents of the "marriage breakdown" concept, consider desirable. The laws of many countries, for example, New Zealand, Australia, France and England, are presently based partly on the 'offence' concept and partly on the 'breakdown' concept. We express the hope, however, that Canada may now take advantage of experience gained elsewhere during the long period in which there has been no Canadian divorce law reform, to frame a law which will give leadership in the direction towards which others are moving.

NEED FOR RECOGNITION AND PROTECTION OF THE INTERESTS OF CHILDREN WHEN DIVORCE IS GRANTED

The next major point which the agency desires to draw to the attention of the Committee is the failure of our present divorce laws to recognize adequately the position of children as interested parties in a divorce action. We respectfully suggest that the law should take cognizance of the fact that where there are children of a marriage, such children become parties directly affected by the continuance or dissolution of the marriage. Our observations lead us to believe that the bitterness, anger and hurt which so frequently accompany marriage breakdown make it difficult and often impossible for the parents to represent adequately and objectively the interests of their children.

As previously indicated, we understand that the law in relation to marriage does not consider it a simple contract between two people which can be dissolved by their own consent; the state becomes a party to the contract. We submit that one of the major arguments for the state being a party to the contract relates to the interests and welfare of children. We respectfully suggest that the state should, therefore, ensure that the interests of children are safeguarded, whether these are children of the marriage itself or other children in the family. We are concerned that in practice this situation does not prevail. Most divorce actions in Canada are undefended actions in which only one party is represented. Although the fact of whether or not there are issue of the marriage is a matter before the Court in a divorce action, the Court rarely inquires into the circumstances surrounding the welfare and interests of the children, and in most cases an order of custody is made without even cursory investigation, or no decision whatever is made concerning custody or support arrangements.

This agency, therefore, recommends that the custody of the children in a family be dealt with in every divorce action to an extent required to safeguard and protect their interests. The agency recommends that no decree of divorce should be granted unless the court has received a report upon an investigation of the plans of the parties to the divorce respecting the custody of the children of the marriage and the interest and welfare of the children. Such a report would not, of course, bind the court, but merely provide the court with professional and

* "Let's Abolish Matrimonial Offences", by Douglas F. Fitch, The Canadian Bar Journal, April 1966.

objective information upon which the court's decision could be made. Directors of Welfare of the various provinces, for example, could be responsible for the making of such a report, as is current practice in adoption legislation in most provinces, or a special court official could be charged with responsibility for obtaining these reports, as is presently done for divorce hearings in the province of Ontario.

This agency has been called upon for help in many family situations following a divorce or separation in which no consideration had been given to adequate planning for the children, and it considers this matter to be of urgent priority.

INEQUITIES AND PROCEDURAL DIFFICULTIES; RECOMMENDATIONS CONCERNING DOMICILE AND LEGAL AID

The final major area in which this agency believes there is urgent need for reform is the existence of inequities and procedural difficulties in obtaining divorce—factors which are unrelated to the basis on which the divorce is sought. First among these are the difficulties created by the requirements of domicile.

In Canada, each province is a separate domiciliary unit and for a provincial court to assume jurisdiction to hear and grant a divorce, it must be proved to the court that the parties to the marriage were at the time the divorce action was instituted domiciled in that province. Domicile is a legal term and means more than mere residence. It means residence along with the intention of remaining, and in some situations a person may be domiciled in one province, but resident in another. A married woman has no independent domicile; while married, her domicile is that of her husband.

The necessity of proving provincial domicile often leads to hardship and unreasonable expense to those seeking divorce and in some situations, may even make a divorce impossible. The Divorce Jurisdiction Act of 1930 partly alleviates the difficulty created by domicile by permitting a wife who has been deserted by her husband for at least two years to bring divorce proceedings in the jurisdiction in which the husband was domiciled at the time of the desertion. That Act, however does not assist a wife where the parties have separated by mutual consent, and if the husband in such case has lived in several provinces since separation, the wife may be prevented from proceeding with a divorce action because she cannot prove her husband's domicile in any particular province.

This agency, therefore, recommends that Canada should be considered as one domiciliary unit for purposes of divorce jurisdiction. The agency recommends that a provincial court be given jurisdiction in a divorce action where one of the parties resides in that province and it is proved that the husband is domiciled anywhere in Canada.

The second major inequity which is unrelated to the actual grounds on which the divorce itself is sought, is the inequity faced by people in our society who are unable to afford the costs of divorce action. While we recognize that this raises matters which are clearly in areas of provincial jurisdiction, we nevertheless consider it a problem so serious and widespread that it needs to be drawn to the attention of the Joint Committee, in the hope that the Committee may in turn find means of encouraging action in provincial jurisdiction towards growth in provision of legal aid. Here, we quote one of our family counselling staff speaking of families she has known over a number of years of experience with

the agency: "In the main, those who have had apportunity to divorce have been able to re-establish themselves relatively successfully, whereas those left in the no-man's land of separation status have a poorer image of themselves, more often pick up with undesirable partners and more often exist for years on welfare payments, with little hope or planning for the future."*

RECOMMENDATIONS CONCERNING POSITIVE PROGRAMS TO STABILIZE AND IMPROVE MARRIAGE AND FAMILY LIFE IN CANADA

In concluding this presentation, the agency wishes again to stress that, as indicated by its name and charter, The Family Bureau of Greater Winnipeg is committed to the aim of strengthening the values of family living. Its substantial concrete experience in this endeavor leads it to the conclusion that these values are not being served by the existing Canadian divorce law.

The agency recognizes and respects the convictions concerning the permanency of marriage and the fears of social and emotional consequences of "easy divorce" which have lead many to oppose any change in the present law. It believes that many people in our society will, as in other areas of social behavior, continue to hold in their individual consciences a standard more exacting than that required by law. It is aware also, however, that many people in our society do not, in belief or practice, hold marriage to be indissoluble under all circumstances, or under the sole circumstances recognized by the present law. It has reason to believe that the values and standards of these people are being undermined by present law and practice. Its direct observations are that social reality has deviated so far from the law in divorce matters as to bring the law itself into disrepute. Since Canadian society in 1967 is so profoundly different from English society in 1857, while the divorce law has remained essentially unchanged from the English law of that time, it is, we suggest, not surprising that such a situation should exist.

The agency submits that there are many possible channels through which the valid concerns of Canadian citizens who have formerly opposed change in the divorce law may find positive expression. If, as a society, we have serious concern and desire to strengthen the values of marriage and family living, there is much for us to do. Pre-marriage education and counselling, marriage and family counselling services and family life education, exist only in scattered and embryonic form throughout our country. What services do exist are confined almost entirely to the major cities, and can serve only a small proportion of their population. Initiative has been taken by private organizations such as our own, and churches have in a number of instances, increasingly of late, given leadership in this field. A concerted effort to develop a broad social program should, we submit, involve financial support for expansion of existing programs, the development of new programs, and specific attention to the education of consellors and educators.

Further, there are various forms of social legislation which can provide broad programs of services which will strengthen and supplement the efforts of families to perform their vital functions under social conditions which create severe strains—strains differing in nature from those existing in earlier societies.

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* Miss Lynn Thomas, family counsellor.

Whether or not these matters form part of the frame of reference of the Joint Committee on Divorce is of course a matter for the Committee itself to decide. We respectfully submit that they are relevant, and express the hope that this Committee will take them under consideration in its deliberations.

Respectfully submitted
on behalf of
The Family Bureau of Greater Winnipeg

Alan R. Philp, President
BOARD OF DIRECTORS

Anthony Quaglia, Vice-President
BOARD OF DIRECTORS

(Mrs. S.) Dorothy McArton
EXECUTIVE DIRECTOR

(Miss) Miriam Schachter
FAMILY COUNSELLOR

264 Edmonton Street
Winnipeg 1, Manitoba
January 26th, 1967

THE FAMILY BUREAU OF GREATER WINNIPEG

264 Edmonton Street
Winnipeg 1, Manitoba — January 27, 1967.

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APPENDIX "36"

SUBMISSION TO SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE BY THE COUNTY OF YORK LAW ASSOCIATION

1. The County of York Law Association is composed of lawyers practising in the County of York. There are about 2,285 members of the Association of about 3,200 lawyers in the County of York. Our membership represents about one-third of all the lawyers in Ontario. The address of the Association is the New Court House, 361 University Avenue, Toronto 1, Ontario.

2. It is the recommendation of this Association that the grounds for dissolution for marriage in Canada be as follows:—

(1) Adultery, sodomy or bestiality, or conviction upon a charge of rape;

(2) Cruelty, as defined as follows:—Cruelty shall include any conduct that creates a danger to life, limb or health and any conduct that in the opinion of the Court is grossly insulting and intolerable, being of such a character that the person seeking the divorce cannot reasonably be expected to be willing to cohabit with the other spouse who has been guilty of such conduct;

(3) Desertion without just cause for a period of three years immediately preceding commencement of the proceedings;

(4) Voluntary separation of the husband and wife for a period of three years immediately preceding the commencement of proceedings provided that the Court shall be satisfied that:—

(i) There is no reasonable likelihood of a resumption of cohabitation, and

(ii) The issue of a decree will not prove unduly harsh or oppressive to the defendant spouse.

(5) Incurable unsoundness of mind where the afflicted spouse has been continuously under care and treatment for a period of five years immediately preceding the commencement of proceedings;

(6) Wilful refusal to consummate the marriage;

(7) Marriage breakdown if there is no reasonable likelihood that the spouses will live together again;

And it is further recommended that:—

(i) That no decree of divorce shall issue unless and until the Court is satisfied as respects every child of the marriage and of the family who is under the age of sixteen years that: Arrangements for the care and upbringing of such child have been made and are satisfactory or are the best that can be devised in the circumstances.

(ii) That the defences of condonation and collusion constitute discretionary and not absolute bars to matrimonial relief.

All of which is respectfully submitted by

THE COUNTY OF YORK
LAW ASSOCIATION

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All of which is respectfully submitted by

THE COUNTY OF YORK LAW ASSOCIATION

First Session—Twenty-seventh Parliament
1966-67

PROCEEDINGS OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON

DIVORCE

No. 15

TUESDAY, FEBRUARY 14, 1967

Joint Chairmen

The Honourable A. W. Roebuck, Q.C.

and

A. J. P. Cameron, Q.C., M.P.

WITNESSES:

His Excellency Sir Kenneth Bailey, C.B.E., Q.C., High Commissioner for Australia. *Barristers' Society of New Brunswick:* John P. Palmer, Q.C., Benjamin R. Guss, Q.C.

APPENDICES:

37.—The Commonwealth of Australia. Matrimonial Causes Act 1959 (*Selected Clauses*).

38.—The Commonwealth of Australia. Matrimonial Causes Act 1965 (*Selected Clauses*).

39.—The Commonwealth of Australia. Matrimonial Causes Act 1966 (*Selected Clauses*).

40.—Brief of the Barristers' Society of New Brunswick.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1967

25437—1

MEMBERS OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

FOR THE SENATE

Hon. A. W. Roebuck, Q.C., Joint Chairman

The Honourable Senators

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A. J. P. Cameron, Q.C., (*High Park*), Joint Chairman

Members of the House of Commons

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Cantin	Langlois (*Mégantic*)	Stanbury
Choquette	MacEwan	Trudeau
Chrétien	Mandziuk	Wahn
Fairweather	McCleave	Woolliams—(24).

(Quorum 7)

ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the House of Commons: March 15, 1966:

"On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—that a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee."

"By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16 An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19 An Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41. An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bills be referred to the Joint Committee of the Senate and the House of Commons on Divorce".

March 16, 1966:

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces a *vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce".

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"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce."

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Goyer, Honey, Laflamme, Langlois (*Mégantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams."

LÉON-J. RAYMOND,
Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of Special Joint Committee of the Senate and House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative."

March 29, 1966:

"With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into and report upon divorce in Canada and the social and legal problems relating

thereto, namely, the Honourable Senators Aseltine, Baird, Belisle, Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig, and Roebuck; and

That a Message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—
Resolved in the affirmative."

May 10, 1966:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19, intituled; "An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief".

The question being put on the motion—

In amendment, the Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative."

J. F. MACNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

TUESDAY, February 14, 1967

Pursuant to adjournment and notice, the Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3:30 p.m.

Present: For the Senate: The Honourable Senators Roebuck *(Joint Chairman)*, Aseltine, Baird, Belisle and Fergusson—5.

For the House of Commons: Messrs. Cameron *(High Park) (Joint Chairman)* Fairweather, Honey, McCleave, McQuaid, Otto, Peters, Stanbury and Wahn—9.

In attendance: Peter J. King, Ph.D., Special Assistant.

The following witnesses were heard:

His Excellency Sir Kenneth Bailey, C.B.E., Q.C.,
High Commissioner for Australia.

Barristers' Society of New Brunswick:

John P. Palmer, Q.C.
Benjamin R. Guss, Q.C.

The following are printed as Appendices:

37. The Commonwealth of Australia. Matrimonial Causes Act 1959 *(Selected Clauses)*
38. The Commonwealth of Australia. Matrimonial Causes Act 1965 *(Selected Clauses)*.
39. The Commonwealth of Australia. Matrimonial Causes Act 1966 *(Selected Clauses)*.
40. Brief of the Barristers' Society of New Brunswick.

At 5.45 p.m. the Committee adjourned until Thursday next, February 16, 1967 at 3:30 p.m.

Attest.

Patrick J. Savoie,
Clerk of the Committee.

THE SENATE

SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

EVIDENCE

OTTAWA, Tuesday, February 14, 1967.

The Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3:30 p.m.

Senator Arthur A. Roebuck and Mr. A. J. P. Cameron *(High Park)* Co-Chairmen.

The CO-CHAIRMAN *(Mr. Cameron)*: The committee will come to order; we have a quorum. Our first witness is Sir Kenneth Bailey, C.B.E., Q.C., High Commissioner for Australia. Sir Kenneth was born in Melbourne, Australia, on November 3, 1898. He served in the First Australian Imperial Force in France, 1918-1919. He was educated at the universities of Melbourne and Oxford, Corpus Christi College; he was Rhodes Scholar for Victoria in 1918; he was called to the bar at Gray's Inn, London, in 1924, and was admitted as a barrister and solicitor in Victoria, Australia, in 1928.

Sir Kenneth Bailey's first appointment was as Vice-Master of Queen's College in the University of Melbourne, 1924 to 1927. From 1928 till 1930 he was Professor of Jurisprudence, and from 1931 till 1946 Professor of Public Law, in the University of Melbourne, and was Dean of the Faculty of Law from 1928 until he was seconded to the Australian Government as a wartime constitutional consultant in 1943. He was Chairman of the Professorial Board from 1938 till 1940. He was a member of the governing body of the University of Melbourne from 1929 till 1942, and of the Australian National University from 1948 till 1960.

From 1946 till 1964 Sir Kenneth Bailey held the offices of Solicitor-General and Secretary of the Attorney-General's Department, the latter office corresponding to the Canadian office of Deputy Minister of Justice. As Solicitor-General he appeared for the Commonwealth of Australia in a number of constitutional cases in the High Court of Australia and in the Privy Council in London. In 1962 he was counsel for Australia in the International Court of Justice in the proceedings leading to the court's advisory opinion on the expenses of the United Nations in the peace-keeping operations in the Gaza Strip and in the Congo.

In 1945 Sir Kenneth Bailey was a member of the Australian delegation at the international conference in San Francisco at which the Charter of the United Nations was adopted. Since then he has represented Australia at a number of the sessions of the General Assembly. In 1956 he was Rapporteur of the Legal Committee. He has led Australian delegations at the two Geneva conferences on the Law of the Sea, in 1958 and 1960, and in the Sub-Committee on the Peaceful Uses of Outer Space, 1962 to 1966.

Sir Kenneth Bailey is an honorary fellow of Corpus Christi College, Oxford, a bencher of Gray's Inn, and Queen's Counsel in Australia. He was awarded the decoration of C.B.E. in 1953, and was knighted in 1958. He took up duty as High Commissioner for Australia in Canada in July, 1964.

In 1925 Sir Kenneth married Yseult Donnison of Blewbury, Berkshire, the sister of a Corpus contemporary. They have three sons, each at present living in a different country. Lady Bailey was awarded the decoration of O.B.E. in 1961, in particuliar for her work as President of the Australian Pre-School Association.

Members of the committee, I have much pleasure in introducing to you Sir Kenneth Bailey, High Commissioner for Australia. I believe that he will give us a background history of the divorce law in Australia.

His Excellency Sir Kenneth Bailey C.B.E., Q.C., High Commissioner for Australia: Mr. Chairman and members of the Committee, the committee does me honour in giving me the opportunity to give a brief explanation of the divorce law of Australia as it is and was.

I think probably most members of the committee know that the current divorce law in Australia is wholly federal in character, under the Matrimonial Causes Act, 1959, which came into operation on February 1, 1961, which has since been amended by two acts, of 1965 and 1966, and which has been supplemented by a number of matrimonial causes Rules regulating the practice in the divorce jurisdictions.

There were two earlier federal acts, 1945 and 1955, about which I shall not make a statement to the committee, other than to say they were directed solely towards relaxing the common-law rule that only the courts of the Australian State in which a petitioner was domiciled could exercise jurisdiction over a petition for divorce. I shall deal later with the question of domicile as it stands under the 1959 act, and the 1959 act repeals both those earlier measures, so I think the committee need not be concerned with them.

Before 1961, with the sole jurisdictional exceptions that I have mentioned, there had been no substantive federal divorce law in Australia except in the two mainland federal Territories, the Australian Capital Territory in which Canberra is situated and the Northern Territory, to the north of the State of South Australia. In these Territories, the law is wholly federal; otherwise, till 1961, the substantive law had been exclusively that of the six component states of the Australian Federation.

Details of the former state laws as such are perhaps not required for the purposes of the committee, but the committee will correct me if that assumption is wrong. The state statutes had existed for different periods up to about 100 years, when they were superseded by the federal act of 1959. They were based largely on the British act of 1857, and provided for the hearing of petitions for divorce, nullity or judicial separation by the superior courts, and also for decrees of dissolution or nullity on specified grounds, added to or modified from time to time.

There was a good deal of diversity from one state to another in the selection of grounds of divorce, and a synoptic table of state statutes would present a most complex picture. However, many of the differences in the law from one state to another in Australia concerned solely questions of detail, or even questions of drafting, rather than questions of substance. I think it a fair generalization to say that, except perhaps in the State of Queensland, which in divorce had been conservative, divorce was available to Australians, in whatever state they lived, on a wider range of grounds than it was, or is, available to their counterparts in Canada. In particular, divorce by judicial decree has been at all material times available in each and every one of the states and territories in Australia. That is to say, there is no Australian analogue to the grant of divorce by *ad hoc* legislative procedure as in Canada, from Quebec and Newfoundland.

Among the few significant diffrences between the states in the grounds of divorce were, first, that Victoria, one of the two most populous states, preserved

in respect of the ground of adultery the double standard which came from the British Act of 1857. A single act of adultery was sufficient, in a husband's petition, to found a decree of divorce, but in the case of a wife suing for divorce from her husband aggravated adultery, in one or other of various forms, was required. New South Wales, the most populous of the Australian states, did not at any time recognize insanity as a ground of divorce, though all the other states had done so for up to sixty years. On the other hand, New South Wales did establish as a ground divorce disobedience to a decree for the restitution of conjugal rights, and that was thought of in other states as providing a quicker and simpler means of divorce than they were prepared to adopt for themselves. Finally, Western Australia permitted divorce on the ground of five years' separation. So did South Australia, but only in the case of separation under judicial order. In Western Australia it did not matter how the separation came into existence.

Turning now to the 1959 Act of the federal Parliament, that act was passed in the exercise of an express constitutional power in Section 51, paragraph (xxii) of the Australian Constitution, which, as perhaps all members of the committee know, was an Act of Parliament of the Parliament of Westminster, enacted in 1900 on the basis of a draft prepared and settled in Australia.

The CO-CHAIRMAN (*Senator Roebuck*): With the consent of the provinces?

Sir Kenneth BAILEY: Yes, by referendum; indeed by Act of Parliament and by referendum. The terms of paragraph (xxii) of Section 51, reading the covering words as well, are: "The Parliament"—that is the federal Parliament—"shall...have power to make laws for the peace, order and good government of the Commonwealth"—that is to say, the whole of federated Australia; I try to avoid the Australian technical use of the word "Commonwealth" because it is so ambiguous a term, referring also as it does nowadays to the Commonwealth of Nations.

The CO-CHAIRMAN (*Senator Roebuck*): And the British Commonwealth.

Sir Kenneth BAILEY: Yes. With us in Australia, the term "Commonwealth" fulfils the same legal and political and practical office as a means of description as the word "Dominion" has done in Canada. "The Parliament shall...have power to make laws for the peace, order, and good government of the Commonwealth with respect to," and then there follows a list of subjects, which includes "(xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants". The preceding paragraph, paragraph (xxi), gives a like power with respect to the simple term "Marriage".

In the drafting stages in Australia, the draftsmen began with the phrase "marriage and divorce". This phrase, of course, came from the British North America Act, which was part of the material that was under very close study in Australia in those years. But our draftsmen had some doubts whether "divorce" was quite a wide enough term, and added both the term "matrimonial causes" and the elaborate qualification about "parental rights, and the custody and guardianship of infants" in relation to divorce and matrimonial causes. If some feel that "matrimonial causes" is a rather stiff phrase and that another term than "matrimonial causes" might be a better one, Australians would have to plead that that was the subject of this constitutional power, and they had better use the constitutional term because, if they used some other word, either it might be less, in which case it would not use the constitutional power to the full, or it might be more, in which case the law might in part be invalid.

Perhaps I should, in Canada, add by way of supplement that the federal power given in Australia by paragraph (xxii) of our Section 51 is not an exclusive federal power. It is a concurrent power and, subject only to the paramountcy of any federal law, the state laws which were already in existence

in 1900 when the constitution was enacted continued in operation, as amended from time to time, until they were superseded at the beginning of 1961.

"Matrimonial causes" were not defined in the Australian Constitution. It was thought at the time that the phrase would include judicial separation as well as dissolution of marriage; nullity; restitution of conjugal rights; jactitation of marriage; damages against an adulterer, and probably maintenance of wives and children and marriage settlements. In recent times some uncertainty has been felt in Australian governmental circles whether maintenance in its entirety is included in the federal constitutional power, for example in cases where no other matrimonial relief is sought, as where perhaps a marriage has ceased to exist and the question is one merely of varying, or seeking enforcement of, a subsisting judicial order for the maintenance of a former wife.

The 1959 act does define "matrimonial causes" very widely, in section 5, but still so as to leave to the states the subject of maintenance orders which are not incidental to a suit for dissolution or nullity of marriage. In effect, that leaves untouched the state law as it is administered in courts of summary jurisdiction, the ordinary magistrates' courts. All suits in matrimonial causes under the federal act, however, are instituted in superior courts, and it is only as incidental to those proceedings that the federal act deals with maintenance.

Since February, 1961, all state laws on the subject of divorce and matrimonial causes have ceased to have any operation. The federal Parliament of Australia cannot, of course, repeal a state law, but section 109 of the Constitution renders invalid any state law to the extent of any inconsistency with a federal law; and by section 8 of the act of 1959 the federal Parliament declared that in future no matrimonial cause should be instituted or continued otherwise than under and in accordance with the federal act. Fairly elaborate transitional provisions were, of course, required and were included, but the state laws have wholly ceased to operate.

The main changes made by the 1959 act can perhaps be stated under four headings. I think the Attorney-General of Australia, who administers this act, would wish me to emphasize that it was not as conceived, and is not as operated, merely a "divorce act", still less an "easy divorce" act. It was an attempt to grapple with the problem of the stability of marriage as an urgent social issue in all its aspects. On the one hand it tried by means, some of which were novel, to avert or prevent the breakdown of marriages and to promote the stability of marriages. On the other hand it provided for relief to parties to a marriage that had hopelessly disintegrated, not only by the traditional procedures of granting dissolution on the petition of a party wronged by a matrimonial offence regarded as being so grave as to destroy the foundations of a common life, but also by the adoption as in western Australia and New Zealand of new provisions permitting the court irrespective of any question of wrongdoing, to dissolve a marriage that had hopelessly broken down in fact, as evidenced by separation of long duration with no prospect of reconciliation.

In considering that aspect in 1959, the Attorney-General of the day, the present Chief Justice of Australia, Sir Garfield Barwick, was greatly pressed with the problem that I know has been so much present in the minds of members of this committee, namely that of the spouse long separated from the other spouse and anxious to start afresh and begin a ligitimate family with another person. The new Australian separation provisions were thought of by Sir Garfield Barwick greatly from that angle—from the angle of promoting a new marriage as well as from the angle of the social disutility of preserving the mere husk, shell or bones of a marriage that has ceased to have vitality or meaning.

The first set of provisions, therefore, to which I should like to direct attention are those provisions directed towards promoting the stability of marriage. There were several. There was in the first place a provision, in completely new

Australian legislation, for federal financial aid to approved marriage guidance organizations. Perhaps I could read the few words in which the act made this provision:

> The Attorney-General may, from time to time, out of moneys appropriated by the Parliament for the purposes of this Part, grant to an approved marriage guidance organization, upon such conditions as he thinks fit, such sums by way of financial assistance as he determines.

This was not an authority to establish a marriage guidance organization of the government's own. There were marriage guidance organizations in being, and the Attorney General was authorised to give them financial support, to the extent provided for by parliament, if he approved them. The amount provided in the current financial year for the support of marriage guidance organizations is a sum of approximately A$183,000, or C$220,000.

The Attorney-General has been at pains not to establish such a close and detailed official supervision of marriage guidance organizations as would destroy their independence. But as a condition of securing approval, and therefore financial support, he has insisted on getting reports of what they are doing, and he has encouraged them to co-ordinate their own activities with those of other organizations, and in particular to establish, in consultation with university faculties of social welfare and the like, suitable courses of training for marriage guidance counsellors. In the result, the work of the marriage guidance organizations has very substantially increased, and improved, since the enactment of the 1959 act.

The second provision for promoting the stability of marriage is one to be found in the Matrimonial Causes Rules. When a petition or other document instituting a matrimonial cause is brought to a solicitor's office, the document is not to be effective for the purpose of proceedings under the act unless the solicitor has, by written certificate under his own hand, certified first that he has brought to the attention of the party the provisions of the act relating to the reconciliation of parties to a marriage, and the approved marriage guidance organizations reasonably available to assist in effecting a reconciliation between the spouses; secondly, that he has discussed with the party the possibility of a reconciliation between that party and the other spouse, either with or without the assistance of such an organization (Rule 15).

My information is that practitioners are treating this obligation seriously. It would be pleasant to be able to report that in a high percentage of cases a reconciliation is effected. I cannot give figures of that kind. But I am assured by persons in a position to know the practice that, not only are the certificates regularly furnished—of course they have to be, because otherwise the petitions cannot proceed—but the obligation to bring the possibilities of reconciliation to the notice of parties is most carefully observed, more particularly, it is said, by the younger practitioners.

Next, the act itself requires a judge before whom a petition for the dissolution of a marriage comes to take into consideration the possibility of reconciliation between the parties even at that stage. Section 14 of the act says:

> It is the duty of the court in which a matrimonial cause has been instituted to give consideration, from time to time, to the possibility of a reconciliation of the parties to the marriage. . . .and if at any time it appears to the Judge constituting the court, either from the nature of the case, the evidence in the proceedings or the attitude of those parties, or of either of them, or of counsel, that there is a reasonable possibility of such a reconciliation, the Judge may do all or any of the following:—

(a) adjourn the proceedings to afford those parties an opportunity of becoming reconciled or to enable anything to be done in accordance with either of the next two succeeding paragraphs;

(b) with the consent of those parties, interview them in chambers, with or without counsel, as the Judge thinks proper, with a view to effecting a reconciliation;

(c) nominate—

(i) an approved marriage guidance organization or a person with experience or training in marriage conciliation; or

(ii) in special circumstances, some other suitable person to act as conciliator.

I may mention that the act makes specific provision for maintaining the secrecy of any statements made in the course of marriage guidance counselling or such conciliation procedures as are provided for in the act.

While I am on the act itself, I think I should also mention the addition in 1965 of provisions based on the British act of 1963, permitting the parties to a marriage, where there has been desertion, to try out the resumption of cohabitation, with or without sexual intercourse, for a period of not more than three months, with a view to effecting a reconciliation, and, if no reconciliation is in fact effected during that period, to resume their separate existence without interrupting the statutory period of desertion or of mere separation, as the case might be.

Our own 1965 provisions took note of some of the criticisms, both by judges and by academic writers, of the British statute of 1963 and are not in exactly the same form. We think they clarify some of the points in the British legislation to which criticism had been directed.

Co-CHAIRMAN (*Mr. Cameron*): Thank you, Sir Kenneth.

Sir Kenneth BAILEY: The provisions of the 1959 act with respect to the position of children may be looked at from more angles than one, but at this moment I want to add them to my list of provisions directed towards promoting the stability of marriages. That may seem an odd classification of the provisions, when I say that Section 71 of the act provides that, where there are children of a marriage, no decree nisi for divorce may become absolute until the court, by order, has declared:

(a) that it is satisfied that proper arrangements in all the circumstances have been made for the welfare and, where appropriate, the advancement and education of those children; or

(b) that there are such special circumstances that the decree nisi should become absolute notwithstanding that the court is not satisfied that such arrangements have been made.

The members of the committee may think that the stage when a decree nisi has been pronounced is a bit late to be thinking of preserving the stability of a marriage, and in a manner of speaking, of course, that is right. It must be only a rare case when the necessity for satisfying the court that proper provision has been made for the children before a decree becomes absolute will lead the parties to become reconciled again and discontinue their proceedings.

But that is not the whole story as we see it in Australia. It is rather that this provision is naturally before the minds of legal advisers, solicitors and counsel for both sides, and in particular before the mind of a petitioner. The rules indeed make provision for the holding of compulsory conferences between the parties, before a suit is set down for hearing, on such matters as the provision to be made for children; rules 165-168. The very existence of these statutory requirements may very well lead, and in some cases has led, to discussions about what is to be

done with the children which will set the dispute between the parents themselves in a quite different light, and have in fact, in a few cases, led to a decision to try again.

Co-CHAIRMAN (*Mr. Cameron*): Changed their minds.

Sir Kenneth BAILEY: Yes. At any rate, not to persist at that stage with the proceedings. I do advisedly, therefore, put that provision in the category of provisions directed towards promoting the stability of marriages, though its effect must be limited to a small number of cases.

The Attorney-General of Australia would certainly include in this set of provisions a reference to the rule in Section 43 of the Act, that no petition may be instituted during the first three years of a marriage, with certain exceptions, without the leave of the court. The thought underlying that provision in the act will be clear to all members of the committee. The feeling is that at that early stage processes of adjustment are still going on, and it is too early to say that a marriage has broken down, or that what one or other party has done makes it impossible ever to resume a common life. The leave of the court is always available in extreme cases.

In the second place, the 1959 act contains certain provisions directed towards establishing an Australian, as distinct from a state, domicile; and in the case of deserted women replacing domicile by residence as a criterion of jurisdiction. These provisions are based on the two earlier federal acts of 1945 and 1955. There are now three jurisdictional rules to be found in Sections 23 and 24 of the act. Firstly, proceedings for dissolution of a marriage can only be instituted by a person domiciled in Australia. It does not matter where in Australia he is domiciled; it may be in a state or in a federal territory, or it may be uncertain in what state or territory he is domiciled; as long as it is in Australia the condition of the act is fulfilled. Secondly, for the purposes of that rule a deserted wife is deemed to be domiciled in Australia if she was herself domiciled in Australia immediately before her marriage; if her husband was domiciled in Australia immediately before he deserted her; or if she has been resident in Australia for three years immediately before the petition was instituted. Therefore, the deserted wife never needs to rely on domicile if she has been resident in Australia for three years before she institutes her petition.

Co-CHAIRMAN (*Senator Roebuck*): Does she bring her action in the courts of the particular state in which she is resident?

Sir Kenneth BAILEY: Yes, sir, in the normal course. The act is very flexible in this regard, however, partly because there has been in Australia, particularly since the second world war, a great deal of movement from one state to another, and the supreme courts of the states have all jurisdiction to deal with suits for dissolution irrespective of any question of the residence of the petitioner or the respondent in their own state. In the normal course it would naturally be most convenient for a petitioner to bring the suit in the supreme court of the jurisdiction in which he or she is living. If for some reason or other a different supreme court is adopted, it is a matter for that court to decide whether it will in fact exercise jurisdiction or make an order transferring it to another. Though it is not laid down precisely anywhere, in the normal course a petition will be instituted in the superior courts of the state or territory in which a petitioner is living, but there is great flexibility. That, sir, was the third of the three jurisdictional rules that I wished to mention.

Co-CHAIRMAN (*Mr. Cameron*): It is solely a matter of convenience?

Sir Kenneth BAILEY: Yes, solely for convenience. That provision for transfer from one court to another on grounds of convenience is to be found in Section 26 of the act. Perhaps I should mention that, partly for constitutional and partly for practical reasons some residential qualifications are required for suits in the

federal territories. But this does not really alter the broad picture of jurisdiction as I have sketched it.

I have spoken for a very long time, and it is time I began to draw these remarks to a close; but I think perhaps the committee would wish me to say something briefly about the grounds for divorce under the act.

Co-CHAIRMAN (*Mr. Cameron*): We are certainly very interested in that.

Sir Kenneth BAILEY: They number fourteen in all, each one of them found in substance, though seldom in exactly the same words, in one or more of the states. Most of them had been found previously in most, if not all, of the states.

Perhaps I should just run down the list in section 28. It begins with what one might call the usual grounds: adultery, desertion—and in this case desertion without just cause or excuse for not less than two years. In the state laws previously the period was three years, but, in part because of the length of time that the preparation of petitions took, in part because of the length of time that often elapsed between the filing of a petition and its hearing, in part because of a general feeling in the community that three years was too long for a party to have to wait before instituting proceedings, the Law Council of Australia recommended that the period of desertion should be reduced to two years, and it was. After (a) adultery and (b) desertion there come: (c) wilful and persistent refusal to consummate the marriage; (d) habitual cruelty during a period of not less than one year; (e) rape, sodomy or bestiality committed since the marriage; (f) habitual drunkenness or intoxication by drugs since the marriage for a period of not less than two years; (g) since the marriage, suffering frequent convinctions for crime and habitually leaving the petitioner without reasonable means of support, within a period of five years; (h) serving since the marriage a term of imprisonment for a period of not less than three years after convinction for an offence punishable by death or imprisonment for life, and being still in prison at the date of the petition; (i) since the marriage, conviction of attempting to murder or otherwise unlawfully kill the petitioner, or of committing offences involving the intentional infliction of grievous bodily harm on the petitioner; (j) failure habitually and wilfully throughout two years to pay maintenance for the petitioner under a court order, or under an agreement providing for separation; (k) failure to comply throughout a period of at least one year, with a decree of restitution of conjugal rights made under the act.

Then there is the ground of insanity, which perhaps I should read in full:

> (l) that the other party to the marriage—
>
> (i) is, at the date of the petition, of unsound mind and unlikely to recover; and
>
> (ii) since the marriage and within the period of six years immediately preceding the date of the petition, has been confined for a period of, or for periods aggregating, not less than five years in a institution where persons may be confined for unsoundness of mind in accordance with law, or in more than one such institution.

There is provision in that paragraph, as you will have noted, for the possibility that, though at the time when the petition is instituted the absent spouse must be found to be unlikely to recover, there may have been periods during the previous six years when possibilities of recovery had permitted his or her temporary release from the institution, following only by re-committal.

Finally, there is the ground of separation, which again I shall read in full:

> (m) that the parties to the marriage have separated and thereafter have lived separately and apart for a continuous period of not less than five years immediately preceding the date of the petition, and there is no reasonable likelihood of cohabitation being resumed.

The provisions of that paragraph, which is Section 28 (*m*) of the act, need to be supplemented by reference to two further provisions, which are to be found in Sections 36 and 37. Section 36 declares that the parties to a marriage may be taken to have separated, not only in accordance with a judicial decree or an express agreement, but if they separated in fact, notwithstanding that the cohabitation was brought to an end by the action or conduct of one only of the parties, whether it constituted desertion or not.

The second is so closely geared to the operation of section 28 (*m*) that I think I should read it almost in full. It is Section 37 (1):

> Where, on the hearing of a petition for a decree of dissolution of marriage on the ground specified in paragraph (*m*) of section twenty-eight...the court is satisfied that, by reason of the conduct of the petitioner, whether before or after the separation commenced, or for any other reason, it would, in the particular circumstances of the case, be harsh and oppressive to the respondent, or contrary to the public interest, to grant a decree on that ground on the petition of the petitioner, the court shall refuse to make the decree sought.

There are two further subsections in that section which are also relevant to the court's discretion. First:

> (3) The court may, in its discretion, refuse to make a decree of dissolution of marriage on the ground of separation if the petitioner has, whether before or after the separation commenced, committed adultery that has not been condoned by the respondent or, having been so condoned, has been revived.

An earlier subsection (2) says that the court shall not grant a decree unless it is satisfied that proper financial provision is made for the respondent—proper, that is, in all the circumstances of the case.

The safeguards, of course, are that, if it can be shown that the court is satisfied that to make the decree would be harsh or oppressive to the respondent, or against the public interest, the decree must not be issued. These are strong words, and they have been judicially noted as strong words. The courts have many times had to interpret these phrases and they have naturally given decisions which are intimately bound up with the totality of all the facts in the particular case. Therefore, there is not much which is serviceable by way of precedent. The courts have avoided trying to paraphrase the statutory words; they have rather attempted to apply these broad moral community judgments—"harsh", "oppressive", "contrary to the public interest"—to the totality of the circumstances in the particular case, and have made up their minds accordingly whether a decree should or should not be issued in those circumstances.

One thing does emerge very clearly from the few years during which this provision has been before the courts. The judges have given effect to what they understand to be the clear intention of parliament, that a petitioner is not to be denied a decree merely because it can be shown that he was at fault in bringing about the separation that has taken place. This is a provision by which parliament intended to make a dissolution of marriage available, irrespective of the question of fault, unless there was something which might very broadly be described as of an outrageous character that would make it harsh, oppressive or contrary to the public interest to give such a petitioner an opportunity of marrying again. It was a real attempt to make a breakdown provision, apart altogether from any question of matrimonial offense.

Now, sir, I think it is high time I desisted from haranguing the committee and allowed the members, who have given me so patient a hearing, to ask any questions.

Co-CHAIRMAN (*Mr. Cameron*): We are greatly indebted to you, Sir Kenneth, for your very learned, instructive and informative discussion on the law of our sister state of Australia.

Have any members of the committee any questions they wish to ask?

Mr. McCLEAVE: I have two or three very quick ones. Sir Kenneth, is the adultery set forth as a ground for divorce defined or limited in any way, or is it just set forth in the Australian act as adultery?

Sir Kenneth BAILEY: Adultery; not qualified.

Mr. McCLEAVE: Turning to the question of public acceptance of the new law in Australia, have there been any requests for wider grounds, or a change or modification of some of the grounds, or are the existing grounds generally accepted?

Sir Kenneth BAILEY: The record would suggest that the act has won very general acceptance. When in 1965 parliament introduced those special provisions about reconciliation that were based on the British act of 1963, it had been noticed that no organizations took the opportunity to raise the question of further or other grounds, or even the removal of grounds already there. The ground of separation had been particularly controversial at the time the 1959 act was enacted, but it was noted that in 1965 no attempt was made to effect further major changes.

Mr. McCLEAVE: My final question, sir, deals with reconciliation. I gather that there are three possible steps or levels. There is no compulsion at any one of these levels, is there?

Sir Kenneth BAILEY: No.

Mr. PETERS: Do you have a problem in Australia in relation to property rights when the disposition of property and jurisdiction of the children are involved in cases where state governments may exercise some control?

Sir Kenneth BAILEY: So far as I know, no difficulty has arisen so long as the federal provision operates as an incident in the handling of a matrimonial cause. That is, federal law by constitutional definition prevails over any inconsistent state law. So far as I am aware, no difficulty has arisen with state law in relation to matrimonial causes.

Mr. PETERS: In Australia has there been a history of provincial or state governments operating by enabling legislation in this field in relation to matrimonial disputes?

Sir Kenneth BAILEY: Yes. Only the states did it until 1959, because the divorce law of Australia was wholly state law until 1959. I think it to be true that the provisions for protecting the property interests of spouses and children are more extensive, more detailed, in the federal act than they were in any of the state acts that it superseded. In the federal act there is even a provision, which again I think had a British counterport, enabling a maintenance order to be enforced by the attachment of earnings, which was not operative under any of the state laws, so far as I know.

Mr. PETERS: In contested cases, is there machinery under the Australia act to allow for appeal, wherever that may exist, either as to the disposition of the property or the disposition of the children?

Sir Kenneth BAILEY: Yes; as to both matters. There are two possible appeals. In the first place, there is an appeal as of right, a full appeal on all matters, from the judge of the superior court of a state who hears the petition to either the full Supreme Court or the Court of Appeal of that state, according to

how the appellate work of the state is organized. Thereafter, by special leave of the federal supreme court, the High Court of Australia, there is an appeal to that court.

The act does not establish or use federal courts to exercise jurisdiction under the Matrimonial Causes Act; it uses the constitutional provision enabling the federal Parliament to invest state courts with federal jurisdiction. The only federal courts which exercise jurisdiction under this act are the supreme courts of the federal territories; otherwise it is the same judges in the same courts, though with a different source of authority and applying different rules, as formerly exercised divorce jurisdiction under state law. Because this is now federal jurisdiction, it is for the federal parliament to regulate the appellate jurisdictions available to it, and it has so regulated it by permitting unrestricted appeal to the full court or the appellate court of the state, and thereafter, by leave, to the High Court of Australia.

Mr. PETERS: With the exception of the territories, have any of the states not availed themselves of the enabling legislation to operate the necessary state court?

Sir Kenneth BAILEY: That question does not really arise, because this is federal law, it is the only law, and the courts are vested with jurisdiction by federal law. They are under a duty to exercise it.

Mr. PETERS: It is really not enabling legislation then, it is substantive legislation?

Sir Kenneth BAILEY: That is correct, it is substantive legislation.

Mr. PETERS: It applies to the state courts?

Sir Kenneth BAILEY: Yes, under a provision in the Constitution enabling the federation to invest the courts of a state with federal jurisdiction in any matter arising under a law made by the Parliament.

Mr. PETERS: Was there any objection on the part of any of the states to accepting this responsibility?

Sir Kenneth BAILEY: No, Mr. Peters, I think not, partly for the reason I have given, that the state supreme courts were already organized to exercise jurisdiction on divorce, and had in fact been exercising it for sixty to a hundred years. They had the courts, they had the organization, the registrars and the premises, and it is their regular constitutional duty to exercise federal jurisdiction as conferred by Parliament, and they have been doing so in many other matters ever since federation. There were, it is right to say, very full consultations at all levels between the federation and the states during the preparation of this measure; there were conferences of registrars in divorce, conferences of attorneys-general, conferences of judges, so it was very fully prepared.

Senator FERGUSSON: Sir Kenneth, I was very interested in what you said about marriage counselling. Could you tell us how long they have been organized? When were the first ones organized? I do not mean the exact date, but is it ten years, fifteen years, five years?

Sir Kenneth BAILEY: I would hesitate to give a year, Senator Fergusson. I seem to remember them in being, one in particular, some thirty years ago. They have increased greatly in recent years, and are now, of course, large and substantial with federal assistance. As I remember, both the churches and welfare organizations had begun to establish marriage guidance organizations by the late thirties.

Senator FERGUSSON: I gather from what you say that they probably got some government support quite early in their career?

Sir Kenneth BAILEY: No, I do not think so: certainly not from federal sources.

Senator FERGUSSON: Apparently the government gives a large amount of support now. Are there any standards that they have to meet to get that support? Do they have to have a certain number of trained social workers doing the counselling, or is the money just given out without any standards to be met?

Sir Kenneth BAILEY: No, that is not so. It is, of course, a diplomatic and delicate operation for a government department to determine the conditions on which it will offer financial assistance to a voluntary organization, and it has been handled with a great deal of delicacy and many conferences. The department has a marriage guidance officer whose sole function is liaison with and organizing conferences of the marriage guidance organizations; these are held regularly. The organizations are invoking the assistance of university faculties of social welfare and social administration and are reporting regularly to the Attorney-General, both the course of training they are prepared to insist on and also the whole manner in which they expend their money. To use a perhaps harsh word, but not an oppressive one I hope, there is some government supervision in order to justify a substantial expenditure of public funds.

Mr. HONEY: Do I take it from what you said, Sir Kenneth, that in each case before a suit is instituted the couple are required to be referred to a marriage counsellor?

Sir Kenneth BAILEY: No, "referred to" goes too far. Under rule 15, the existence of the facilities has to be brought to their notice, and their solicitor has to certify that he has done so. In fact, the marriage guidance organizations do have people who become their clients as a result of this procedure. But of course, they are always available, and many people are sent to them by solicitors, family friends, relatives, medical practitioners, clergymen, quite apart from any actual proceedings.

Mr. HONEY: They are not in the strict sense of the word agents of the court?

Sir Kenneth BAILEY: No, unless at a later stage a judge makes an appointment with the consent of the parties, under section 14 of the Act.

Mr. HONEY: I assume they make a report. If an action is instituted for dissolution of the marriage, does the report form part of the court record?

Sir Kenneth BAILEY: No.

Mr. HONEY: But it is given in a formal manner to the judge, he is apprised of it? Or is he not?

Sir Kenneth BAILEY: He would not be apprised of the terms of any report. He would be apprised simply by the parties, through their counsel, whether or not reconciliation had been effected, and whether or not the parties wished the matter to proceed. That I think is the effect of section 14 of the act.

Mr. HONEY: The judge would not have knowledge of the terms of the recommendation, if one was made?

Sir Kenneth BAILEY: No.

Co-CHAIRMAN (*Mr. Cameron*): If there are no more questions, may I say that Sir Kenneth has very kindly indicated that as he lives in Ottawa he would be very glad to come back at any time if the committee wanted to continue with questions or to hear anything further about the law of divorce in Australia.

Senator Roebuck, would you be good enough to thank our speaker?

Co-CHAIRMAN (*Senator Roebuck*): It would take me a long time to do so adequately, because we have been very much impressed, Sir Kenneth, with your distinguished career. I also notice that you are here with the consent of your home government, and I think we would all be pleased if you would convey to the Prime Minister of Australia, and anyone else who is involved in that consent, our recognition of and our thanks for the privilege of having you here.

You have given us many practical thoughts. The Australian act is different from ours in many material respects. It contains a wealth of suggestions, such as the certificate with regard to conciliation and the fact that the thought of conciliation continues right up until the final decree, the question of domicile and quite a number of other thoughts, including those with regard to the causes or grounds for divorce. These are all subjects which are before us, and I can assure you that what you have said and what you have pointed out in the Australian act will be of value to us, that it will all be thoroughly considered, and we thank you for bringing it before us.

CO-CHAIRMAN (*Mr. Cameron*): We next have before us representatives from the Barristers' Society of New Brunswick in the persons of John P. Palmer, Q.C., and Benjamin R. Guss, Q.C.

Mr. Palmer was born on August 17, 1916, at Dorchester, New Brunswick. He is married and has five children. He attended Ottawa public schools, Glebe Collegiate, Ottawa, Osgoode Hall Law School in 1937, the University of New Brunswick Law School from 1945 to 1946, and became a Bachelor of Civil Law in 1946. He was called to the New Brunswick Bar in 1946 and was made Q.C. in 1962. He served in the Canadian Army from 1940 to 1945.

He was employed by Sanford and Teed, Saint John, New Brunswick, from 1954 to 1957. He was a member of Teed Palmer O'Connell, later Teed Palmer O'Connell and Leger, from 1957 to 1966, and Palmer O'Connell Leger Turnbull 1966 and following. He practices law at Saint John, New Brunswick. He was part-time lecturer on law at the University of New Brunswick from 1947 to 1949 and from 1954 to 1956. He was President of the Saint John Law Society, 1965-67, and he is a member of the council of the New Brunswick Barristers' Society and a member of the Canadian Bar Association.

Our other witness is Mr. Benjamin R. Guss, Q.C., who received his B.A. degree in 1928, and was made LL.B. in 1930 from Dalhousie University. He read law with the Honourable J.B.M. Baxter, Premier and Attorney-General of New Brunswick, and later Chief Justice. He was President of the Saint John Law Society, Chairman of the Junior Bar of Canada, Chairman of the Legal Aid Committee of the Canadian Bar Association, a founder and President of the Medico-Legal Society of Saint John, Vice-President for New Brunswick of the Canadian Bar Association, solicitor for the municipality of the County of Saint John, Chairman of the Commission to Establish Hospital Insurance in New Brunswick, counsel for the delegation representing Saint John before the Joint International Waterways Commission. He is a member of the Council of the Canadian Bar Association, member of the Council of the New Brunswick Barristers' Society, secretary to the Municipalities Section of the Canadian Bar Association, Chairman of the Defence Research Institute (Atlantic provinces), Master of the Supreme Court of New Brunswick, honorary solicitor to the Animal Rescue League, honorary solicitor to the Saint John Tuberculosis Association, and other organizations.

Those are our two distinguished witnesses.

Mr. John P. Palmer, Q.C., Member of Council, New Brunswick Barristers' Society: Mr. Chairman, we are here to speak on behalf of the bar of the Province of New Brunswick, and perhaps a few preliminary remarks would be in order. The first is that New Brunswick is Canada in microcosm, because, although a small province, it has the marked racial complexion that is a feature of Canadian society: 38 per cent of our citizens in New Brunswick are of French descent, and I suppose 35 per cent. of them use French as their language of the home. The great majority of our French citizens in New Brunswick are members of the Roman Catholic faith. Again among the English speaking citizens of New

Brunswick we have a very considerable Roman Catholic element; probably one-third of the primarily English speaking families would be of the Roman Catholic faith. New Brunswick is not as highly urbanized, of course, as much of the rest of Canada.

The background to this report arises from a speech Mr. Guss made in July, 1965, at the annual meeting of the New Brunswick Bar. We have a very democratic Bar Society in New Brunswick; we have a meeting which all are free to attend, at which we get perhaps a quarter of our practising bar, and Mr. Guss spoke on the subject of broadening the grounds for divorce at that time. Consequently, he was appointed chairman of a committee in September, 1965, to draft report on this subject, of which I was made a member, together with Professor D. M. Hurley of the Law Faculty of the University of New Brunswick. We met several times, a draft report was prepared and eventually finalized, and it was presented to the Barristers' Society of New Brunswick at its annual meeting in July, 1966. The report of this committee of Professor Hurley, Mr. Guss and myself is attached to the society's submission.

The meeting of the Barristers' Society of New Brunswick at which this matter was considered was the largest meeting the society had ever seen; we had a very wide representation present, and I would think between one-quarter and one-third of the practising lawyers in New Brunswick were there; all elements, such as religious and language elements, were well represented. A point I wish to stress is that the resolutions which form the basis of the society's report were adopted unanimously at that meeting, so this is a very wide consensus of opinion of our bar. Those are the preliminary remarks that I wish to make.

The CO-CHAIRMAN (*Mr. Cameron*): All the members of the committee have a copy of the presentation by the society, and we will print it as part of the record.

Mr. PALMER: Do you wish me to read it?

The CO-CHAIRMAN (*Mr. Cameron*): You present it in the way you feel you should. You know what we are trying to find out about grounds and reasons. You tell us why you are advocating the broadening of the grounds, and generally what you feel on the subject-matter of divorce.

Mr. PALMER: The reason we advocated it as a committee was certainly because of our own observation of these cases and the very serious hardships which come to the attention of every lawyer. It is obvious that a great number of the lawyers in New Brunswick subscribe fully to these feelings, and this is a series of unanimous resolutions appearing in our report.

The CO-CHAIRMAN (*Senator Roebuck*): There are only two pages in the first report, and I would suggest that they be read with such comments as you wish to make as you go along, if that meets with your approval.

The CO-CHAIRMAN (*Mr. Cameron*): I think that would be a very good idea.

Mr. PALMER: The first resolution was a preliminary one, to see whether it was worth while going any further with our resolution, namely:

> That this society does support legislation leading to a broadening of the grounds for divorce in Canada.

When that passed we felt we could go on with the details. If that one did not pass we would have backed away from the meeting. This was the feeling of the meeting.

The second resolution deals with various additional grounds in addition to adultery:

> (a) The commission of an act of sexual or deviate sexual intercourse voluntarily performed by the defendant after marriage with a person other than the plaintiff (petitioner) or with an animal.

This is an adaptation of the New York State language. The committee felt, and apparently the society agreed with us, that adultery is probably no more offensive to a spouse, or not as offensive, as some other forms of deviate sexual conduct which could be even more repugnant to many people.

The second ground is cruelty, which is a ground known in Nova Scotia. Many of our bar were trained at Dalhousie and it was agreed that this could well become a ground in Canada.

The CO-CHAIRMAN (*Senator Roebuck*): Did you define it?

Mr. PALMER: No, we did not define it.

The CO-CHAIRMAN (*Senator Roebuck*): Why not?

Mr. PALMER: We felt it was very well defined by the courts. We were not drafting legislation anyway, and at a meeting of a hundred people you cannot draft legislation. The meeting debated whether it should be persistent, but it was left as just cruelty.

(c) Separation pursuant to judicial decree for a period of not less than three years.

At this meeting, which went on for an afternoon and a good deal of the following morning, five hours being devoted to the debate, many members of the bar, particularly those of the Roman Catholic faith, wanted to avoid any suggestion of divorce by consent; that was obviously their sentiment. There was discussion of marital breakdown, but it was apparent that a strong element of our bar was not prepared to go that far at this time. In the committee's report separation pursuant to a separation agreement was recommended as a ground for divorce, and that did pass by a very narrow margin. However, for the sake of unanimity that resolution was rescinded and this unanimous resolution adopted.

The CO-CHAIRMAN (*Senator Roebuck*): Your suggested grounds (c) and (d) are the same thing, are not they, separation pursuant to a judicial decree and separation, both for a period of not less than three years?

Mr. PALMER: Ground (d) is desertion, Mr. Chairman. Separation by agreement was not recommended because it was so close to divorce by consent.

Mr. MCCLEAVE: Could I ask one question for clarification? You say "Separation pursuant to judicial decree". On what grounds would the judicial decree be granted?

Mr. PALMER: Divorce *a mensa et thoro* or judicial separation in New Brunswick is granted on grounds of cruelty or adultery. I think that various sexual acts which are not sufficient for divorce fall within "cruelty", such as bestiality; they consider that cruelty, and therefore give a divorce *a mensa et thoro.*

On "Insanity" there was great debate about time, but that was eventually left this way. Then we have "Persistent criminality" and "Persistent and wilful failure to support dependent children." Those were the grounds.

CO-CHAIRMAN (*Senator Roebuck*): What about the wife?

Mr. PALMER: That was not adopted anyway. It is felt in this generation by many people that a wife is no longer as dependent as she was thirty years ago.

CO-CHAIRMAN (*Senator Roebuck*): If she has children she is.

Mr. PALMER: While she has children, yes, while the children are young certainly.

CO-CHAIRMAN (*Senator Roebuck*): It seems strange that "Persistent and wilful failure to support dependent children" stops there without any mention of the wife.

Mr. PALMER: Well, that was the resolution of the society, I think as proposed by our committee. It was felt that the wife without the children may well be able

in this generation to fend for herself, but it is needed when there are young children.

The third item in the report concerns jurisdiction.

> upon proof of domicile within Canada where there has been residence by either party to the suit in the province where action is brought for more than one year of the three years prior to commencement of the action.

That refers to the deserted wife and so on. There shall be Canadian domicile and a definite residence requirement to give jurisdiction to the provincial court.

Then we recommend that collusion be a discretionary bar only.

Co-CHAIRMAN (*Senator Roebuck*): You mean the domicile of the husband as applied to the wife, do you? You mean that residence in Canada should be considered the domicile of the wife?

Mr. PALMER: The society's report is proof of domicile within Canada and then residence within the province. The matrimonial domicile would have to be Canada, except perhaps in the case of a deserted wife, which we already have.

Co-CHAIRMAN (*Senator Roebuck*): Do you mean the present rule with regard to domicile? That is, that the domicile of the wife is the domicile of the husband?

Mr. PALMER: The basis of the recommendation is that there be a Canadian domicile for the purposes of divorce.

Co-CHAIRMAN (*Senator Roebuck*): For both of them?

Mr. PALMER: Yes. This report does not deal with the possibility of separate domicile, of a married woman retaining her own domicile, except that we hope there will be a Canadian domicile.

Co-CHAIRMAN (*Mr. Cameron*): That applies to both spouses?

Mr. PALMER: Yes. By that time the society had received a communication from this committee, and the resolution was adopted at this general meeting that the society do submit a brief to this joint committee of the Senate and House of Commons and send a delegation here.

The report continues with a brief summary of the discussion. The society felt that the broader grounds were required to meet the social needs of the people in this generation, but that divorce by consent was not acceptable to a very large element of our number.

The time for desertion or for separation pursuant to judicial decree as a ground for divorce was set at three years. That was the committee's recommendation. There was a great deal of debate; many wanted to reduce it to as low as one year, many wanted to extend it to five, and finally the three-year provision was adopted.

There was some discussion about making a term of imprisonment of itself—for instance, life imprisonment or a 20-year sentence—ground for divorce, but that was not adopted, it was not acceptable to a great many at the meeting. It was not recommended by the committee, and it was not accepted by the majority. They felt that a criminal way of life, persistent criminality, might be a ground for divorce, but that certainly just one sentence of itself would not be sufficient.

Co-CHAIRMAN (*Senator Roebuck*): Even if it were for life?

Mr. PALMER: Even if it were for life. That was the feeling of the meeting, that it would inhibit any chance of rehabilitation and so on; that was one of the arguments against it.

On insanity, certainly they felt that the bare word would not be sufficient, but the feeling of the society was that unsoundness of mind at some point should be made a ground for divorce. We could not get a consensus on the time and conditions; that was felt to the legislative draftsmen.

There was considerable discussion of a definition of "cruelty", which was finally abandoned, because it was a large meeting.

I think that is all I want to say, Mr. Chairman. I do not know whether Mr. Guss would like to amplify any points.

Mr. Benjamin R. Guss, Q.C., Member of Council, New Brunswick Barristers' Society: Messrs. Chairmen and honourable members of the committee, I think Mr. Palmer has dealt properly with the report of the New Brunswick Barristers' Society. The hour is late; I was to read or discuss the report of our committee, but I note that it is an exhibit to the society's report.

The CO-CHAIRMAN (*Mr. Cameron*): You make whatever comments you think necessary. We do not want to limit your time. This is a very important organization, the Barristers' Society of New Brunswick, and we certainly want to hear their views on this.

Mr. MCCLEAVE: Don't make your speech on the train going back, Mr. Guss.

Mr. GUSS: I must say, you are all very kind, and I do have a sense of privilege at being invited to be here to be part of this serious investigation in depth of a serious social problem that faces the country.

I think that perhaps the recitals to the draft resolutions as they appeared when the report was presented to the New Brunswick Barristers' Society might well go on the record, and if you will permit me I will read them, because they give the background of our thinking.

> Whereas, in the opinion of this society, the grounds for divorce presently available within the Province of New Brunswick do not meet the social needs of the public;
>
> And whereas the narrow grounds for divorce which the present law admits may be conducive to perjured evidence, collusion, suppressed testimony and other offenses and devices, the effect of which could be to induce in the public a lack of respect for and of confidence in our courts generally;
>
> And whereas this society is concerned to bring law into accord with social need and to uphold and maintain public confidence in and respect for the administration of justice in the province,

and then follow the suggestions of our committee.

Another appendix to the report of our committee dealt with the grounds for divorce in New York State. We felt that the conditions which prevailed in New York State paralleled similar conditions which existed in New Brunswick, and perhaps throughout Canada. It might be well at this point to quote the *New York Times* on Pope John, because the *New York Times* attributed this whole new wave of the future (as I think Mr. Fairweather, my friend the Member for Royal, called it) as follows:

> It began with Pope John. Almost every politician here agrees that the reform could never have taken place if the Roman Catholic clergy and laity had not been in a state of ferment in which old dogmas were undergoing an agonizing re-examination—as one Liberal Democratic Assembly man put it: "What really got this divorce bill off the ground was a man named John—Pope John."

It was startling at first to read this, but when the discussion before the New Brunswick Barristers' Society proceeded it was obvious that the Roman Catholic lawyers had had a change of heart, and in deference to them we agreed that only those recommendations which received unanimous consent would be the ones we would advocate, and that is exactly what happened.

I would like to mention another point. There was considerable discussion about the breakdown of marriage idea as opposed to the guilt idea. I understand statistics show that there are fewer divorces, at least up to present time, amongst Jewish people than there are amongst other ethnic groups. A husband and wife go to a rabbi, who ascertains whether the spiritual and physical basis of the marriage has broken down. If he decides that the spiritual and physical basis of the marriage has broken down he buzzes for the scribe, the scribe comes in with a piece of parchment and a feathered pen and proceeds to write a bill of divorcement; the rabbi then hands the bill of divorcement to the husband, the husband hands the bill of divorcement to the wife, and that is it. Now, it has not caused a breakdown of marriage, it has not caused any greater number of divorces, because, as we say in our original report, by the time they come to the lawyers or the rabbi there is in fact no marriage, all sane communication has broken down between husband and wife. There have been no ill effects on family life amongst the Jewish people because of what some people call "easy divorce".

It is the stiff and tough grounds that cause the trouble and heartache, the conditions which some people say exist in our courts and before the senate, when you have to spy, have a proctor or somebody to try to find out "Are you kidding us or not?" which are the wrong attitudes in the case of tragic breakdown in marriage. I know some people do not think that this should be done. I understand that the Member for Royal has presented a bill on this "new wave." I say, however, it is not a new wave; it has been honoured now among the Jewish people for over 3000 years, and family life still runs strong.

I want to follow the precedent set by the previous two speakers. I am married, I have a nice wife who is a B.A. from McGill. I have three daughters and a son. The three girls are graduates of Dane Hall in Wellesley; one is a graduate of Vassar, another is a graduate of Goucher and the third is a graduate of Bradford Junior College in the Boston University School of Fine Arts. My son is a graduate of Phillips Academy in Andover, and is now a junior in economics at Harvard. I pay them respect, as did the previous speakers, this being also St. Valentine's Day. With those few remarks I will stop.

The Co-Chairman (*Mr. Cameron*): Perhaps the honourable Member for Royal has a question.

Mr. Fairweather: I wanted to clear the record. I seconded a bill of Mr. Brewin, the honourable Member for Greenwood. I accept the appellation of "new wave", but I cannot accept the credit for introducing this bill.

Mr. Honey: There are two matters I would like to ask a few questions on. One concerns paragraph 2(c) of the brief. I listened with interest to the reasons why the society considered not making divorce by consent available. There is a problem, I think, in some jurisdictions, in Ontario for example, where separation by judicial decree is not available. Have you considered that? In other words, you have been occupied—and I think in most jurisdictions quite properly—with the situation where there can be a judicial decree prior to the institution of divorce. What would happen in other jurisdictions where this remedy is not available?

Mr. Palmer: If I might venture to answer that, it seems to me that the Parliament of Canada might well make provision in any divorce measure for divorce *a mensa et thoro* as well as final divorce.

The Co-Chairman (*Senator Roebuck*): You have that in your province, have you not?

Mr. Palmer: The courts exercise this jurisdiction, yes, without hesitation, although the statutory basis for it is very vague.

The Co-Chairman (*Mr. Cameron*): Based on the common law.

Mr. PALMER: They seem to apply the common law, yes. The basis of our divorce jurisdiction is the statute of 1792, which established the Lieutenant-Governor in Council as the divorce court, and that jurisdiction was later, before Confederation, transferred to a court. The grounds for divorce so declared were very restricted, but the court has nevertheless always granted divorce *a mensa et thoro* on the grounds accepted in England by the church courts at the time the province was founded.

Mr. WAHN: Could the witness tell us what additional grounds are covered by paragraph 2(c) over and above those contained in the other paragraphs?

Mr. PALMER: I think once there has been a divorce *a mensa et thoro*, as we would still call it, or separation pursuant to judicial decree, the guilty party can after the three years bring a petition for divorce absolute based on the fact that they have been separated by judicial decree.

Mr. WAHN: My question is: what grounds would justify a judicial decree of separation which are not already included in (a), (b), (d), (e), (f) or (g)?

Mr. PALMER: There would be none. I do not think there are any grounds for a judicial separation that would not be grounds for divorce if these were all adopted. Nevertheless, you might have a situation where the wife, for perhaps religious reasons, would not petition for an absolute divorce. The husband, after this judicial separation for three years, could then petition for divorce on the ground of this prolonged period of separation pursuant to judicial decree.

Mr. WAHN: Either party could get it instead of just the innocent party?

M. PALMER: That is right.

Mr. HONEY: After the three-year period?

Mr. PALMER: Yes.

Mr. GUSS: I know of a case now where a woman will not take proceedings against her husband for divorce and she is planning to take proceedings against him for judicial separation *a mensa et thoro*. He is now living with another woman and the wife out of spite—as was said before the committee by another witness—will not take any action against him for divorce, but she proposes to take action against him for judicial separation. On that same subject I might refer to *Hunter v. Hunter* (1863) 10 N.B.R., 593, which deals with divorce *a mensa et thoro*, and various grounds are given there.

Mr. HONEY: Referring to paragraph 3, do you suggest that we should enlarge the law, as I think it is now, and provide for a domicile in Canada for either the husband or wife? For example, suppose the husband moved to the United Kingdom but was still supporting the wife. If he had deserted her in that sense possibly she would be able to institute an action under the existing legislation, but would she not be barred from instituting a suit if her domicile at that point was in the United Kingdom, even though she was resident in New Brunswick?

Mr. PALMER: I think that is true, and I think that is probably an oversight. We spent a long time debating other aspects of this. Perhaps Mr. Guss and myself do not represent the society in this matter, but we would feel that the wife's domicile following the husband's can cause many hardships.

Mr. HONEY: Do you think it should be changed?

Mr. PALMER: Mr. Guss and I would agree with that. I would not like to speak for the society.

Mr. FAIRWEATHER: I was at the meeting of the society and I remember this discussion. I agree this might have been an oversight, because to anybody with whom I spoke about this it was almost self-evident, and probably because it was self-evident the society, of which I am a member, did not spend quite as much time on it as it should. Certainly there was a wide consensus of opinion in this direction, particularly in the maritimes, where there is a great exodus.

Mr. McCLEAVE: "Cultural influences abroad" I think is the correct description.

Mr. FAIRWEATHER: It means a great deal of hardship for many wives.

Mr. GUSS: I personally would like to go on record as saying that I strongly believe every woman should be able to make her own domicile. It is because of this question of domicile that there are many hardships. I know of a case where the husband is now an engineer in Tanganyika. One of my partners took the case to Fredericton, because the man was born in New Brunswick and had never made a real home anywhere else. His lawyer, when written to, sent a solemn declaration from Tanganyika saying that the husband owns a little farm in New Brunswick and intends to come back to New Brunswick, but the judge did not accept it. That is a real hardship in that case, and I know of several somewhat similar cases. I believe that a woman should be able to have her own domicile. If you want to limit it to divorce only, that is all right. I think perhaps we should limit it in that way and then the professors can argue it.

Co-CHAIRMAN (*Senator Roebuck*): Could not we avoid the subject of domicile entirely and simply give her the right of access to the courts? We have done that in our present act. We have not changed the rules of domicile. We have simply given her access to the court.

Mr. GUSS: Are you referring to Chapter 84 of the Revised Statutes of Canada, 1952?

Co-CHAIRMAN (*Senator Roebuck*): That is right.

Mr. GUSS: That is a very hard section and I do not think it does much good to the woman, because it says the husband must have deserted her in the province in which she brings the action, and I think that is abominable.

The Co-CHAIRMAN (*Senator Roebuck*): But, you see, it gives her access to the courts without any mention of domicile.

Mr. GUSS: But if they were in Tanganyika and parted in Tanganyika and she comes home to Saint John, New Brunswick, what good is that to her? Is she to go back to Tanganyika?

Co-CHAIRMAN (*Senator Roebuck*): I thoroughly agree with you on that.

Co-CHAIRMAN (*Mr. Cameron*): You want the offending words removed?

Mr. GUSS: Yes.

Senator FERGUSSON: This has been my contention, that a married woman should have her own domicile the same as a married man. There is no difference. I am very glad to hear those from the New Brunswick Bar supporting that.

Mr. GUSS: I think it was the feeling of the entire bar that that is what was meant. I appreciate Mr. Fairweather's explanation.

Co-CHAIRMAN (*Mr. Cameron*): Are there any more questions? This is an opportunity for the lawyers on the committee to cross-examine lawyers who are giving evidence.

Mr. McCLEAVE: I have one question on attitudes. Was the fact that judicial decree was mentioned in paragraph 2 (c) the factor that persuaded the Roman Catholic members of the bar to accept the whole resolution, or did they see beyond it and approve of these other extra grounds such as cruelty and insanity?

Mr. PALMER: They approved of all those additional grounds. What they did not want was divorce by consent; that is what they drew the line at. I would say that the Roman Catholic element, and perhaps some others, felt upon religious grounds that they could not recommend divorce by consent, and that it would be offensive to a great many people in the province. Almost anything short of that they seemed to accept. There was a lot of debate about time. This went on for five hours; it was not just run through in a few minutes; this was a very prolonged debate.

Mr. McCLEAVE: Had there been previous debates on a divorce resolution at meetings of the Barristers' Society of New Brunswick which had foundered because of the religious question or attitudes?

Mr. GUSS: I had spoken to successive presidents over a number of years and they had said: "Cut it, don't embarrass me; we're going to have trouble." In 1965 I told the president that I wanted to speak to it, that I was not just going to introduce a resolution, and I did so; I spoke to it, a committee was appointed and this is what followed. I want to say that the committee was a working committee; it was not just a case of the chairman working. Professor Hurley corresponded with me on it regularly; he was in Fredericton; Mr. Palmer and myself had many discussions in Saint John, and Mr. Palmer acted as editor, he edited and re-edited.

Mr. PALMER: I acted as secretary to the committee.

Mr. WAHN: Was there any discussion of the possibility of a sacramental form of marriage which would be indissoluble on any ground, and also a form of civil marriage which could be dissolved quite readily? Was this possibility discussed at all?

Mr. PALMER: No.

Mr. GUSS: We have civil marriage in New Brunswick though.

Mr. MacEWAN: This is not dealt with in the brief but I would like to ask Mr. Palmer and Mr. Guss about it. It has been suggested to this committee that the proper court for hearing divorce cases could be the family court; another suggestion was that perhaps the county court could be given concurrent jurisdiction with the Supreme Court—that is county court judges and Supreme Court judges—on divorce cases. I wondered if you had any ideas on that, as to whether in your own province cases should continue to be heard by the Supreme Court judges, or in what form they should be heard.

Mr. PALMER: It should be explained that in New Brunswick we have a separate court called the Court of Divorce and Matrimonial Causes; that is a pre-Confederation court. The judge who sits is a judge of the Supreme Court of New Brunswick, who is appointed for the purpose, I think by the province rather than by the federal authority, though he is also a judge of the Supreme Court. You do get just one judge. I think they now arrange for a deputy in case that judge is absent through illness, or if in some case he felt unfit to try it because of relationship or something of that sort. In effect we have just one divorce judge in New Brunswick. The registrar of the Supreme Court acts as registrar of that divorce court, he uses the same office and so on.

I think the bar of New Brunswick is very, very satisfied with this system. This has not been discussed by the society, but it is my impression that no one in New Brunswick would like to have divorce cases handled at the circuit court in with damage actions. This court sits only in Fredericton, which means that, except when it is a Fredericton case, it is some little distance to travel for anybody who wants to listen in on the dirt. The statute limits publication of proceedings in the divorce court by the local newspapers to the bare fact of a decree. This has proved very successful, and I think almost all lawyers subscribe to it. In a small province, having all the trials in Fredericton is not a big problem; it is within five hours drive of any place in New Brunswick, and you do not get all that many divorces in your life that it is a real hardship to drive that far.

Mr. MacEWAN: This one judge can hear the divorce cases expeditiously, render decisions and so on? There is no hold-up in giving decisions?

Mr. PALMER: No. The judge told me that the divorce work he does takes 90 sitting days a year. The rest of the time he is available for other duties of the Supreme Court of New Brunswick.

Mr. McCLEAVE: Would he take four cases a day?

Mr. PALMER: No, he takes eight uncontested cases a day. They are set down in the calendar; we have a precise hour set for the case; there are four uncontested cases in the morning and four in the afternoon, and it is rarely that the time of an uncontested case has to be varied. With a contested case the judge finds out from the counsel how long it is likely to take and allots the appropriate time to it. On top of actually hearing the cases he has chambers applications, commission evidence and so on.

The judge says that in the aggregate, including decrees and reasons for judgment in contested cases and so on, or cases where there are real problems of domicile, in which case he might write reasons for granting or refusing the application, the work occupies about ninety days. It is my impression that the bar of New Brunswick would not want to have these cases tried by the county court or by the Supreme Court along with damage actions.

Mr. McCLEAVE: Or by family courts?

Mr. PALMER: Or by family courts, which are not nearly so highly qualified as a Supreme Court judge.

Mr. GUSS: I agree wholeheartedly about who should try divorce cases, that it should continue in New Brunswick as it is now. When I became chairman of the committee a number of members of the junior bar questioned the superiority of the Supreme Court judge to hear divorce cases. One man in particular, who spoke for a number of the younger men over coffee at a coffee shop one day when this was debated, said that about seven of the younger lawyers thought it could be a more or less administrative thing, with perhaps three people sitting, such as a social service worker, possibly a magistrate of the juvenile court and perhaps a woman who worked in welfare. He said he spoke for about seven junior members of the bar and we debated it thoroughly. I did not convince him, and he did not convince me.

If you are going to enlarge the scope and the grounds for divorce, I think you must maintain the dignity, decorum and solemnity that pervades a hearing before the Supreme Court judge, where you are gowned and he is gowned, which makes people realize that something serious is going on and it is not just a little chit-chat around the table, which I think would be wrong.

Co-CHAIRMAN (*Mr. Cameron*): That is a matter of procedure, is it not?

Mr. GUSS: That is right.

Co-CHAIRMAN (*Mr. Cameron*): Are there any more questions?

Senator BELISLE: I was going to ask whether the judge is a roving judge or whether he attends courts in every city, but that has been partly answered. He sits only in one city?

Mr. PALMER: He sits only in Fredericton.

Senator BELISLE: And there has been no objection to it?

Mr. PALMER: No serious objection has been heard to that. Reverting to the point raised by Mr. Guss, that is a different concept of divorce and judicial trial, that there should be a psychological examination of the breakdown really rather than establishment of a fact. If that were the test, maybe a court is not the best tribunal to plumb it in depth.

Mr. PETERS: Was the breakdown of marriage theory discussed?

Mr. PALMER: Yes, it was discussed at that meeting.

Mr. PETERS: What was the conclusion? That it was only another ground?

Mr. PALMER: The conclusion was that it was too close to divorce by consent for a considerable element of our membership, and they thought of the population as well. That is why there is nothing in the brief resembling it. Mr. Guss and

I would both have advocated that, of course, but even in our committee this was not acceptable to Professor Hurley.

Mr. GUSS: What we tried to do was to accomplish the possible and get a consensus, which I think is an important aspect of the whole question. You have got to take it phase by phase and step by step. When the breakdown of marriage theory was being discussed one very distinguished lawyer, when I was on my feet, pulled a postcard out of his pocket and said, "Are you going to send your wife a postcard saying you are divorced?" That was how he looked at it, and we appreciated that some people would take that view, although I do not myself.

Mr. PETERS: I should not really ask this because it is obviously asking for an opinion, but are you of the opinion that the courts as now constituted are in a position to exercize the social control that would be necessary for the operation of the breakdown theory, which really has no offending parties and no specific grounds, except the total dissipation of the contract as it would apply between two people?

Mr. GUSS: It would seem to me that a judge could not decide it on a whim. He would have to hear the parties. There might still be opposition. The husband might come forward and say, "I am disenchanted with my wife", but the wife might come forward and say, "Well, I'm not disenchanted with my husband." In such cases the judge would have to sit in judgment and make a judicial decision as to whether there has been a breakdown or not, and he could take into consideration any of the grounds we have suggested as a basis for coming to the conclusion that the marriage has in fact broken down. But it would not be on a whim; it would be on a consideration of judicial facts.

Mr. PETERS: Which in effect requires a stronger judicial position than in the case even of the present law, where everybody knows it is not a fact, yet they all agree.

Mr. GUSS: Well, they do not know it is not a fact. They may guess.

Mr. PETERS: It is a supposition.

CO-CHAIRMAN (*Mr. Cameron*): Are there any more questions?

CO-CHAIRMAN (*Senator Roebuck*): I wanted to point out to the committee that these gentlemen have come here under somewhat different circumstances from some others. They have come at our request, because in the brief that was submitted to us I noticed this phrase:

> if the Council deem advisable, the society do send a delegation to make representations to such committee on behalf of the society.

I brought that to the attention of the Steering Committee, and we decided that we would invite these gentlemen to come and talk to us. That was after we had read the brief. These two distinguished lawyers from that territory are here at our request, and I think I should extend our thanks to them personally, and to the society who sent them here whom they represent. If you gentlemen would convey that message to the society at some convenient time, I think it would be appropriate and would be approved by us here. You have spoken in a most practical way, not so much theoretically, because you know what you are doing from practice, from experience, and that is of real assistance to us. I speak for everyone here when I say "Thank you".

The committee adjourned.

APPENDIX "37"

THE COMMONWEALTH OF AUSTRALIA MATRIMONIAL CAUSES ACT 1959.

An Act relating to Marriage and to Divorce and Matrimonial Causes and, in relation thereto, Parental Rights and the Custody and Guardianship of Infants.

Be it enacted by the Queen's Most Excellent Majesty, the Senate, and the House of Representatives of the Commonwealth of Australia, as follows:—

Part III.—Reconciliation.

Reconciliation.

14.—(1.) It is the duty of the court in which a matrimonial cause has been instituted to give consideration, from time to time, to the possibility of a reconciliation of the parties to the marriage (unless the proceedings are of such a nature that it would not be appropriate to do so), and if at any time it appears to the Judge constituting the court, either from the nature of the case, the evidence in the proceedings or the attitude of those parties, or of either of them, or of counsel, that there is a reasonable possibility of such a reconciliation, the Judge may do all or any of the following:—

(a) adjourn the proceedings to afford those parties an opportunity of becoming reconciled or to enable anything to be done in accordance with either of the next two succeeding paragraphs;

(b) with the consent of those parties, interview them in chambers, with or without counsel, as the Judge thinks proper, with a view to effecting a reconciliation;

(c) nominate—

(i) an approved marriage guidance organization or a person with experience or training in marriage conciliation; or

(ii) in special circumstances, some other suitable person, to endeavour, with the consent of those parties, to effect a reconciliation.

(2.) If, not less than fourteen days after an adjournment under the last preceding sub-section has taken place, either of the parties to the marriage requests that the hearing be proceeded with, the Judge shall resume the hearing, or arrangements shall be made for the proceedings to be dealt with by another Judge, as the case requires, as soon as practicable.

Hearing when reconciliation fails.

15. Where a Judge has acted as conciliator under paragraph (b) of sub-section (1.) of the last preceding section but the attempt to effect a reconciliation has failed, the Judge shall not, except at the request, arrangements shall be made for the proceedings to be dealt ceedings, or determine the proceedings, and, in the absence of such a request, arrangements shall be made for the proceedings to be dealt with by another Judge.

Statements, &c., made in course of attempt to effect reconciliation.

16. Evidence of anything said or of any admission made in the course of an endeavour to effect a reconciliation under this Part is not admissible in any court (whether exercising federal jurisdiction or not) or in proceedings before a person authorized by a law of the Commonwealth or of a State or Territory of the Commonwealth, or by consent of parties to hear, receive and examine evidence.

17. A marriage conciliator shall, before entering upon the performance of his functions as such a conciliator, make and subcribe, before a person authorized under the law of the Commonwealth or of a State or a Territory to which this Act applies to take affidavits, an oath or affirmation of secrecy in accordance with the form in the First Schedule to this Act. Marriage conciliator to take oath of secrecy.

PART V.—JURISDICTION.

24.—(1.) For the purposes of this Act, a deserted wife who was domiciled in Australia either immediately before her marriage or immediately before the desertion shall be deemed to be domiciled in Australia. Special provisions as to wife's domicile.

(2.) For the purposes of this Act, a wife who is resident in Australia at the date of instituting proceedings under this Act and has been so resident for the period of three years immediately preceding that date shall be deemed to be domiciled in Australia at that date.

PART VI.—MATRIMONIAL RELIEF.

Division 1.—Dissolution of Marriage.

28. Subject to this Division, a petition under this Act by a party to a marriage for a decree of dissolution of the marriage may be based on one or more of the following grounds:— Grounds for dissolution of marriage.

(a) that, since the marriage, the other party to the marriage has committed adultery;

(b) that, since the marriage, the other party to the marriage has, without just cause or excuse, wilfully deserted the petitioner for a period of not less than two years:

(c) that the other party to the marriage has wilfully and persistently refused to consummate the marriage;

(d) that, since the marriage, the other party to the marriage has, during a period of not less than one year, habitually been guilty of cruelty to the petitioner;

(e) that, since the marriage, the other party to the marriage has committed rape, sodomy or bestiality;

(f) that, since the marriage, the other party to the marriage has, for a period of not less than two years—

(i) been a habitual drunkard; or

(ii) habitually been intoxicated by reason of taking or using to excess any sedative, narcotic or stimulating drug or preparation,

or has, for a part or parts of such a period, been a habitual drunkard and has, for the other part or parts of the period, habitually been so intoxicated;

(g) that, since the marriage, the petitioner's husband has, within a period not exceeding five years—

(i) suffered frequent convictions for crime in respect of which he has been sentenced in the aggregate to imprisonment for not less than three years; and

(ii) habitually left the petitioner without reasonable means of support;

(h) that, since the marriage, the other party to the marriage has been in prison for a period of not less than three years after conviction for an offence punishable by death or imprison-

ment for life or for a period of five years or more, and is still in prison at the date of the petition;

(i) that, since the marriage and within a period of one year immediately preceding the date of the petition, the other party to the marriage has been convicted, on indictment, of—

(i) having attempted to murder or unlawfully to kill the petitioner; or

(ii) having committed an offence involving the intentional infliction of grievous bodily harm on the petitioner or the intent to inflict grievous bodily harm on the petitioner;

(j) that the other party to the marriage has habitually and wilfully failed, throughout the period of two years immediately preceding the date of the petition, to pay maintenance for the petitioner—

(i) ordered to be paid under an order of, or an order registered in, a court in the Commonwealth or a Territory of the Commonwealth; or

(ii) agreed to be paid under an agreement between the parties to the marriage providing for their separation;

(k) that the other party to the marriage has, for a period of not less than one year, failed to comply with a decree of restitution of conjugal rights made under this Act;

(l) that the other party to the marriage—

(i) is, at the date of the petition, of unsound mind and unlikely to recover; and

(ii) since the marriage and within the period of six years immediately preceding the date of the petition, has been confined for a period of, or for periods aggregating, not less than five years in an institution where persons may be confined for unsoundness of mind in accordance with law, or in more than one such institution;

(m) that the parties to the marriage have separated and thereafter have lived separately and apart for a continuous period of not less than five years immediately preceding the date of the petition, and there is no reasonable likelihood of concurrently,

(n) that the other party to the marriage has been absent from the petitioner for such time and in such circumstances as to provide reasonable grounds for presuming that he or she is dead.

Constructive desertion.

29. A married person whose conduct constitutes just cause or excuse for the other party to the marriage to live separately or apart, and occasions that other party to live separately or apart, shall be deemed to have wilfully deserted that other party without just cause or excuse, notwithstanding that that person may not in fact have intended the conduct to occasion that other party to live separately or apart.

Refusal to resume cohabitation.

30.—(1.) Where husband and wife are parties to an agreement for separation, whether oral, in writing or constituted by conduct, the refusal by one of them, without reasonable justification, to comply with the other's bona fide request to resume cohabitation constitutes, as from the date of the refusal, wilful desertion without just cause or excuse on the part of the party so refusing.

(2.) For the purposes of the last preceding sub-section, "reasonable justification" means reasonable justification in all the circumstances, including the conduct of the other party to the marriage since the marriage, whether that conduct took place before or after the agreement for separation.

Desertion continuing after insanity.

31. Where a party to a marriage has been wilfully deserted by the other party, the desertion shall not be deemed to have been terminated by reason only that the deserting party has become incapable of forming or having an intention to continue the desertion, if it appears to the court that the desertion would probably have continued if the deserting party had not become so incapable.

Restriction on dissolution of marriage on ground of wilful refusal to consummate.

32. A decree of dissolution of marriage shall not be made upon the ground specified in paragraph (c) of section twenty-eight of this Act unless the court is satisfied that, as at the commencement of the hearing of the petition, the marriage had not been consummated.

33. Where—

Aggregation of concurrent sentences.

(a) a person has been sentenced to imprisonment in respect of each of two or more crimes that, in the opinion of the court hearing the petition, arose substantially out of the same acts or omissions; and

(b) the sentences were ordered to be served, in whole or in part, concurrently,

then, in reckoning for the purposes of paragraph (g) of section twenty-eight of this Act the period for which that person has been sentenced in the aggregate, any period during which two or more of those sentences were to be served concurrently shall be taken into account once only.

Restriction on dissolution of marriage on ground of failure to pay maintenance.

34. A decree of dissolution of marriage shall not be made upon the ground specified in paragraph (j) of section twenty-eight of this Act unless the court is satisfied that reasonable attempts have been made by the petitioner to enforce the order or agreement under which the maintenance was ordered or agreed to be paid.

Restriction on dissolution of marriage on ground of insanity.

35. A decree of dissolution of marriage shall not be made upon the ground specified in paragraph (l) of section twenty-eight of this Act unless the court is satisfied that, at the commencement of the hearing of the petition, the respondent was still confined in an institution referred to in that paragraph and was unlikely to recover.

Provisions relating to ground of separation.

36.—(1.) For the purposes of paragraph (m) of section twenty-eight of this Act, the parties to a marriage may be taken to have separated notwithstanding that the cohabitation was brought to an end by the action or conduct of one only of the parties, whether constituting desertion or not.

(2.) A decree of dissolution of marriage may be made upon the ground specified in paragraph (m) of section twenty-eight of this Act notwithstanding that there was in existence at any relevant time—

(a) a decree of a court suspending the obligation of the parties to the marriage to cohabit; or

(b) an agreement between those parties for separation.

Court to refuse to make decree on ground of separation in certain circumstances.

37.—(1.) Where, on the hearing of a petition for a decree of dissolution of marriage on the ground specified in paragraph (m) of section twenty-eight of this Act (in this section referred to as "the ground of separation"), the court is satisfied that, by reason of the

conduct of the petitioner, whether before or after the separation commenced, or for any other reason, it would, in the particular circumstances of the case, be harsh and oppressive to the respondent, or contrary to the public interest, to grant a decree on that ground on the petition of the petitioner, the court shall refuse to make the decree sought.

(2.) Where, in proceedings for a decree of dissolution of marriage on the ground of separation, the court is of opinion that it is just and proper in the circumstances of the case that the petitioner should make provision for the maintenance of the respondent or should make any other provision for the benefit of the respondent, whether by way of settlement of property or otherwise, the court shall not make a decree on that ground in favour of the petitioner until the petitioner has made arrangements to the satisfaction of the court to provide the maintenance or other benefits upon the decree becoming absolute.

(3.) The court may, in its discretion, refuse to make a decree of dissolution of marriage on the ground of separation if the petitioner has, whether before or after the separation commenced, committed adultery that has not been condoned by the respondent or, having been so condoned, has been revived.

(4.) Where petitions by both parties to a marriage for the dissolution of the marriage are before a court, the court shall not, upon either of the petitions, make a decree on the ground of separation if it is able properly to make a decree upon the other petition on any other ground.

Provisions relating to presumption of death.

38.—(1.) Where proceedings are brought upon the ground specified in paragraph (n) of section twenty-eight of this Act, proof that, for a period of seven years immediately preceding the date of the petition, the other party to the marriage was continually absent from the petitioner and that the petitioner has no reason to believe that the other party was alive at any time within that period is sufficient to establish the ground of the petition unless it is shown that the other party to the marriage was alive at a time within that period.

(2.) A decree upon the ground specified in paragraph (n) of section twenty-eight of this Act shall be in the form of a decree of dissolution of marriage by reason of presumption of death.

Condonation or connivance to be an absolute bar to relief.

39. A decree of dissolution of marriage shall not be made upon a ground specified in any of paragraphs (a) to (k), inclusive, of section twenty-eight of this Act, if the petitioner has condoned, or has connived at, the ground.

Collusion to be an absolute bar.

40. A decree of dissolution of marriage shall not be made if the petitioner, in bringing or prosecuting the proceedings, has been guilty of collusion with intent to cause a perversion of justice.

Discretionary bars.

41. The court may, in its discretion, refuse to make a decree of dissolution of marriage upon a ground specified in any of paragraphs (a) to (l), inclusive, of section twenty-eight of this Act, if, since the marriage—

(a) the petitioner has committed adultery that has not been condoned by the respondent or, having been so condoned, has been revived;

(b) the petitioner has been guilty of cruelty to the respondent;

(c) the petitioner has wilfully deserted the respondent before the happening of the matters constituting the ground relied

upon by the petitioner or, where that ground involves matters occurring during, or extending over, a period, before the expiration of that period; or

(d) the habits of the petitioner have, or the conduct of the petitioner has, conduced or contributed to the existence of the ground relied upon by the petitioner.

Court not to make decree of dissolution where petition for decree of nullity before it.

42. Where both a petition for a decree of nullity of a marriage and a petition for a decree of dissolution of that marriage are before a court, the court shall not make a decree of dissolution of the marriage unless it has dismissed the petition for a decree of nullity of the marriage.

Petition within three years of marriage.

43.—(1.) Subject to this section, proceedings for a decree of dissolution of marriage shall not be instituted within three years after the date of the marriage except by leave of the court.

(2.) Nothing in this section shall be taken to require the leave of the court to the institution of proceedings for a decree of dissolution of marriage on one or more of the grounds specified in paragraphs (a), (c) and (e) of section twenty-eight of this Act, and on no other ground, or to the institution of proceedings for a decree of dissolution of marriage by way of cross-proceedings.

(3.) The court shall not grant leave under this section to institute proceedings except on the ground that to refuse to grant that leave would impose exceptional hardship on the applicant or that the case is one involving exceptional depravity on the part of the other party to the marriage.

(4.) In determining an application for leave to institute proceedings under this section, the court shall have regard to the interests of any children of the marriage and to the question whether there is any reasonable probability of a reconciliation between the parties before the expiration of the period of three years after the date of the marriage.

(5.) Where, at the hearing of proceedings that have been instituted by leave of the court under this section, the court is satisfied that the leave was obtained by misrepresentation or concealment of material facts, the court may—

(a) adjourn the hearing for such period as the court thinks fit; or

(b) dismiss the petition on the ground that the leave was so obtained.

(6.) Where, in a case to which the last preceding sub-section applies, there is a cross-petition, if the court adjourns or dismisses the petition under that sub-section, it shall also adjourn for the same period, or dismiss, as the case may be, the cross-petition, but if the court, having regard to the provisions of this section, thinks it proper to proceed to hear and determine the cross-petition, it may do so, and in that case it shall also proceed to hear and determine the petition.

(7.) The dismissal of a petition or a cross-petition under sub-section (5.) or (6.) of this section does not prejudice any subsequent proceedings on the same, or substantially the same, facts as those constituting the ground on which the dismissed petition or cross-petition was brought.

(8.) Nothing in this section prevents the institution of proceedings, after the period of three years from the date of the marriage, based upon matters which have occurred within that period.

(9.) In this section, a reference to the leave of the court shall be deemed to include a reference to leave granted by a court on appeal.

Division 6.—General.

Decree *nisi* in first instance.

70. A decree of dissolution of marriage or nullity of a voidable marriage under this Act shall, in the first instance, be a decree *nisi*.

Decree absolute where children under sixteen years &c.

71.—(1.) Where there are children of the marriage in relation to whom this section applies, the decree *nisi* shall not become absolute unless the court, by order, has declared—

(a) that it is satisfied that proper arrangements in all the circumstances have been made for the welfare and, where appropriate, the advancement and education of those children; or

(b) that there are such special circumstances that the decree *nisi* should become absolute notwithstanding that the court is not satisfied that such arrangements have been made.

(2.) In this section, "children of the marriage in relation to whom this section applies" means—

(a) the children of the marriage who are under the age of sixteen years at the date of the decree *nisi*; and

(b) any children of the marriage in relation to whom the court has, in pursuance of the next succeeding sub-section, ordered that this section shall apply.

(3.) The court may, in a particular case, if it is of opinion that there are special circumstances which justify its so doing, order that this section shall apply in relation to a child of the marriage who has attained the age of sixteen years at the date of the decree *nisi*.

PART VIII.—MAINTENANCE, CUSTODY and SETTLEMENTS.

Definition.

83. In this Part, "marriage" includes a purported marriage that is void.

Powers of court in maintenance proceedings.

84.—(1.) Subject to this section, the court may, in proceedings with respect to the maintenance of a party to a marriage, or of children of the marriage, other than proceedings for an order for maintenance pending the disposal of proceedings, make such order as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances.

(2.) Subject to this section and to the rules, the court may, in proceedings for an order for the maintenance of a party to a marriage, or of children of the marriage, pending the disposal of proceedings, make such order as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances.

(3.) The court may make an order for the maintenance of a party notwithstanding that a decree is or has been made against that party in the proceedings to which the proceedings with respect to maintenance are related.

(4.) The power of the court to make an order with respect to the maintenance of children of the marriage shall not be exercised for the benefit of a child who has attained the age of twenty-one years unless the court is of opinion that there are special circumstances that justify the making of such an order for the benefit of that child.

Powers of court in custody, &c., proceedings.

85.—(1.) In proceedings with respect to the custody, guardianship, welfare, advancement or education of children of a marriage—

(a) the court shall regard the interests of the children as the paramount consideration; and

(b) subject to the last preceding paragraph, the court may make such order in respect of those matters as it thinks proper.

(2.) The court may adjourn any proceedings referred to in the last preceding sub-section until a report has been obtained from a welfare officer on such matters relevant to the proceedings as the court considers desirable, and may receive the report in evidence.

(3.) In proceedings with respect to the custody of children of a marriage, the court may, if it is satisfied that it is desirable to do so, make an order placing the children, or such of them as it thinks fit, in the custody of a person other than a party to the marriage.

(4.) Where the court makes an order placing a child of a marriage in the custody of a party to the marriage, or of a person other than a party to the marriage, it may include in the order such provision as it thinks proper for access to the child by the other party to the marriage, or by the parties or a party to the marriage, as the case may be.

Powers of court in proceedings with respect to settlement of property.

86.—(1.) The court may, in proceedings under this Act, by order require the parties to the marriage, or either of them, to make, for the benefit of all or any of the parties to, and the children of, the marriage, such a settlement of property to which the parties are, or either of them is, entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of the case.

(2.) The court may, in proceedings under this Act, make such order as the court considers just and equitable with respect to the application for the benefit of all or any of the parties to, and the children of, the marriage of the whole or part of property dealt with by ante-nuptial or post-nuptial settlements on the parties to the marriage, or either of them.

(3.) The power of the court to make orders of the kind referred to in this section shall not be exercised for the benefit of a child who has attained the age of twenty-one years unless the court is of opinion that there are special circumstances that justify the making of such an order for the benefit of that child.

General powers of court.

87.—(1.) The court, in exercising its powers under this Part, may do any or all of the following:—

(a) order that a lump sum or a weekly, monthly, yearly or other periodic sum be paid;

(b) order that a lump sum or a weekly, monthly, yearly or other periodic sum be secured;

(c) where a periodic sum is ordered to be paid, order that its payment be wholly or partly secured in such manner as the court directs;

(d) order that any necessary deed or instrument be executed and that such documents of title be produced or such other things be done as are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;

(e) appoint or remove trustees;

(f) order that payments be made direct to a party to the marriage, or to a trustee to be appointed or to a public authority for the benefit of a party to the marriage;

(g) order that payment of maintenance in respect of a child be made to such person or public authority as the court specifies;

(h) make a permanent order, an order pending the disposal of proceedings or an order for a fixed term or for a life or during joint lives or until further order;

(i) impose terms and conditions;

(j) in relation to an order made in respect of a matter referred to in any of the last three preceding sections, whether made by that court or by another court and whether made before or after the commencement of this Act—

(i) discharge the order if the party in whose favour it was made marries again or if there is any other just cause for so doing;

(ii) modify the effect of the order or suspend its operation wholly or in part and either until further order or until a fixed time or the happening of some future event;

(iii) revive wholly or in part an order suspended under the last preceding sub-paragraph; or

(iv) subject to the next succeeding sub-section, vary the order so as to increase or decrease any amount ordered to be paid by the order;

(k) sanction an agreement for the acceptance of a lump sum or periodic sums or other benefits in lieu of rights under an order made in respect of a matter referred to in any of the last three preceding sections, or any right to seek such an order;

(l) make any other order (whether or not of the same nature as those mentioned in the preceding paragraphs of this sub-section, and whether or not it is in accordance with the practice under other laws before the commencement of this Act) which it thinks it is necessary to make to do justice;

(m) include its order under this Part in a decree under another Part; and

(n) subject to this Act, make an order under this Part at any time before or after the making of a decree under another Part.

(2). The court shall not make an order increasing or decreasing an amount ordered to be paid by an order unless it is satisfied—

(a) that, since the order was made or last varied, the circumstances of the parties or either of them, or of any child for whose benefit the order was made, have changed to such an extent as to justify its so doing; or

(b) that material facts were withheld from the court that made the order or from a court that varied the order or material evidence previously given before such a court was false.

(3.) The court shall not make an order increasing or decreasing—

(a) the security for the payment of a periodic sum ordered to be paid; or

(b) the amount of a lump sum or periodic sum ordered to be secured,

unless it is satisfied that material facts were withheld from the court that made the order of from a court that varied the order or that material evidence given before such a court was false.

Execution of deeds, &c., by order of court.

88.—(1.) Where a person who is directed by an order under this Part to execute a deed or instrument refuses or neglects to do so, the court may appoint an officer of the court or other person to execute the deed or instrument in his name and to do all acts and things necessary to give validity and operation to the deed or instrument.

(2.) The execution of the deed or instrument by the person so appointed has the same force and validity as if it had been executed by the person directed by the order to execute it.

(3.) The court may make such order as it thinks just as to the payment of the costs and expenses of and incidental to the preparation of the deed or instrument and its execution.

Power of court to make orders on dismissal of petition.

89.—(1.) Except as provided by this section, the court shall not make an order under this Part where the petition for the principal relief has been dismissed.

(2). Where—

(a) the petition for the principal relief has been dismissed after a hearing on the merits; and

(b) the court is satisfied that—

(i) the proceedings for the principal relief were instituted in good faith to obtain that relief; and

(ii) there is no reasonable likelihood of the parties becoming reconciled,

the court may, if it considers that it is desirable to do so, make an order under this Part, other than an order under section eighty-six of this Act.

(3.) The court shall not make an order by virtue of the last preceding sub-section unless it has heard the proceedings for the order at the same time as, or immediately after, the proceedings for the principal relief.

(4.) In this section, "principal releif" means relief of a kind referred to in paragraph (a) or (b) of the definition of "Matrimonial cause" in sub-section (1.) of section five of this Act.

PART XII.—ENFORCEMENT OF DECREES.

Attachment.

102.—(1.) Subject to the rules, a court having jurisdiction under this Act may enforce by attachment or by sequestration an order made by it under this Act for payment of maintenance or costs or in respect of the custody of, or access to, children.

(2.) The court shall order the release from custody of a person who has been attached under this section upon being satisfied that that person has complied with the order in respect of which he was attached and may, at any time, if the court is satisfied that it is just and equitable to do so, order the release of such a person notwithstanding that he has not complied with that order.

(3.) Where a person who has been attached under this section in consequence of his failure to comply with an order for the payment of maintenance or costs becomes a bankrupt, he shall not be kept in custody under the attachment longer than six months after he becomes a bankrupt unless the court otherwise orders.

Enforcement of decrees by other Supreme Courts.

103.—(1) A decree made under this Act by a court having jurisdiction under this Act may, in accordance with the rules, be registered in another court having jurisdiction under this Act.

(2.) A decree registered in a court under this section may, subject to the rules, be enforced as if it had been made by the court in which it is registered.

(3.) A reference in this Part to the court by which a decree was made shall be read as including a reference to a court in which the decree is registered under this section.

Recovery of moneys as judgment debt.

104.—(1.) Where a decree made under this Act orders the payment of money to a person, any moneys payable under the decree may be recovered as a judgment debt in a court of competent jurisdiction.

(2.) A decree made under this Act may be enforced, by leave of the court by which it was made and on such terms and conditions as the court thinks fit, against the estate of a party after that party's death.

Summary enforcement of orders for maintenance.

105.—(1.) Where a court has made under this Act an order for payment of maintenance, the order may be registered, in accordance with the rules, in a court of summary jurisdiction of a State or of a Territory to which this Act applies, and an order so registered may, subject to the rules, be enforced in the same manner as if it were an order for maintenance of a deserted wife made by the court of summary jurisdiction.

(2.) The several courts of summary jurisdiction of the States and of the Territories to which this Act applies are authorized to do all things necessary for the purposes of the last preceding sub-section.

(3.) In this section, "court of summary jurisdiction of a State or of a Territory to which this Act applies" has the same meaning as in section eight of this Act.

Enforcement of maintenance orders by attachment of earnings.

106. An order under this Act for the payment of maintenance may be enforced in accordance with the Third Schedule to this Act and the provisions of that Schedule have effect in relation to the enforcement of such orders.

Restrictions on publication of evidence.

123.—(1.) Except as provided by this section, a person shall not, in relation to any proceedings under this Act, print or publish, or cause to be printed or published, any account of evidence in the proceedings, or any other account or particulars of the proceedings other than—

(a) the names, addresses and occupations of the parties and witnesses, and the name or names of the members or members of the court and of the counsel and solicitors;

(b) a concise statement of the nature and grounds of the proceedings and of the charges, defences and counter-charges in support of which evidence has been given;

(c) submissions on any points of law arising in the course of the proceedings, and the decision of the court on those points; or

(d) the judgment of the court and observations made by the court in giving judgment.

(2.) The court may, if it thinks fit in any particular proceedings, order that none of the matters referred to in paragraph (a), (b), (c) or (d) of the last preceding sub-section shall be printed or published or that any matter or part of a matter so referred to shall not be printed or published.

(3.) A person who contravenes sub-section (1.) of this section, or prints or publishes, or causes to be printed or published, any matter, or part of a matter, in contravention of an order of a court under the last preceding sub-section, is guilty of an offence punishable, on conviction—

(a) in the case of a first offence, or a second or subsequent offence prosecuted summarily—by a fine not exceeding Five hundred pounds or imprisonment for a period not exceeding six months; and

(b) in the case of a second or subsequent offence, being an offence prosecuted on indictment—by a fine not exceeding One thousand pounds or imprisonment for a period not exceeding one year.

(4.) Proceedings for an offence against this section shall not be commenced except by, or with the written consent of, the Attorney-General.

(5.) The preceding provisions of this section do not apply to or in relation to—

(a) the printing of any pleading, transcript of evidence or other document for use in connexion with proceedings in any court or the communication of any such document to persons concerned in the proceedings;

(b) the printing or publishing of a notice or report in pursuance of the direction of a court;

(c) the printing or publishing of any publication *bona fide* intended primarily for the use of members of the legal or medical profession, being—

(i) a separate volume or part of a series of law reports; or

(ii) any other publication of a technical character; or

(d) the printing or publishing of a photograph of any person, not being a photograph forming part of the evidence in proceedings under this Act.

(6.) In this section, "court" includes an officer of a court investigating a matter in accordance with the rules and "judgment of the court" includes a report made to a court by such an officer.

APPENDIX "39"

COMMONWEALTH OF AUSTRALIA

MATRIMONIAL CAUSES ACT 1965

No. 99 of 1965

AN ACT

To amend the *Matrimonial Causes Act* 1959

[*Assented to 13th December, 1965*]

Be it enacted by the Queen's Most Excellent Majesty, the Senate, and the House of Representatives of the Commonwealth of Australia, as follows:—

9. Section 39 of the Principal Act is repealed and the following sections are inserted in its stead:—

Condonation or connivance to be an absolute bar to relief.

"39. A decree of dissolution of marriage shall not be made upon a ground specified in any of paragraphs (a) to (k), inclusive, of section twenty-eight of this Act if—

(a) the petitioner has condoned the ground and the ground has not been revived; or

(b) the petitioner has connived at the ground,

Presumption as to condonation to be rebuttable.

"39A. For the purposes of any provision of this Part referring to continuance, any presumption of condonation that arises from the continuance or resumption of sexual intercourse may be rebutted on the part of a husband, as well as on the part of a wife, by evidence sufficient to negative intent to condone.".

10. After section 41 of the Principal Act the following section is inserted:—

Effect of cohabitation with a view to reconciliation.

"41A.—(1) For the purposes of section thirty-nine of this Act, a ground shall not be deemed to have been condoned, and, for the purposes of sub-section (3.) of section thirty-seven of this Act and of section forty-one of this Act, adultery of the petitioner shall not be deemed to have been condoned, by reason only of a continuation or resumption of cohabitation between the parties (whether with or without acts of sexual intercourse between them) for one period not exceeding three months if the court is satisfied that—

(a) the cohabitation was continued or resumed, as the case may be, with a view, on the part of the party to whom condonation might otherwise be attributed, to effecting a reconciliation; and

(b) a reconciliation was not effected during that period.

"(2) For the purposes of proceedings on the ground specified in paragraph (b) of section twenty-eight of this Act, where—

(a) before the desertion had continued for two years, the parties, on one occasion, resumed cohabitation (whether with or without acts of sexual intercourse between them), but the deserting party, within a period of three months after the resumption of cohabitation, again, without just cause or excuse, wilfully deserted the other party; and

(b) the court is satisfied that—

(i) the resumption of cohabitation was with a view, on the part of the deserted party, to effecting a reconciliation; and

(ii) a reconciliation was not effected during the period of cohabitation,

the periods of desertion before and after the period of cohabitation may be aggregated as if they were one continuous period, but the period of cohabitation shall not be deemed to be part of the period of desertion.

"(3.) For the purposes of proceedings on the ground specified in paragraph (m) of section twenty-eight of this Act, where—

(a) since the separation, the parties, on one occasion, resumed cohabitation (whether with or without acts of sexual intercourse between them), but, within a period of three months after the resumption of cohabitation, they again separated and thereafter lived separately and apart up to the date of the petition; and

(b) the court is satisfied that—

(i) the resumption of cohabitation was with a view, on the part of either party, to effecting a reconciliation; and

(ii) a reconciliation was not effected during the period of cohabitation

the periods of living separately and apart before and after the period of cohabitation may be aggregated as if they were one continuous period, but the period of cohabitation shall not be deemed to be part of the period of living separately and apart.

"(4.) For the purposes of the preceding provisions of this section, a period of cohabitation shall be deemed to have continued during any interruption of the cohabitation that, in the opinion of the court, was not substantial.

"(5.) The operation of this section extends to things that occurred before the commencement of this section."

Decree absolute where children under sixteen years, &c.

12.—(1.) Section 71 of the Principal Act is amended by omitting sub-section (1.) and inserting in its stead the following sub-sections:—

"(1.) A decree *nisi* of dissolution of a marriage or of nullity of a voidable marriage, being a decree made on or after the date of commencement of the *Matrimonial Causes Act* 1965, does not become absolute unless the court, by order, has declared that it is satisfied—

(a) that there are no children of the marriage in relation to whom this section applies; or

(b) that the only children of the marriage in relation to whom this section applies are the children specified in the order and that—

(i) proper arrangements in all the circumstances have been made for the welfare of those children; or

(ii) there are special circumstances by reason of which the decree *nisi* should become absolute notwithstanding that the court is not satisfied that such arrangements have been made.

"(1A.) For the purposes of the last preceding sub-section, the court shall, where the circumstances make it appropriate to do so, treat the welfare of a child as including its advancement and education.".

(2.) Subject to the next succeeding sub-section, section 71 of the Principal Act continues to apply in relation to a decree *nisi* made before the date of commencement of this Act.

(3.) In relation to a decree *nisi* made before the date of commencement of this Act, section 71 of the Principal Act has effect, and shall be deemed to have had effect, as if the only children of the marriage who are or were under the age of sixteen years at the date of the decree *nisi* are or were the children of the marriage specified in the petition (either as originally filed or as amended) and appearing from the petition not to have attained the age of sixteen years before the date of the decree *nisi*.

APPENDIX "39"

COMMONWEALTH OF AUSTRALIA

MATRIMONIAL CAUSES ACT 1966

No. 60 of 1966

AN ACT

To amend the *Matrimonial Causes Act* 1959-1965 in relation to the Enforcement of Orders for Maintenance and in relation to Decimal Currency.

[*Assented to 29th October, 1966*]

Be it enacted by the Queen's Most Excellent Majesty, the Senate, and the House of Representatives of the Commonwealth of Australia, as follows:—

4. The Third Schedule to the Principal Act is repealed and the Schedule set out in the Schedule to this Act inserted in its stead. Third Schedule.

Section 4

THE SCHEDULE

Schedule Inserted in the Principal Act by this Act

"Third Schedule"

Section 196

Enforcement of Orders for Maintenance

1. In this Schedule, unless the contrary intention appears—

"attachment of earnings order" means an order under paragraph 5 of this Schedule;

"defendant", in relation to a maintenance order or to proceedings in connexion with a maintenance order, means the person liable to make payments under the order;

"earnings", in relation to a defendant, means any moneys payable to the defendant—

(a) by way of wages or salary (including any fees, bonus, commission, overtime pay or other emoluments payable in addition to wages or salary); or

(b) by way of pension, including—

(i) an annuity in respect of past services, whether or not the services were rendered to the person paying the annuity; and

(ii) periodical payments in respect of or by way of compensation for the loss, abolition or relinquishment, or any diminution in the emoluments, of any office or employment,

but not including any pay or allowances as a member of the Defence Force or any moneys payable to the defendant under the *Social Services Act* 1947-1966, the *Repatriation Act* 1920-1966, the *Repatriation (Far East Strategic Reserve) Act* 1956-1964, the *Repatriation (Special Overseas Service) Act* 1962-1965 or the *Seamen's War Pensions and Allowances Act* 1940-1966:

"employer", in relation to a defendant, means a person (including the Crown in right of the Commonwealth or a State, the Administration of a Territory to which this Act applies and any authority of the Commonwealth, of a State or of a Territory to which this Act applies) by whom, as a principal and not as a servant or agent, earnings are payable or are likely to become payable to the defendant;

"maintenance order" means an order under this Act for the payment of maintenance, and includes such an order that has been discharged if any arrears are recoverable under the order;

"net earnings", in relation to an attachment of earnings order and in relation to a pay-day, means the amount of the earnings becoming payable on that pay-day to the defendant by the employer to whom the order is directed, after deduction from those earnings of—

(a) any sum deducted from those earnings under Division 2 of Part VI of the *Income Tax Assessment Act* 1936-1966;

(b) any sum of a kind referred to in section 82H of that Act deducted from those earnings, not being a sum deducted in respect of a life

insurance premium other than a life insurance premium payable under a superannuation or retirement benefit scheme; and

(c) any sum of a kind referred to in section 82HA of that Act deducted from those earnings;

"normal deduction", in relation to an attachment of earnings order and in relation to a pay-day, means an amount representing a payment at the normal deduction rate specified in the order, or at the normal deduction rate so specified that is applicable to that pay-day, as the case may be, in respect of the period between that pay-day and either the last preceding pay-day, or, where there is no last preceding pay-day, the date on which the employer became, or last became, the defendant's employer;

"pay-day" means an occasion on which earnings to which an attachment of earnings order relates become payable;

"protected earnings", in relation to an attachment of earnings order and in relation to a pay-day, means the amount representing a payment at the protected earnings rate specified in the order in respect of the period between that pay-day and either the last preceding pay-day, or, where there is no last preceding pay-day, the date on which the employer became, or last became, the defendant's employer.

2. In this Schedule—

(a) a reference to an order includes, in relation to an order that has been varied, a reference to the order as so varied;

(b) a reference to a person entitled to receive payments under a maintenance order is a reference to a person entitled to receive payments under the maintenance order either directly or through another person or for transmission to another person;

(c) a reference to proceedings relating to an order includes a reference to proceedings in which the order may be made; and

(d) a reference to costs incurred in proceedings relating to a maintenance order shall be read, in the case of a maintenance order made by the Supreme Court of a State or of a Territory to which this Act applies, as a reference to such costs as are included in an order for costs relating solely to that maintenance order.

3. Subject to this Schedule, a person entitled to receive payments under a maintenance order may apply to—

(a) the court that made the order; or

(b) the court in which the order is for the time being registered under section 103 or section 105 of this Act,

for an attachment of earnings order.

4. An application under the last preceding paragraph may be made *ex parte* and without specifying the name of any employer of the defendant.

5. If the court is satisfied that the defendant is a person to whom earnings are payable or are likely to become payable and—

(a) that, at the time when the application was made, there was due under the maintenance order and unpaid an amount equal to not less than—

(i) in the case of an order for weekly payments—four payments; or

(ii) in any other case—two payments; or

(b) that the defendant has persistently failed to comply with the requirements of the order,

the court may, in its discretion, by an order require a person who appears to the court to be the defendant's employer in respect of those earnings or a part of

those earnings to make out of those earnings or that part of those earnings payments in accordance with paragraph 13 of this Schedule.

6. The court shall not make an attachment of earnings order if it appears to the court, in a case to which sub-paragraph (a) of the last preceding paragraph applies, that the failure of the defendant to make payments under the maintenance order was not due to his wilful refusal or culpable neglect.

7. An attachment of earnings order shall specify a normal deduction rate or normal deduction rates and, where it specifies two or more such rates, it shall also specify the pay-day or pay-days to which each of those rates is applicable.

8. The rate to be specified as a normal deduction rate shall be the rate at which the court considers it to be reasonable that the earnings to which the order relates should, or should on the pay-day or pay-days to which the rate is to be applicable, as the case may be, be applied in satisfying the requirements of the maintenance order but not exceeding the rate that appears to the court to be necessary for the purpose of—

(a) securing payment of the sums from time to time falling due under the maintenance order; and

(b) securing payment within a reasonable time of any sums already due and unpaid under the maintenance order and any costs incurred in proceedings relating to the maintenance order that are payable by the defendant.

9. An attachment of earnings order shall also specify the protected earnings rate, that is to say, the rate below which, having regard to the resources and needs of the defendant and of any person for whom he must or reasonably may provide, the court considers it to be reasonable that the net earnings of the defendant on any pay-day should not be reduced by a payment under the order.

10. An attachment of earnings order shall provide that payments under the order are to be made to an officer of the court specified in the order.

11. An attachment of earnings order shall contain such particulars as the court thinks proper for the purpose of enabling the person to whom the order is directed to identify the defendant.

12. An attachment of earnings order does not come into force until the expiration of seven days after the day on which a copy of the order is served on the person to whom the order is directed.

13. An employer to whom an attachment of earnings order is directed, being an attachment of earnings order that is in force, shall, in respect of each pay-day, if the net earnings of the defendant exceed the sum of—

(a) the protected earnings of the defendant; and

(b) so much of any amount by which the net earnings that became payable on any previous pay-day were less than the protected earnings in relation to that pay-day as has not been made good on any other previous pay-day,

pay, so far as that excess permits, to the officer specified for the purpose in the order—

(c) the normal deduction in relation to that pay-day; and

(d) so much of the normal deduction in relation to any previous pay-day as was not paid on that pay-day and has not been paid on any other previous pay-day.

14. A payment made by the employer under the last preceding paragraph is a valid discharge to him as against the defendant to the extent of the amount paid.

15. Where proceedings for attachment are brought in a court under section 102 of this Act, or where proceedings are taken in a court of summary jurisdiction to enforce an order registered in that court under section 105 of this Act, the court may, instead of making any other order, make an attachment of earnings order.

16. Where an attachment of earnings order is in force, no writ, order or warrant of commitment or attachment shall be issued or made in proceedings for the enforcement of the maintenance order that were begun before the making of the attachment of earnings order unless the court in which those proceedings were taken otherwise orders.

17. The court by which an attachment of earnings order has been made may, in its discretion, on the application of the defendant or a person entitled to receive payments under the maintenance order, make an order discharging, suspending or varying the attachment of earnings order.

18. An order suspending or varying an attachment of earnings order shall not come into force until the expiration of seven days after the date on which a copy of the order is served on the person to whom the attachment of earnings order is directed.

19. An attachment of earnings order ceases to have effect—

(a) upon the issuing or making of a writ, order or warrant of commitment or attachment for the enforcement of the maintenance order in relation to which the attachment of earnings order applies;

(b) upon the discharge of the attachment of earnings order; or

(c) subject to the next succeeding paragraph, upon the discharge or variation of that maintenance order.

20. Where it appears to the court discharging a maintenance order that arrears under the order will remain to be recovered under the order, the court may, in its discretion, direct that the attachment of earnings order shall not cease to have effect until those arrears have been paid.

21. Where an attachment of earnings order ceases to have effect, the proper officer of the court by which the order was made shall forthwith serve notice in writing accordingly on the person to whom the order was directed.

22. Where an attachment of earnings order ceases to have effect, the person to whom the attachment of earnings order is directed does not incur any liability in consequence of his treating the order as still in force at any time before the expiration of seven days after the date on which the notice required by the last preceding paragraph is served on him.

23. A person to whom an attachment of earnings order is directed shall, notwithstanding anything in any other law, but subject to this Schedule, comply with the order.

24. Where, on any occasion on which earnings become payable to a defendant, there are in force two or more attachment of earnings orders in relation to those earnings, the person to whom the orders are directed—

(a) shall comply with those orders according to the respective dates on which they came into force and shall disregard any order until an earlier order has been complied with in relation to those earnings; and

(b) shall comply with any order as if the earnings to which the order relates were the residue of the defendant's earnings after the making of any payment under any earlier order.

25. Where, on any occasion on which earnings become payable to a defendant, there is in force, in addition to an attachment of earnings order under this Act, a State attachment of earnings order directed to the employer in respect of the defendant, being an order that came into force before the order under this Act came into force, the employer shall—

(a) disregard the order under this Act for the purpose of complying with the State attachment of earnings order; and

(b) comply with the order under this Act as if the earnings to which the order related were the residue of the defendant's earnings after the making of any payment under the State attachment of earnings order.

For the purposes of this paragraph—

'maintenance order', means an order for the payment of money made under, or enforceable under, a law of a State or Territory of the Commonwealth that makes provision in relation to the maintenance of wives, children or other persons including an order for payment of expenses of any kind or for payment of costs and an order for the recoupment of moneys spent in, or provided for, the maintenance of a person or meeting expenses of any kind;

'State attachment of earnings order' means an order called an attachment of earnings order made, for the purpose of enforcement of a maintenance order, in accordance with the law of a State or Territory of the Commonwealth, including an order made by virtue of the *Maintenance Orders (Commonwealth Officers) Act* 1966.

26. For the purposes of paragraphs 24 and 25 of this Schedule, where a variation of an order has come into force, the order shall be deemed to have come into force as so varied on the day upon which the order came into force.

27. A person who makes a payment in compliance with an attachment of earnings order shall give to the defendant a notice in writing specifying particulars of the payment.

28. Where a person on whom a copy of an attachment of earnings order that is directed to him is served—

(a) is not the defendant's employer at the time when the copy of the order is served on him; or

(b) is the defendant's employer at that time but ceases to be the defendant's employer at any time before the order ceases to have effect,

the person shall give notice in writing accordingly to the proper officer of the court that made the order and shall so give notice—

(c) in a case to which sub-paragraph (a) of this paragraph applies —forthwith after the copy of the order is served on the person; and

(d) in a case to which sub-paragraph (b) of this paragraph applies —forthwith after the person ceases to be the defendant's employer.

29. Where proceedings relating to an attachment of earnings order are brought in any court, the court may, either before or after the hearing—

(a) order the defendant to furnish to the court, within a specified period, a statement signed by the defendant specifying—

(i) the name and address of his employer, or, if he has more employers than one, of each of his employers;

(ii) particulars as to the defendant's earnings; and

(iii) such particulars as are necessary to enable the defendant to be identified by any of his employers; and

(b) order any person who appears to the court to be an employer of the defendant to give to the court, within a specified period, a statement signed by him or on his behalf containing such particulars as are specified in the order of all earnings of the defendant that became payable by that person during a specified period.

30. A document purporting to be a statement referred to in the last preceding paragraph shall, in any proceedings relating to an attachment of earnings order, be received in evidence and shall, unless the contrary is shown, be deemed without further proof to be such a statement.

31. The court by which an attachment of earnings order has been made shall, on the application of the person to whom the order is directed, of the defendant or of the person in whose favour the order was made, determine whether payments to the defendant of a particular class or description specified in the application are earnings for the purposes of that order.

32. A person to whom an attachment of earnings order is directed who makes an application under the last preceding paragraph does not incur any liability for failing to comply with the order with respect to any payments of the class or description specified in the application that are made by him to the defendant while the application, or any appeal from a determination made on the application, is pending.

33. The last preceding paragraph does not apply in respect of any payment made after the application has been withdrawn or any appeal from a determination made on the application has been abandoned.

34. The officer to whom an employer pays any sum in pursuance of an attachment of earnings order shall pay that sum to such person entitled to receive payments under the maintenance order as is specified by the attachment of earnings order.

35. Any sum received by virtue of an attachment of earnings order by the person entitled to receive it shall be deemed to be a payment made by the defendant to that person, so as to discharge first any sums due and unpaid under the maintenance order (a sum due at an earlier date being discharged before a sum due at a later date) and secondly any costs incurred in proceedings relating to the maintenance order that were payable by the defendant when the attachment of earnings order was made or last varied.

36. A copy of an order or other document that is required or permitted to be served on a person other than an incorporated company, society or association under this Schedule may be served on the person—

(a) by delivering the document to the person personally;

(b) by leaving the document at the usual place of residence or business of the person, or at the last place of residence or business of the person known to the person on whose behalf the document is being served, with a person who apparently resides in, or is employed at, that place and is apparently over sixteen years; or

(c) by properly addressing and posting (under prepaid postage) the document as a registered letter to the person at any place referred to in the last preceding sub-paragraph.

37. A copy of an order or other document that is required or permitted to be served on an incorporated company, society or association under this Schredule may be served on the company, society or association—

(a) by leaving the document at any place of business of the company, society or association, or at any place that is the registered office of the company, society or association under the law of any State or

Territory to which this Act applies, with a person who is apparently employed at that place and is apparently over the age of sixteen years; or

(b) by properly addressing and posting (under prepaid postage) the document as a registered lettter to the company, societey or association at any place referred to in the last preceding sub-paragraph.

38. Service of a document in accordance with sub-paragraph (c) of paragraph 36, or sub-paragraph (b) of paragraph 37, of this Schedule shall, unless the contrary is proved, be deemed to have been effected at the time at which the letter would be delivered in the ordinary course of post.

39. The rules may make provision for or in relation to the service on the Commonwealth, on a State, on the Administration of a Territory to which this Act applies or on a body corporate (not being an incorporated company, society or association) incorporated for a public purpose by or under a law of the Commonwealth, of a State or of such a Territory of copies of orders or other documents that are required or permitted to be so served under this Schedule.

40. A person who—

(a) fails to comply with a requirement of this Schedule, or of an order under this Schedule, that is applicable to him;

(b) in any statement or notice furnished to a court under this Schedule or in compliance with an order made under this Schedule makes a statement that he knows to be false or misleading in a material particular; or

(c) recklessly furnishes such a statement or notice that is false or misleading in a material particular,

is guilty of an offense punishable, on conviction, by a fine not exceeding Two hundred dollars.

41. It is a defence if a person charged with an offence arising under sub-paragraph (a) of the last preceding paragraph proves that he took all reasonable steps to comply with the requirement or order.

42. A person who dismisses an employee, or injures him in his employment, or alters his position to his prejudice, by reason of the circumstance that an attachment of earnings order has been made in relation to the employee or that the person is required to make payments under such an order in relation to the employee is guilty of an offence punishable, on conviction, by a fine not exceeding Two hundred dollars.

43. In any proceedings for an offence arising under the last preceding paragraph, if all the facts and circumstances constituting the offence, other than the reason for the action of the person charged with having committed the offence, are proved, the burden lies upon that person to prove that he was not actuated by the reason alleged in the charge.

44. Where a person is convicted of an offence arising under paragraph 42 of this Schedule, the court by which he is convicted may order that the employee be reimbursed any wages lost by him and may also direct that the employee be reinstated in his old position or in a similar position.

45. Where a court has made an order under the last preceding paragraph for the reimbursement of any wages lost by an employee, a certificate under the hand of the clerk or other proper officer of the court specifying the amount ordered to be reimbursed and the persons by whom and to whom the amount is payable, may be filed in a court having civil jurisdiction to the extent of that amount and is thereupon enforceable in all respects as a final judgment of that court.

46. The several courts of the States are invested with federal jurisdiction, and jurisdiction is conferred on the courts of the Territories to which this Act applies, in matters arising under this Schedule.

47. The jurisdiction with which the several courts of the States are invested by the last preceding paragraph is subject to the conditions and restrictions specified in subsection (2.) of section 39 of the *Judiciary Act* 1903-1966 so far as they are applicable.

48. Notwithstanding anything contained in the *Judiciary Act* 1903-1966, an appeal does not lie to the High Court from an order of a court of summary jurisdiction under this Schedule.

49. This Schedule has effect in relation to a defendant notwithstanding any law that would otherwise prevent the attachment of his earnings or limit the amount capable of being attached."

APPENDIX "40"

Brief to the Special Joint Committee of the Senate and House of Commons on Divorce

by

BARRISTERS' SOCIETY OF NEW BRUNSWICK

BRIEF ON DIVORCE

At the annual meeting of the Barristers' Society of New Brunswick the following resolution was passed unanimously.

Resolved

1. That this Society does support legislation leading to a broadening of the grounds for divorce in Canada.

2. That, in particular, this Society is in favour of legislation extending the grounds for divorce to include the following grounds, in addition to adultery:—

(a) The commission of an act of sexual or deviate sexual intercourse voluntarily performed by the defendant after marriage with a person other than the Plaintiff (Petitioner) or with an animal;

(b) Cruelty;

(c) Separation pursuant to judicial decree for a period of not less than three years;

(d) Desertion for a period of not less than three years;

(e) Insanity;

(f) Persistent criminality;

(g) Persistent and wilful failure to support dependent children.

3. That the Society does recommend that provision be made by the Parliament of Canada to give jurisdiction to provincial or territorial courts (otherwise having jurisdiction in cases of divorce) upon proof of domicile within Canada where there has been residence by either party to the suit in the province where action is brought for more than one year of the three years prior to commencement of the action.

4. That the Society does recommend that collusion be a discretionary bar only.

5. That the Council do submit a brief incorporating these resolutions to the Special Joint Committee of the Senate and House of Commons of Canada on Divorce and, if the Council deem advisable, the Society do send a delegation to make representations to such Committee on behalf of the Society.

This resolution was the result of a study made by a Committee appointed by the Society. The complete report is hereto annexed. The report was discussed before all the members at the annual meeting for a period of more than five hours.

The many arguments as to why the original report was amended will be commented upon briefly.

In addition to adultery the New Brusnwick Society felt that other grounds were necessary to meet the social needs of the public, however, it was strongly argued by the members that such grounds should not be broadened to the extent that divorce became a matter of mere consent between the parties. For that reason paragraph 2(d) was deleted and no divorce should be granted unless the separation is pursuant to a judicial decree and only after three years. This clause 2(c) was retained in the resolution.

You will note that the times of separation and desertion have been set forth as 3 years. There is no reason for this extension other than that the majority of the members of the Society felt that this gives the parties an extra year to attempt to resume married life.

Some of the strongest arguments heard, were both "pro" and "con" with respect to a petitioner obtaining a divorce when the other party was imprisoned for a term certain (allowing for parole). It was eventually agreed that there should be no grounds for divorce for imprisonment and the paragraph was deleted despite the fact that the members agreed that "*persistent*" criminality should be a ground.

The committee and members of the Society felt that insanity as a ground for divorce must be clearly defined and hoped that Parliament would clarify this by defining insanity with respect to certification and duration of the unsoundness of mind.

The ground of cruelty was felt to be a necessity but after considerable discussion the definition of cruelty was considered to be a matter to be decided by the court.

C. T. Gilbert
Secretary-Treasurer,
Barristers' Society of New Brunswick.

REPORT OF COMMITTEE ON GROUNDS FOR DIVORCE

To the President, Council and
Members of the Barristers' Society
of New Brunswick:

Your Committee begs leave to report as follows:

PART I

ESTABLISHMENT

Your Committee was established by the Council of the Society pursuant to resolution adopted at the 1965 annual meeting.

PART II

MARRIAGE AS AN INSTITUTION

The members of your Committee believe and have a firm faith in the institution of marriage and in the maintenance of the family unit.

They believe in the value of the stability and endurance of marriages.

They believe in marriages as being important to the social well-being of the state.

They believe there should be no relaxation in the rules of evidence or the modicum of proof required in divorce cases nor in the dignity, decorum or solemnity with which our divorce cases are tried.

They hope that they may be spared the unwarranted criticism that the Society is in favour of breaking up happy homes. It should not be necessary to state—but unfortunately it must be re-iterated—that the individual members of this Society are not responsible for breaking up the homes of the parties who come to them seeking advice in their tragedies, but that it is after the home has broken down, it is after sane and logical communication between the spouses has come to an end, that the unfortunate victims must come to the lawyer.

PART III

CONSTITUTIONAL POSITION

Your Committee has concluded that under the provisions of the British North America Act, Section 91 (26) the matter of divorce is completely assigned to the Parliament of Canada and any change in legislation must be enacted by the Parliament of Canada.

By Section 129 of the British North America Act the laws in force in New Brunswick at the time of Confederation were continued in effect. The Legislature of New Brunswick has, however, no power to amend or repeal the statutes which were in effect at the time of Confederation, including in particular those sections declaring grounds for divorce and annulment which are reproduced as part of Section 37 of the Divorce Court Act, R.S.N.B. (1952) c. 63. Similarly, the

Court of Divorce and Matrimonial Causes as established by the statute 1860 (23 Victoria) c. 37 has continued in existence by virtue of the provisions of Section 129 of the British North America Act with no more than administrative changes.

PART IV

PRESENT GROUNDS FOR DIVORCE IN NEW BRUNSWICK

The effective words of the pre-Confederation statute which is re-stated in the Divorce Court Act, R.S.N.B. (1952) c. 63, section 37, read as follows:

> "the causes for divorce from the bond of matrimony and of dissolving and annuling marriage are and shall be frigidity or impotence, adultery and consanguinity within the degrees prohibited by... (32 Henry VIII)"

There has been only one reported decision on the language of this rather ambiguous section. In the case of *Babineau v Babineau*, 51 N.B.R. 501, it was held that the word "adultery" was not broad enoughtto include bestiality, and that no more than a judicial separation (or divorce a mensa et thoro) could be granted on such grounds.

Despite the apposition of the words, there is no reported case where a decree of divorce a vinculo was granted on the grounds of frigidity or impotence which might have supervened after a duly consummated marriage.

Your Committee concludes that adultery is the sole effective ground for divorce a vinculo in the Province.

It is to be noted that despite the restricted language of the section quoted above, it is the understanding of your Committee that the New Brunswick Court of Divorce and Matrimonial Causes have never hesitated to grant decrees of divorce a mensa et thoro on any of the grounds permitted by the law of England at the time of the establishment of the Province; (See *Hunter v Hunter* (1863) 10 N.B.R. 593); nor has it hesitated to grant annulments on any other grounds permitted by the Common Law. There are, however, very few reported cases which so declare.

PART V

PROBLEMS OF DOMICILE

Under the decisions of the Courts it is well established that a divorce a vinculo can only be lawfully granted by the Courts of the province of the matrimonial domicile, which is generally taken to be the province of the husband's domicile. By the Divorce Jurisdiction Act of Canada, R.S.C. (1952) c. 84, a limited jurisdiction is accorded to the province of residence in certain cases of desertion.

It is the opinion of this Committee that, in view of the increasing mobility of the Canadian population, the determination of domicile becomes more and more difficult in many cases.

It is the opinion of your Committee that a statute should be enacted stating that (for the purposes of divorce only) a domicile anywhere in Canada will give jurisdiction to a Court of residence and that the residential requirements should be spelled out in liberal terms, and that, for this purpose, a wife may have a separate domicile.

PART VI

OBSERVATIONS OF COMMITTEE

Your Committee has not called evidence nor has it made a study of any reports on the subject which might be available. At the same time it is the observation of all members of the Committee that the narrow grounds presently available for divorce in this Province have led to cases of great hardship. It is not uncommon for an unhappy husband to desert his wife and children and to disappear completely and for a prolonged period of years. In these circumstances it is often difficult or impossible for the deserted wife to lawfully establish a new and stable relationship. A protracted period of desertion should, in the opinion of your Committee, be grounds for divorce a vinculo.

The members of your Committee have, from discussions with members of the public and other members of the Bar, reached the conclusion that in many divorce actions, while true grounds may exist, the evidence adduced is not representative of the true facts of the case. It is felt that such practices cannot but lead to disrespect for the law and for the Courts generally.

The Chairman of your Committee has received a number of letters (one from as far as Victoria, B.C.) urging persistence in the effort to enlarge the grounds for divorce in this Province.

PART VII

DEVELOPMENTS IN OTHER JURISDICTIONS

Your Committee has been greatly impressed with the action taken in England by the Matrimonial Causes Act of 1937 and subsequent additions thereto. Your Committee is also much impressed with the recent enactment in the State of New York of a new divorce code which greatly broadens the grounds for divorce in that jurisdiction. Some comments on the New York legislation are incorporated in Appendix "B" to this report.

It is the view of your Committee that the social requirements which led to the changes in England and in New York State are in large measure also operative in New Brunswick. It is pointed out that a divorce decree (which may not be valid but which would still have some effect in a prosecution for bigamy) can be obtained by any New Brunswicker who has the money and time to go to Nevada or Idaho or Mexico or any other jurisdiction which gives easy divorces. The result is that the law of New Brunswick bears most harshly on the poorer residents of the Province.

PART VIII

JOINT PARLIAMENTARY COMMITTEE

Your Committee has been made aware that a Joint Committee of the Senate and the House of Commons of Canada has been convened to consider the law relating to divorce in Canada and that the Society has been requested to make a submission to this Committee if it wishes to do so.

In the opinion of the undersigned, the establishment of this parliamentary Committee gives new urgency to consideration of this report. It is the hope of the undersigned that the Society will respond to the parliamentary request for a submission.

PART IX

RECOMMENDATIONS

The Committee recommends for the consideration of the Council and the Society the draft resolutions hereto annexed as Appendix "A".

Respectfully submitted,

(*Sgd*) *B. R. Guss*
(B. R. Guss, Q.C.)

(*Sgd*) *D. M. Hurley*
(Professor D. M. Hurley)

(*Sgd*) *J. P. Palmer*
(J. P. Palmer, Q.C.)

June 27th, 1966.

APPENDIX "A"

DRAFT RESOLUTIONS

WHEREAS, in the opinion of this Society, the grounds for divorce presently available within the Province of New Brunswick do not meet the social needs of the public;

AND WHEREAS the narrow grounds for divorce which the present law admits may be conducive to perjured evidence, collusion, suppressed testimony and other offences and devices, the effect of which could be to induce in the public a lack of respect for and of confidence in our Courts generally;

AND WHEREAS this Society is concerned to bring law into accord with social need and to uphold and maintain public confidence in and respect for the administration of justice in the Province;

NOW THEREFORE BE IT RESOLVED:

1. That this Society does support legislation leading to a broadening of the grounds for divorce in Canada.

2. That, in particular, this Society is in favour of legislation extending the gorunds for divorce to include the following grounds, in addition to adultery:

(a) The commission of an act of sexual or deviate sexual intercourse voluntarily performed by the defendant after marriage with a person other than the Plaintiff (Petitioner) or with an animal;

(b) Cruelty;

(c) Separation pursuant to judicial decree for a period of not less than three years;

(d) Desertion for a period of not less than three years;

(e) Insanity;

(f) Persistent criminality;

(g) Persistent and wilful failure to support dependent children.

3. That the Society does recommend that provision be made by the Parliament of Canada to give jurisdiction to provincial or territorial courts (otherwise having jurisdiction in cases of divorce) upon proof of domicile within Canada where there has been residence by either party to the suit in the province where action is brought for more than one year of the three years prior to commencement of the action.

4. That the Society does recommend that collusion be a discretionary bar only.

5. That the Council do submit a brief incorporating these resolutions to the Special Joint Committee of the Senate and House of Commons of Canada on Divorce and, if the Council deem advisable, the Society do send a delegation to make representations to such Committee on behalf of the Society.

APPENDIX "B"

NEW YORK STATE

New York State had a divorce law that was 179 years old. Recently, at the end of April, 1965, the divorce law was extended and grounds were added in addition to adultery as follows:

1. Cruel and inhuman treatment...of the plaintiff by the defendant;
2. The abandonment of plaintiff by defendant for a period of two years or more;
3. The confinement of defendant to prison for a period of three or more consecutive years;
4. The commission of an act of adultery; but it is to be noted that adultery is defined as the commission of an act of sexual or deviate sexual intercourse voluntarily performed by defendant with person other than the plaintiff or with an animal after marriage;
5. The husband and wife have lived apart pursuant to a decree of separation for a period of two years after the granting of such decree;
6. The husband and wife have lived separate and apart pursuant to a written agreement of separation subscribed and acknowledged by the parties in the form required to entitle a deed to be recorded, for a period of three years after execution of such agreement...such agreement filed in the office of the Registrar of Divorce Court within thirty days after execution.

In New York State it is admitted openly that the new legislation is in large measure attributable to "...the help in recent weeks of legislative leaders who are Catholics themselves but lawmakers first....."

The New York *Times* asked—"what wrought this change?" We think the words of Richard Cardinal Cushing of Boston, uttered in 1965 in another context, may give a clue:

> "Catholics do not need the support of civil law to be faithful to their own religious convictions and they do not seek to impose by law their moral views on other members of society".

The New York *Times,* under date of 30th April 1966, stated under a sub-heading:

"BEGAN WITH POPE JOHN

> Almost every politician here agrees that the reform could never have taken place if the Roman Catholic Clergy and laity had not been in a state of ferment in which old dogmas were undergoing an agonizing re-examination—as one Liberal Democratic Assemblyman put it:
>
> 'What really got this divorce bill off the ground was a man named John—Pope John'."

First Session—Twenty-seventh Parliament

1966-67

PROCEEDINGS OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON

DIVORCE

No. 16

THURSDAY, FEBRUARY 16, 1967

Joint Chairmen

The Honourable A. W. Roebuck, Q.C.

and

A. J. P. Cameron, Q.C., M.P.

WITNESS:

Douglas A. Hogarth, Barrister at law, *on behalf of* Mothers Alone Society, All Lone Parents Society (ALPS), Canadian Single Parents and Parents without Partners.

APPENDICES:

41.—Brief of the Mothers Alone Society, All Lone Parents Society (ALPS), Canadian Single Parents and Parents without Partners.

42.—Brief of the majority members of a Committee appointed by the Bar of Montreal to examine into the question of divorce.

43.—Brief of the minority report submitted by Bernard M. Deschênes, Q.C., member of a Committee appointed by the Bar of Montreal to examine into the question of divorce.

44.—Brief of the Manitoba Bar Association.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1967

25892—1

MEMBERS OF THE

SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS

ON DIVORCE

FOR THE SENATE

Hon. A. W. Roebuck, Q.C., Joint Chairman

The Honourable Senators

Aseltine	Connolly (*Halifax North*)	Flynn
Baird	Croll	Gershaw
Belisle	Denis	Haig
Burchill	Fergusson	Roebuck—(12).

FOR THE HOUSE OF COMMONS

A. J. P. Cameron, Q.C. (*High Park*), Joint Chairman

Members of the House of Commons

Aiken	Forest	McQuaid
Baldwin	Goyer	Otto
Brewin	Honey	Peters
Cameron (*High Park*)	Laflamme	Ryan
Cantin	Langlois (*Mégantic*)	Stanbury
Choquette	MacEwan	Trudeau
Chrétien	Mandziuk	Wahn
Fairweather	McCleave	Woolliams—(24).

(Quorum 7)

ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the House of Commons:

March 15, 1966:

"On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—that a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee."

"By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19, an Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bills be referred to the Joint Committee of the Senate and House of Commons on Divorce".

March 16, 1966:

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce".

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce."

25892—1½

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Goyer, Honey, Laflamme, Langlois (*Mégantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams."

LÉON-J. RAYMOND,
Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:
March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate and House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative."

March 29, 1966:

"With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, namely, the Honourable Senators Aseltine, Baird, Belisle, Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig, and Roebuck; and

That a Message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—
Resolved in the affirmative."

May 10, 1966:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19 intituled: "An Act to extent the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief".

The question being put on the motion—

In amendment, the Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

J. F. MACNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

THURSDAY, February 16, 1967.

Pursuant to adjournment and notice, the Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3:30 p.m.

Present: For the Senate: The Honourable Senators Roebuck (*Joint Chairman*), Aseltine, Baird, Bélisle, Denis, Fergusson and Haig—7.

For the House of Commons: Messrs. Cameron (*High Park*) (*Joint Chairman*), Baldwin, Cantin, Forest, Honey, McQuaid, Otto, Peters and Stanbury—9.

In attendance: Peter J. King, Ph.D., Special Assistant.

The following witness was heard:

Douglas A. Hogarth, Barrister at law, *on behalf of* Mothers Alone Society, All Lone Parents Society (ALPS), Canadian Single Parents, Parents without Partners.

Briefs submitted by the following are printed as Appendices:

41. Mothers Alone Society, All Lone Parents Society (ALPS), Canadian Single Parents and Parents without Partners.
42. Majority members of a Committee appointed by the Bar of Montreal to examine into the question of divorce.
43. Minority report submitted by Bernard M. Deschênes, Q.C., member of a Committee appointed by the Bar of Montreal to examine into the question of divorce.
44. The Manitoba Bar Association.

At 5:30 p.m. the Committee adjourned until Tuesday next, February 21, 1967 at 3:30 p.m.

Attest.

Patrick J. Savoie,
Clerk of the Committee.

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THE SENATE

SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

EVIDENCE

OTTAWA, Thursday, February 16, 1967.

The Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3.30 p.m.

Senator Arthur W. Roebuck and Mr. A. J. P. Cameron (*High Park*), Co-Chairmen.

The CO-CHAIRMAN (*Senator Roebuck*): Ladies and gentlemen of the committee, we have a quorum. It does not look like a very thriving audience but, as I was explaining to Mr. Hogarth, it is not so much the numbers who are here as it is—

Senator BAIRD: The quality.

The CO-CHAIRMAN (*Senator Roebuck*): Yes, the quality, but I was about to say it is the record. We have a very considerable distribution of the record; not only that, but the record is the basis upon which we shall make our report to Parliament in due season, and I hope to bring about the necessary legislation, as may be determined by what we hear.

For the sake of the record I should like to introduce our main witness for today and give you some idea of who he is. Mr. Douglas Hogarth was born in 1927 in the City of Saskatoon, so that he is a western man. He was educated in the public schools of that city and at the University of Saskatchewan.

Towards the end of World War II he served briefly in the Canadian Army in Canada, and upon discharge moved to the Province of British Columbia, where he received a law degree at the University of British Columbia in 1950. He was called to the bar in 1951 and practised in the City of Prince Rupert for two years, thereafter with Mr. Alistair Fraser who is now, as you all know, Clerk Assistant to the House of Commons.

Since 1954 Mr. Hogarth has been engaged in the general practice of law in the City of New Westminster. He is presently a partner of Mr. Michael G. Oliver of that city and his work has particular emphasis in the field of criminal and civil litigation.

Mr. Hogarth is a past president of the New Westminster Bar Association and an elected member of the Council of the Canadian Bar. He is chairman of the British Columbia section of the Criminal Justice Committee of the Canadian Bar Association and has been such for the past year and a half.

Mr. Hogarth is a resident of the District of Coquitlam and an elected member of the Municipal Council of the Corporation of the District of Coquitlam. He is married and has four children—I do not know what that has to do with it but we always mention it, and it is to his credit—the eldest of whom is eleven and the youngest is two.

May I say, Mr. Hogarth, this is a very informal proceeding and if you care to sit down while you are talking to us, that is all right; or you can stand, as you wish.

Mr. Douglas A. Hogarth, Barrister-at-Law, (on behalf of Mothers Alone Society, All Lone Parents Society, Canadian Single Parents, Parents Without Partners): That is very good of you, Mr. Chairman. Messrs. Chairmen, honourable senators and members of the House of Commons, at the outset of my remarks I should like to say how grateful my clients are that you have made possible my appearance here today to speak on behalf of the brief that has been filed by them. For the people who form the societies mentioned in the brief divorce reform is much like the cure for cancer; they are looking forward to it very, very much, because all of them have suffered the problems arising from marital discord.

I regret to say that I have not got any special qualifications in the field of divorce law or constitutional law, but can only offer the views of a general legal practitioner with a modest amount of experience in these matters. The individuals who comprise these associations, however, that have banded together to prepare this brief have all, with the exception of those who are widowed of course, suffered from marital discord and can tell you of all its many and varied forms. I think you would find that they would complain in the main that their marriages have broken down to a large extent because one or other partner to the marriage failed to live up to the commitments that are made when the marital bond is entered into.

If they were here themselves to say it, they would not complain that they were inadequately prepared for marriage; I do not think they would complain that they lacked any education with regard to getting into marriage, that they did not know what it was all about. It is just that the day to day tensions during the course of their marriage eventually brought about a failure of the marriage and, as the expression goes, it "broke down," and in the literal and figurative sense died. The results are of course very obvious. They seem to run into a pattern. First of all the bickering and quarrelling, then the separation, and for some there is divorce, but many of them get hung up at that place where they are merely separated from their respective spouses.

It has been advocated before you a great deal, as I have read in the proceedings, that there be legislation pertaining to reconciliation procedures, that people be brought together to talk it all over. However, I think my clients when considering this brief suggested that so far as they are concerned reconciliation has pretty well gone by the board; the lines of battle, so to speak, have been drawn and reconciliation from a judicial point of view would not be of much assistance to them. Their great problem is that very often they cannot find their respective spouses, that the husband left the wife ten years ago and they have not seen each other for ten years. Some of them complain that they can find their spouses but half the time they cannot find them sober. They have real fundamental problems. Reconciliation in that type of situation is just a waste of legislative and judicial time. Their real problem is that they want to be freed from these bonds which have long since died so that there is no hope of re-establishing a valid marriage.

I discussed this matter with Mr. Kincaid, the social welfare director in the municipality in which I am a counsellor. In our municipality we have 42,000 people, of whom about 6,000 to 8,000 speak French, they are French Canadian people. In January we had 88 single parent families on welfare, and Mr. Kincaid estimated that those 88 families were paid $15,000 for the month of January. Mr. Kincaid has had extensive experience in this field, and we discussed this and concluded that if there were adequate divorce laws these women—and they are mostly women who are on welfare of course—could remarry and get off welfare. They do not want to be on welfare. They could get off it and we could save our municipality up to about $60,000 a year if one-third of them could remarry.

The lack of divorce reform has brought about tremendous welfare costs in our country. The husbands of these women are long gone, they cannot find them.

The police help and assist all they can, but they have gone to other provinces, they have even gone to other countries and they cannot be found. These women cannot remarry because of the existence of their original marital bonds. That means over a mill on our municipal tax roll, which is extremely important. Multiply that throughout the country and I think you will find that this is an extensive financial problem. My clients cannot remarry because they cannot find their respective spouses, husband or wife as the case may be; or, in the alternative, if they do know where they are they cannot find them in a situation where there is evidence on which they can get a divorce; they know adultery is taking place, I do not think there is much doubt in their minds about that, but they just cannot get the evidence, and they have not got the money to employ detectives to get it anyhow. That is one of their great problems—maintenance.

The second great problem is this. I do not think there is any doubt that the crime rate in this country is sustained by the children of broken homes. I do not think there is any doubt about that. I have prosecuted for over ten years in juvenile courts, police courts, county court judges criminal courts and in assize courts, and I do not think there is any doubt that the crime rate is sustained by children coming from broken homes. If these women who are trying to rear these children could form stable second marriages, if they could get their divorces and remarry, the stability of their homes would be such that the children would not tend to go into crime, they would have the parental influence of the mother and father type in the home and there would be discipline within the home to a greatly improved extent.

I was in a juvenile court in January in New Westminster prosecuting a young chap who had breached his curfew; he was on probation for the theft of a camera. His mother had been separated from her husband for many, many years. He was fifteen years old and stood about 5' 10", a big boy, his mother was about the size of a half-pint milk bottle, and the magistrate was complaining to the mother that she should get this boy in the house before ten o'clock according to the terms of the curfew. The tears were just streaming down the woman's face; physically she could not handle the boy. That woman should have been freed from her martial bond, she should have been able to remarry so that somebody would have been in the house to get the boy in, and that is what would happen if we had adequate divorce reform.

Those are the two salient problems my clients face, but there are many others. They face the problems of constant poverty, constant loneliness, constant frustration from trying to get maintenance and locate their departed spouse. There is complete despair about the existing divorce laws and maintenance laws. Think of the predicament of the soldiers who married overseas; then came back with their wives who then deserted and went back to England and divorced their husbands under the laws of England. Those men are in a hopeless predicament; if their wives do not remarry they will never get divorces.

There is complete despair about relief under our existing laws, and this is breeding among many people an infectious cynicism that is penetrating their own lives, the lives of their children and the lives of many people with whom they are daily associating. It is very morally and spiritually destructive.

Some of these people—though certainly not among the people I represent, because they are the ones who are complaining—have sought relief through common-law marriages. You have had the figure of 400,000 common-law marriages in this country given to you; some through "cooked" divorces, some through invalid American divorces, to give their relationships an aura of respectability. But these solutions are no answer to morally responsible people.

The CO-CHAIRMAN (*Senator Roebuck*): I think we settled on about 50,000.

Mr. HOGARTH: That got cut down, did it?

The CO-CHAIRMAN (*Senator Roebuck*): Yes. Four hundred thousand is too high. But 50,000 is enough to impress anybody, I should think.

Mr. HOGARTH: I should think it would, Mr. Chairman, and I think the government should be most concerned about the fact, and the dangerous fact, that it is becoming morally acceptable in the community.

The inability of reform to have taken place in the past is, I think, felt by many to be the result of the strong influence of the Roman Catholic church and the concept held by that church that marriage is indissoluble. I think there can be no doubt that divorce was given to the federal government in the first instance because it was advocated at the time that if it was given to the federal government it would be far more difficult to have marriages dissolved. I think that is what was meant by the honourable Solicitor General Langevin when he spoke in the Confederation debate of 1865, saying that in the Quebec conference it had been decided that divorce would go to the federal government to make the dissolution of marriage extremely difficult to bring about.

In my submission it is quite clear that, in so far as that may have been an extension of a religious tenet at the time, the Catholic church is no longer interested in imposing its principles upon all the people of this country. In short, I doubt if you would find any evidence of that at all. It is, if I may put it this way, apathetic towards divorce reform. Certainly the brief put forward by Mr. Carter for the Catholic Women's League and the comments made by the Catholic bishops of Canada, as outlined in the brief we have filed, would indicate that contemporary Roman Catholic thought in this country does not sustain the suggestion that divorce reform should not take place.

My clients recognize, however, that individual provinces, particularly Quebec and Newfoundland, might well prefer to have their own divorce laws concerning the grounds upon which divorce might be granted. In addition, the people of the Province of Alberta might want fewer grounds than the people of the Province of British Columbia. In conjunction with my appearance here today, I wrote to Dr. Gilbert Kennedy, the Deputy Attorney General of the Province of British Columbia—who is one of the leading lawyers in the province, and I would suggest one of the leading lawyers in Canada today—asking him if I could possibly mention to this committee the position of the Attorney General of British Columbia with respect to divorce reform, and I further asked him to comment on the brief we have filed before you. He was good enough to write to me under cover of February 7 as follows:

> I now have an opportunity of examining your letter of January 27 and a copy of your brief to the Joint Senate and House Committee on Divorce reform, presented on behalf of the Mothers Alone Society and three other societies.
>
> The honourable the Attorney General has authorized me to say that he is in full support of proposals for enlarging the grounds for divorce. In fact the Attorney General, without going into details other than a discussion of your proposed grounds, questions whether you have gone far enough.
>
> May I, for my own part, indicate my own support for the move to enlarge the grounds for divorce. Both the Attorney General and I prefer the concept which you have to a large extent adopted, namely retain parliament's control of this matter constitutionally but allow a certain amount of local option similar to the Juvenile Delinquents Act and Part II of the Narcotics Control Act, as you illustrate by way of example on page 14. To that extent, therefore, we would not think of powers of divorce being granted to the provinces but an enlarged national basis. I concur in a need for the proposal in paragraph 56 until the legislation is operative to grant divorces in all provinces.

The proposal in paragraph 56 dealt with a suggestion that parliamentary divorce might be retained for the provinces of Quebec and Newfoundland if they did not

adopt any grounds whatsoever. I will comment on that in a few moments. I do point out that it shows that the individual provinces might well select some grounds and others might not select as many, and our suggestion is that there be broad grounds provided by the federal government for selection by the provinces.

We do not suggest, however, that there be an amendment to the British North America Act to bring this about. We make this suggestion, and do so with the greatest respect to Senate Commissioner Mr. Justice Walsh when he suggests that divorce grounds should be on a national basis, as I understand his proposal. It is certainly with the greatest deference to his suggestion that we put forward what we have to say. If we have to wait for the reform of the constitution to bring about this situation we will have to wait an awfully long time, and my suggestion is that it can be done, and done immediately, by a method other than making an amendment to the British North America Act.

We are also concerned that if it became a matter of constitutional amendment it might well become a question of bartering policial powers one for the other, trading in the different fields in which the respective governments are concerned. Therefore, it is our suggestion that whatever reform does take place—and that reform should take place—it should take place immediately, and take place within the framework of the existing constitution and existing legislative and judicial institutions.

The recommendations that my clients are putting forward are further based upon the assumption that the federal government's powers under Section 91 of the British North America Act extend to granting ancillary relief such as maintenance and custody and divorce legislation, and also ancillary relief by way of costs. Mr. Power in his work on divorce—and you have heard earlier in these proceedings from certain lawyers more learned than I with respect to this matter—suggests that this is an open question, as does Mr. Laskin in his work on constitutional law. It is interesting to me that it has not been suggested in this committee that Section 94 of the British North America Act might be utilized to effect the implementation of these ancillary powers on a national basis.

However, I would suggest that if the Canada Shipping Act can provide for compensation to widows and children of the victims of disasters at sea, surely divorce and marriage in Section 91 should provide compensation to the women and children who are the victims of disastrous marriages. It seems inconceivable to me that on a constitutional basis the words "marriage and divorce" in Section 91 would not include ancillary provisions for maintenance, custody and costs flowing from the grant of a decree.

Mr. Power in his book on divorce also cites British authority for the suggestion that these are ancillary to and so closely coupled with divorce that they must necessarily be considered in the same field.

Therefore, the first recommendation my clients put before you is simply this. The federal government should pass a divorce code very similar to the criminal code, and that code should have broad and comprehensive provisions dealing with divorce, provided the grounds therein stated—there might be five, six, seven, eight or nine grounds—could be selected or rejected by the provinces in whole or in part as the various provincial legislatures think fit. This is not out of keeping with what the Law Society of British Columbia suggested in the brief they filed. However, their brief suggests that you would run across another constitutional hurdle when you were concerned with whether or not the provincial governments could select a part of the grounds in the federal legislation.

Mr. Justice MacIntyre, who was a bencher at the time that brief was proposed, discussed this matter with me the other day, and he told me they had no real case law authority for the suggestion that that was a constitutional problem. I discussed it briefly with Dr. Kennedy and, with the greatest respect to the view of the benchers, neither of us can see where that would be particularly

offensive from a constitutional point of view. It was our opinion that the Lord's Day Alliance legislation dealing with the Vancouver Charter pretty well answered the point. Certainly the Juvenile Delinquents Act and the Lord's Day Act are samples of legislation very similar to what we proposed, along with the Narcotics Control Act.

In any event, this whole problem, if it does exist, could be resolved by parts of the divorce code being expressly made applicable to various provinces. That happens now in, for instance, the Prisons and Reformatories Act, which has provisions applicable to New Brunswick and provisions applicable to British Columbia. Those provisions could be in the divorce code, and they could be put in there at the request of the various provincial governments. You will also note that in the Juvenile Delinquents Act, in Saskatchewan a juvenile is any person under the age of sixteen, but in British Columbia it is any person under the age of eighteen. The reason for that is that the provincial government of British Columbia has asked the federal government to proclaim the age as eighteen for British Columbia, and that results in the difference. That type of legislation could be put into our divorce act.

This type of legislation has several great advantages, in my submission. The first is that it recognizes the social and religious differences that we have throughout this country, and to deny that they exist is, of course, absurd. It would make enforceable the decrees of one province in every other province, and it could so provide that maintenance and custody orders made in Manitoba could be enforceable in British Columbia in a summary fashion. This, particularly in the custody field, is an extremely important point. The big problem now is that you get a custody order in British Columbia against a wife, when the kids get out of school she takes them from the school to the airport, she is in Calgary in two hours and you might as well tear the custody order up, because there is no reciprocity in the enforcement of custody orders. The brief we filed has a paragraph which suggests that there is, but that is an error; there is no reciprocity in the enforcement of custody orders. In addition to that, the reciprocity with regard to the enforcement of maintenance orders is extremely difficult and cumbersome to invoke.

The third great advantage of legislation of this nature is that it would have a common constitutional source, and amendments and changes would be uniform throughout the whole of the Dominion of Canada.

Quite frankly, the suggestion includes the abolition of the parliamentary divorce which presently exists. It seems very anomalous to many of us who are more or less away from government that parliament ever really got engaged in granting the dissolution of marriage between two conflicting spouses. It would appear to a great many of us that parliament has so much more to do that it could well, if I may use the expression, divorce itself from this function. Certainly the suggestion made in the brief might leave Quebec and Newfoundland without divorce, but the fundamental proposition we put forward before you is that if the majority of the people of the Province of Quebec do not want divorce, then that is something the Province of Quebec has to resolve, it is something that should be left with them to resolve. We suggest as an alternative, but only as an alternative, that parliamentary divorce, or alternatively a federal court proposal, could be constructed for the purpose of giving relief to any person of any province which has not adopted any ground for divorce as we suggest, or as the legislation provides.

My clients also suggest that the right of action which accrues under the statute be exercisable by either spouse in any province in which either might be domiciled. In short, separate domicile.

The CO-CHAIRMAN (*Senator Roebuck*): Or residence?

Mr. HOGARTH: No, we have stuck with domicile. Dr. Kennedy in his letter to me suggested that we might be prepared to go to other grounds such as

residence or even citizenship, but we have proposed domicile and we have stuck with the concept of domicile as we now know it. That has already been done in part by the Divorce Jurisdiction Act anyhow, and the federal government has given a married woman who is deserted by her husband for a period of time a separate domicile, and there is no real reason why that cannot be done in all instances pertaining to marital conflict. After all, I think a modern community recognizes the equal status of women, and this is not doing much more than realizing it in a legislative way.

We suggest that if a man and wife have separate domicile and should proceedings for divorce be commenced by each in their separate domiciles, then those commenced second in time would be automatically stayed by the statute until the first has been heard out. I certainly have not had extensive experience, but I know of no case under the Divorce Jurisdiction Act in which divorce proceedings have been commenced by the husband in a domicile to which he had fled and by the wife in a domicile in which she was left. I have never heard of that happening, but I submit that it could none the less be dealt with in a divorce code.

Together with this concept of separate domicile, my clients further suggest that matrimonial causes to be heard under this divorce code be heard in courts of uniform stature throughout the dominion, and we suggest the superior courts —Queen's Bench or Supreme Courts as the case may be, dependent upon the province; courts of what we refer to as original and inherent jurisdiction. Some of these procedures would probably be based on the old chancery practice of petitions and answers etcetera, but the courts are left to their own devices how they wish to proceed. In British Columbia we switched in 1961 from the old chancery practice of petition etcetera to the common law practice of writ and statement of claim. But this could be left to the courts. We see no need whatsoever, in our submission to you, why there should be special divorce courts or separate divorce courts in any province, or federal divorce courts in the national sense.

One advantage of courts of equal stature throughout the dominion hearing cases under this divorce code would be much like the courts hearing cases under the criminal code; there would be a uniformity of judicial interpretation of terms and a uniformity of judicial proof required, the degree of proof, the onus of proof, would be the same pretty well throughout the dominion. Then if a person in the Province of Ontario was subjected to an order that had been obtained in the Province of Nova Scotia, he could rest assured that it had been heard and determined in a court of responsibility—not that all our courts do not have responsibility—a court of stature and a court of inherent jurisdiction.

As I mentioned earlier when prefacing my remarks, to my clients it is inconceivable that divorce legislation would not include provisions for maintenance, custody and costs, which is tantamount to criminal legislation providing for the creation of an offence but not providing for any punishment to be imposed because of it. It is submitted that if the authorities were carefully gone into and reviewed it would be found that divorce and marriage are clearly within the ambit of the federal government. It is interesting to note the Canadian Bar Association's suggestion that no divorce be granted until custody has been dealt with satisfactorily; it is a negative suggestion in a sense, but it is our submission that certainly it must be within federal jurisdiction, and that this could in any event be determined by a reference to the Supreme Court.

The reason why my clients are so anxious to have this ancillary relief included in such a divorce code is so that these provisions can be enforceable throughout the whole of the dominion. The present law with regard to the enforcement of maintenance and custody is, as I have mentioned, extremely difficult from province to province. Our suggestion would prevent the abduction of children. Although section 236 of the criminal code does that now, I have

never heard it suggested that it forms a right of action to get the children back. This suggestion would permit people to enforce court orders throughout the whole dominion.

There is a reference in one paragraph in our brief which suggests that this enforceability throughout the whole dominion should apply only in provinces which have accepted the grounds, or any one of the grounds, for divorce provided in the statute. That is an error. Much like the Juvenile Delinquents Act, it is contemplated that aspects of this statute would be enforceable throughout the whole dominion, in every province, whether that province had accepted any part of the legislation for granting relief to persons domiciled within it.

The CO-CHAIRMAN (*Senator Roebuck*): That is the case in the states now, is it not?

Mr. HOGARTH: Yes. The American Constitution has a full-faith-in-credit clause. I think it is the *Williams v. Williams* decision pertaining to the acknowledgment of Nevada decrees by the State of Maryland or North Carolina, one of which had no divorce. Oddly enough, our constitution apparently did not provide for such a contingency. Dr. Kennedy suggested to me that a reference made to the Supreme Court enquiring what the nature of Confederation is might reveal that that is inherent in Confederation, that the orders are enforceable in each of the provinces. However, I think he at the same time admits that that might not be too fruitful.

On maintenance and support, my clients propose that the time has come when some teeth should be put into the laws of maintenance in this nation. They say that this is within the scope of dominion legislation, and that they are very much in need of assistance in this regard. If taxes in this nation were collected under the same legislation as maintenance is collected the nation would be bankrupt. Mind you, we would all be rich, but the nation would be completely bankrupt. The provisions that we have provided are deplorable. There is a great deal of criticism that can be directed at provincial legislatures in this regard too; this is not an attack on any particular government. The deficiencies in the law are deplorable.

Referring to the Reciprocal Enforcement of Maintenance Act, it is sometimes easier to collect maintenance from a foreign country within the Commonwealth than from another province of Canada because they have no reciprocity with other provinces. As I understand the procedure, what you have to do in British Columbia is to refer a transcript and a certified copy of the order from the court in which it was made to the Attorney General, who sends it to the Attorney General of the reciprocating state, who designates a court to hear the claim, then the husband is given a show cause summons. Of course, by this time he has got wind of it and has left for the next province. It is impossible.

My clients suggest that this could be very, very much improved. They suggest, first, once a maintenance order is made by a court of competent jurisdiction in the Dominion of Canada the defendant in that order is deemed to be able to pay the amount therein stated. If it says he is to pay $50 a month, then he is deemed to be able to pay $50 a month. They further suggest that if he cannot pay that $50 a month, if he gets sick or loses his job, it is up to him to go back to the court and say, "Listen, give me some relief from this. I can't make it next month. I've lost my job." It is not up to the wife to be concerned with whether he has the ability to pay it once the order is made.

Secondly, they suggest that if he fails to pay any amount of that money it should automatically be an offence under summary conviction procedures of the criminal code, so that he can be dealt with immediately at the police court.

Next they suggest that this maintenance order should be a first charge on all the man's assets and incomes; that is to say, the wife and children should come first, next to taxes. One of the great problems in the enforcement of these maintenance orders is that you have to issue a summons to show cause—"Why

haven't you paid the amount?"—and the man comes back to the police court or to the Supreme Court and says, "Well, I tried to pay it last month, but I owed my brother $3,000 on the car I bought six years ago and I just had to pay him something." Every excuse in the world is given to avoid paying that amount, and the result is complete frustration for the wife, endless proceedings in the police court, and of course she has long since exhausted any money she had for legal expenses. It is a completely frustrating experience.

In British Columbia, if it is in the Supreme Court, first of all the wife has to prove her entitlement, prove that she was deserted or prove the matrimonial offence; then the judge makes a reference to the registrar; then there is a hearing to determine the amount; then there is a reference back to the court to have it confirmed; then there is the process to obtain it if he goes into arrears, or alternatively there is a motion to cite him for contempt; then a show cause summons is issued and he comes back before the court and argues whether or not he can pay it; usually he is given a period of redemption, and it goes on endlessly. It is no wonder these women are all on social welfare. Where else would they be? Their husbands are not going to support them when they can evade it in this way. It is our submission that more teeth should be put into it, and they should be primarily responsible once that order is made.

The CO-CHAIRMAN (*Senator Roebuck*): Is not that purely provincial?

Mr. HOGARTH: It may be, sir.

The CO-CHAIRMAN (*Senator Roebuck*): As it is now.

Mr. HOGARTH: Yes, but it is our suggestion that in a divorce code under the auspices of the federal government this could be straightened out and could be provided for. It would be interesting to hear how, under the criminal code, a man would make out if he were ordered to pay a fine of $250 for impaired driving, got two weeks or a month to pay and came back from time to time to the magistrate and offered the excuses some of these husbands offer, which really are endless. There is very little assistance to the wife in this regard. The police court remedies, although they offer a little more effectiveness, are not always the answer either.

My clients suggest that all that should have to be done, particularly if the man goes from one province to another, is that a court certified copy of the order from, say, Manitoba should be filed in the local registry of the Supreme Court of Ontario, or whatever the court may be, which automatically becomes the judgment of that court and the amount is automatically payable; once a certified copy is filed with the man's employer, that money is payable to the wife as the recipient. If the man needs relief he can go back to the court and ask to be relieved because of strained circumstances. This could apply within the province merely by filing a certified copy with the employer, and there should be an automatic garnishee created as soon as that is done.

I have left the suggestions about the grounds put forward in our brief to the latter stage of my remarks today, because I think you have probably heard so much about the grounds for divorce in this committee that there is not much new I could add. However, we thought that some aspects we have considered might be of interest to you.

Some attention has been paid before you to abandoning the concept of a matrimonial offence. This was discussed by the committee which instructed me with regard to our brief and it was suggested that the matrimonial offence concept should not be abandoned in its entirety. We do not agree with the suggestion made at one of the earlier hearings that in every case of marital breakdown there is a little bit of blame on both sides. If you look into some of these situations where you have psychopathic personalities involved, or where you have chronic alcoholism, you will see that there are spouses, both men and

women, who have done their best to try to keep the marriage together, and to suggest there is a little bit of blame on each side is unquestionably going too far.

With the marriage breakdown theory, when everything has been looked into by a psychiatrist, social welfare people and so on, in the end somebody has got to pay; somebody is going to lose the custody of the children they love very dearly and have only reasonable access to them; somebody is going to have to pay maintenance for the children, and probably for the wife because she has to look after the children. When you end up with the fact that somebody is going to be penalized you are going to want to equate that with fault and blame, so you get into a situation where you go right round again, and pretty soon the judiciary will build up a series of decisions on what constitutes blame; they will become matrimonial offences, and I think you will go right back almost to the basic matrimonial offences recognized by the law today.

Last Monday, in New Westminster there were at least ten divorces, and in Vancouver on Friday there would be about twenty to thirty heard. Let us say thirty-five to forty divorces per week in that part of British Columbia are heard in a summary fashion by a single judge of the Supreme Court, and they take fifteen to twenty minutes to present when undefended. These are divorces based on the present ground of adultery.

The United Church of Canada in their very splendid brief—and I do not want to criticize them unduly—suggested that we should have social and welfare workers, psychiatrists and other people examining reconciliation procedures, with delays in effecting divorces. I ask you to reflect for a moment on what will happen in the City of Vancouver, with twenty divorces a week now, if a number of social welfare people and psychiatrists are to be employed to examine these people to see if they cannot get them back together again, to see if their differences cannot be reconciled, whether the marriage is on the rocks or not. I am sure you will hear from jurisdictions where this procedure is being used and I would be most interested to learn how it is working out, because from a practical point of view it appears to me that the cost of divorce will become fantastic. After all, one of the litigants has to pay these costs; I am sure the state will not pay for psychiatric assistance to these people, and I do not think the state should be expected to pay for it. Somebody will have to pay, and the colossal cost of these things has to be borne in mind.

The Co-CHAIRMAN (*Senator Roebuck*): Where could you get the officials to do such work?

Mr. HOGARTH: Having trained officials is most important. Certainly we are using social welfare people extensively in British Columbia in custody cases, and they are of tremendous assistance, but when it comes to determining the respective problems of the adults I think a long training period would be necessary. It therefore seems to us that sooner or later you will go back to the matrimonial offence problems and theories.

My clients do suggest, though, that where a marriage is dead, where the parties have lived separate and apart for some time, even though there has been no matrimonial offence there should be a discretionary divorce granted by the court by consent. They say that where the matrimonial offence is proven there should be a divorce as of right in favour of the party who has not committed it. They further say that where no matrimonial offence is proven but the parties have lived separate and apart for two years and they acknowledge that their marriage is dead and both consent, then if custody, maintenance and all these matters have been satisfied, the court should have a discretion to grant that divorce. As you have heard earlier, courts are granting discretionary divorces now where each of the litigants has committed a matrimonial offence, so the concept of discretionary divorce is not new. But my clients suggest that all these ancillary things would have to be attended to to the satisfaction of the judge before this is done. In a way this is much in keeping with what Mr. Brewin has suggested in bill C-264, it is somewhat along that line.

The other grounds for divorce as of right that we have put forward are intended to reflect, we hope, a moderate and realistic point of view. They are not too great a departure from what you have heard from many who have submitted briefs to you—adultery, desertion, cruelty. Frankly we do not anticipate that there would be any great departure from the present judicial decisions and definitions pertaining to cruelty. We do not think that Canadian judges will very rapidly dissolve marriages on trivial matters on the ground of cruelty.

We put forward the suggestion that there should be a matrimonial offence of gross indecency. We think that gross indecency which does not amount to a matrimonial offence of adultery or cruelty should be a ground for divorce. Certainly in police court prosecutions and assize courts one sees many instances of this. I know it is not prevalent throughout the community, of course not; but in the police courts it comes up from time to time and it is tragic that no divorce is available.

In July I prosecuted a man on a charge of the grossest indecency with his seven-year old daughter. He was found to be unfit to stand trial and sent to Riverview Hospital. He came back in October, was found fit to stand trial but found not guilty by reason of insanity and committed to a mental institution, where he will remain, I am told by Dr. Thomas the provincial psychiatrist, for some time because of his paranoid delusions. It is tragic that this man's wife cannot get a divorce. The offence was committed on a seven-year old child of the marriage; it of course did not amount to adultery. It is just tragic. There she is, for the rest of her natural life—or for the rest of his, which will probably be longer—without remedy. Gross indecency within a family and insanity of that nature which will be permanent, or has been shown to be permanent, should certainly be a ground for divorce. It is hideous that it has not long since been attended to.

My clients think that mental illness is a ground which will cause you a great deal of concern because of the fact that such tremendous progress is being made in the treatment of mental illness. The phrases used certainly in the bills before you and the English statute, such as "chronically unsound mind" and so on, are extremely difficult things to conceive from a practical point of view when considering what proof is to be offered. My clients suggest that the important consideration in determining the extent of the mental illness should be: is the person so mentally ill that the marital commitments cannot be met, and has it been shown that the mental illness has existed for a considerable length of time?

The CO-CHAIRMAN (*Senator Roebuck*): Would not that apply to any illness?

Mr. HOGARTH: No, I do not think it would apply to any illness, with great deference. Although I saw that mentioned in the earlier proceedings, I think that a person who is physically ill can certainly live up to a great many of his commitments in the marriage, but when a person is mentally ill to the extent that he cannot, then I think the marriage is dead. Very few people get so physically ill that they cannot live up to many of their marital commitments. Again, they do not affect the marriage so deeply as happens with those who have the misfortune to be mentally ill.

The CO-CHAIRMAN (*Senator Roebuck*): But if they do affect the marriage deeply, as the other illness does, why should not they be included?

Mr. HOGARTH: I will put it this way, Mr. Chairman. They might well be included but we did not consider it in that light and I would like to think about that. Certainly we suggest that there would have to be committal to a mental institution. We cannot see mental illness without committal forming grounds for divorce. People will never seek or go for treatment if they know the chances of divorce are antedated to the first day they went to a doctor, because rarely does anybody admit he needs help of that nature.

We have also suggested that there be grounds for divorce on the basis of serving a sentence of penal servitude. We suggest that anyone whose spouse is serving a sentence of penal servitude, two years of which has been served, should be entitled to a divorce. A sentence of that nature would indicate, first that the sentence is being served in a penitentiary, and secondly that it was a serious offence or, alternatively, repetitive offences. We would submit that the two-year period would indicate that the National Parole Board had probably had an opportunity to review the sentence, and if the man was still serving the sentence it would further indicate that his rehabilitation was somewhat questionable.

It can be argued that sustaining the marital bond when a man is in prison is an inducement to the offender to correct his ways, and that by cancelling it you just make him a more sour and hostile individual. However, it is our submission that to impose on a woman the concept that she has to remain married to her husband who is an inmate in a penitentiary upon the basis that she will help rehabilitate him when he gets out is just asking a bit too much. It is our submission that she should have the right to be free. If she wants to stay with him she certainly can, and vice versa if it is the wife who is in prison.

Some thought might be given by the committee, if you consider this ground at all, to whether or not it should be for particular offences. We point out in our brief that it would be extremely odd if a man who had committeed a gigantic fraud and given half the money to his wife should end up by being divorced while he was in prison serving time for the fraud. Then, of course, there would be an anomalous situation, because he could not testify against her and vice versa. We suggest that consideration might be given to that.

The Co-CHAIRMAN (*Senator Roebuck*): She might need to be free to be able to spend the money.

Mr. HOGARTH: That may be so, sir.

Mr. OTTO: He could sue for maintenance when he gets out.

Mr. HOGARTH: I mentioned the concept of discretionary divorce by consent and I do not think I need go back to that, but it will be noted that it is in addition to the grounds I have briefly covered. Other matters contained in our brief are well before you in other briefs and I do not think I need go into them.

There are provisions pertaining to nullity. We suggest that this be extended to wilful refusal to consummate.

In dealing with judicial separation, our brief suggests that this should be kept for the purpose of providing something for those provinces in which divorce has not been implemented by the act of the provincial legislature as contemplated by the brief. As far as I can see—and certainly my clients would agree—the remedy of judicial separation is completely useless. It is used in British Columbia when you have not got grounds for divorce so that you can get an injunction to restrain the husband from doing something or other, or the wife from taking the chlidren etcetera. However, there are so many other provincial statutes—the Equal Guardianship of Infants Act, the Married Women's Property Act, the Wives and Children Maintenance Act—there are so many summary procedures available that to go through the Supreme Court procedure for judicial separation is expensive and completely and utterly useless.

Senator FERGUSSON: On what grounds would a judicial separation be granted in British Columbia?

Mr. HOGARTH: I think it is extended to adultery, desertion and cruelty. I understand that Ontario has no judicial separation.

Mr. OTTO: Cruelty of a limited definition?

Mr. HOGARTH: A judicial definition, which means cruelty extending to actual physical detriment. Not the hiding of the toothbrush and that sort of nonsense. It

has to be along the lines on which I take it the Nova Scotia courts would interpret it.

The Co-CHAIRMAN (*Senator Roebuck*): The burning of the toast was one that I think was mentioned.

Mr. HOGARTH: Judicial separation is a remedy which is rarely used, and most lawyers will not pursue it, it is too expensive.

The Co-CHAIRMAN (*Senator Roebuck*): Section 717 is pretty useful.

Mr. HOGARTH: Section 717 of the criminal code is a very good remedy by way of injunction, but it has its problems of enforcement too. Mark you, it is rather effective. Under section 717 of the criminal code the wife can lay the complaint, a warrant issued and the man immediately imprisoned and brought up next day before the magistrate, by which time he has cooled off a little or perhaps come to his senses.

This committee is about the first real glimmer of hope to thousands of Canadians who find themselves in a predicament of marital discord and have all but lost hope. I cannot help but remember the remark made by one member of the associations I represent when this brief was being considered. She said, "It really isn't any use. It's no use compiling a brief and filing it because nobody will listen to it anyhow." I and many other members of the committee assured her that that just was not so, that there was no real reason for assuming that point of view, because this is an indication, certainly in the hearts of many of them, that something will be done.

It is difficult for me to say just how delicate your task might become from the political point of view. We recognize that there are many things to take into consideration. I note that your terms of reference are to consider divorce from its social and legal points of view. That is extremely interesting, because to my mind the political and religious implications are so very, very important. It is inconceivable to us who from time to time are involved in these problems that reform would not take place in the divorce laws of this country. You know, they are almost a national scandal. In addition to that, if reform did not take place it would be an unbelievable example of political decadence in this nation, which we do not believe exists.

I submit that it is largely a question of the nature, direction and extent to which change can be accomplished from a practical point of view, bearing in mind the constitutional limitations, the available institutions, judicial and otherwise, the economic factors and, what we think are most important, the religious and social backgrounds of the various people and parts of the nation. We submit that this can be done effectively and can be done immediately. We submit that legislation which is contrary to contemporary morality cannot exist too long and it becomes ignored. Section 150 of the criminal code is a prize example: banning the sale of contraceptives is absurd, but it still exists; it cannot continue, nor can our divorce laws continue as they now are.

We do not suggest for a moment that the morality in one part of the nation be imposed upon others, and we know that others do not suggest that about our province or the people in it. We look forward in the near future to a change which will bring happiness and a happy future for many, many people, many married people and their children.

I would like to make it clear, sir, that we are not here with any political or religious axe to grind, or any demands to make, and I hope the suggestions we put forward are of some assistance to you.

Senator HAIG: Have the organizations you represent given any thought to the question of a time element before divorce proceedings are started after marriage, and a time period after the decree absolute has been granted before remarriage?

Mr. HOGARTH: Along the lines of the old decree nisi?

Senator HAIG: No. You have to be married for, say, two or three years before you can apply for a decree, and after the decree absolute is granted should there be a period of waiting before the remarriage of either spouse?

Mr. HOGARTH: In British Columbia we have a period of forty-five days, but that is not what you are driving at; that is the appeal period. You mean a period of, say, two years before a spouse can remarry?

Senator HAIG: Yes, after the decree absolute is granted. Should there be a period of waiting before either divorced spouse can remarry?

Mr. HOGARTH: We did not consider that in our discussions or in what was put forward, and I do not think my clients would advocate it at all, certainly not the last suggestion. After all, if a man proves after three or four months of marriage to be completely irresponsible, pulls out and leaves his wife, going back to England or wherever he might have come from in the first place, we see no reason why she should have to wait; it is quite obvious he is not coming back. Similarly, if he moves in with another woman, we see no reason why she should have to wait. If a matrimonial offence is committed—

Senator HAIG: That is the end.

Mr. HOGARTH: We think that is the end, yes. I think my clients are of that view. As for remarriage, that is something they have not considered, but it may be a good idea.

The CO-CHAIRMAN (*Senator Roebuck*): It will contribute to the opportunity to get a few more illegitimate children.

Senator BELISLE: Are you saying that after three or four months trial on the first marriage, if he leaves her or she leaves him that should be the end?

Mr. HOGARTH: The suggestion is that if two people marry and after, say, five months of marriage the husband goes and lives with another woman, we do not think the woman he married should have to wait before she can exercize her rights for divorce.

Senator BELISLE: You are certainly asking for wholesale legislation.

Mr. HOGARTH: Well, I do not think that is any different from what the law is now.

Mr. MCQUAID: Rather than write this into the law, don't you think it is worth a chance to have the period longer than three months, in the hope that even in one case out of fifty you save a marriage? Is it not worth extending it for longer than three months? Three months seems an unreasonably short time. If you make this law it will mean as soon as a couple have separated for three months they will rush in and get a divorce. If there is a chance of saving even one marriage by extending that time, don't you think that chance should be taken?

Mr. HOGARTH: I looked at it from the point of view of what the attitude of a husband would be if five months after the marriage the wife goes off to live with another man. I do not think he would be interested in rehabilitating the marriage, certainly if she announced that she was not coming back to live with him. You have got a big hurdle to overcome in getting those two people back together, particularly if she says, "The child I am about to bear is the other man's." That marriage, even though of short duration, is obviously not going to work out.

Mr. MCQUAID: You are assuming she is going to bear a child.

Mr. HOGARTH: I am bringing in factors you did not propose, that is true.

Mr. BREWIN: You are assuming that within the three or four months offences have been committed which come within the limits you propose, which would constitute grounds for dissolution; you are not suggesting mere separation per se for three of four months?

Mr. HOGARTH: By no means. Indeed, with regard to the marriage breakdown theory and discretionary divorce by consent, our suggestion is that they have to be married at least two years before they can have any relief of that nature.

The CO-CHAIRMAN (*Senator Roebuck*): But where there are certain offences the woman or man should have an instant divorce?

Mr. HOGARTH: Yes.

The CO-CHAIRMAN (*Senator Roebuck*): We had an interesting case of a man who married a woman, kissed her goodbye on the church steps and took the boat to England. We got round it by giving a nullity on the ground that the fellow was crazy. We gave her an instant divorce, and she was certainly entitled to it.

Senator FERGUSSON: I would like to ask about you clients. I was rather struck by the fact that the four organizations have all been set up in the last two years. Would you tell us how this came about? Also, the Vancouver Chapter of Parents Without Partners is Chapter 153. Where are the other chapters? Are they in Canada or elsewhere?

Mr. HOGARTH: They even have a chapter in California, and I think there are chapters throughout the whole of North America. My connection with all these societies has been through the committee of eleven or twelve people which was formed to work on this brief, and I do not have an intimate knowledge of the workings of each one of them in the sense that I have acted for them personally or individually.

Senator FERGUSSON: I was struck by the fact that the four of them had been organized within such a short time.

Mr. HOGARTH: Certainly one of them was organized generally to try to do something in the first instance about maintenance within the provinces; they more or less evolved in the last three years, but why it has happened so suddenly I do not know.

Senator FERGUSSON: We had before us Judge O Hearn from Halifax, who, as perhaps you know, recommended that divorce cases be assigned to family courts. You would not agree with that at all?

Mr. HOGARTH: No. I think that divorce should be kept in the superior courts, with great respect to his views, which I saw in the press.

The CO-CHAIRMAN (*Senator Roebuck*): Have you got the counterpart of our county courts in British Columbia?

Mr. HOGARTH: Yes.

The CO-CHAIRMAN (*Senator Roebuck*): What do you say about giving the county courts and the Supreme Court concurrent jurisdiction?

Mr. HOGARTH: Ours have, because divorces are heard by local judges of the Supreme Court, who are county court judges.

The CO-CHAIRMAN (*Senator Roebuck*): Does that work very well?

Mr. HOGARTH: Yes. In the County of Westminster divorces might come before Judge F.K. Grimmett or Judge G.W.B. Fraser, or if they are busy a Supreme Court judge will come over from Vancouver to hear them, so it works very well.

Mr. OTTO: Mr. Chairman, the witness is obviously a good lawyer because he argues the case from every point as long as it serves his clients. Mr. Hogarth, are you a practising solicitor?

Mr. HOGARTH: Yes.

Mr. OTTO: Have you had a lot of divorce cases, both contested and uncontested?

Mr. HOGARTH: No. I have had a lot of uncontested cases. The worst contested cases I have had have been custody cases, but they are not very often divorces.

Mr. OTTO: Let me put it to you this way. If you have a contested divorce on the ground of adultery—that is the present law—where the accused guilty party says "I did not commit adultery", do you think there is much chance of a divorce being granted on circumstantial evidence?

Mr. HOGARTH: The first case I had at the bar was in Prince Rupert and it was a contested divorce. I acted for the husband respondent. The judge was Mr. Justice Manson. The evidence with regard to adultery was extremely slim and the whole contention was on the custody of the child. The result was that Mr. Justice Manson ruled, after hearing a day's evidence, that so far as he was concerned adultery had been proven and the marriage was on the rocks. After the case he wanted to hear counsel in his chambers on custody. Mr. Justice Manson, now deceased, was one of the greatest judges in British Columbia, and at one time in the north country he had awarded custody of the child in the proceedings to the solicitor of the petitioner. The lawyer on the other side, now his Honour Judge Harvey, told me the judge had done this just as we went into his chambers and said, "Hogarth, one of us is going to have a baby." This so disturbed me that I lost custody of the child for my client. I think I agree that contested divorce cases take on an entirely different complexion from uncontested cases.

Mr. OTTO: I am trying to recall the case heard in England, I believe of Lord Middleton, in which milady was caught in bed with her stablehand at midnight. Her explanation in answer to the charge of adultery was that since they were both interested in horses they were merely discussing horses. The judge thought there was nothing unusual about two people interested in horses discussing them and that there was no evidence of any kind of adultery. I am putting it to you in this way. Under the present law, if one of the parties contests adultery it is very, very, difficult and expensive to obtain a divorce stricly on circumstantial evidence. Would that be correct?

Mr. HOGARTH: No, I do not think so.

Mr. OTTO: I have probably had a few more contested cases than you, but perhaps I am not as good a lawyer.

Mr. HOGARTH: The lady you spoke of would not do too well in British Columbia.

Mr. OTTO: This is still the rule that is applied today. However, most of the cases are uncontested, but would you say that in reality they are consented divorces?

Mr. HOGARTH: No.

Mr. OTTO: I say consented, not collusive.

Mr. HOGARTH: I appreciate the difference.

Mr. OTTO: Both parties agree the marriage is on the rocks and one of the parties says ,"I will supply the evidence".

Mr. HOGARTH: I do not go along with that suggestion. I think they are consented to in the sense that all default judgements are consented to. I think that the husband or wife, the erring spouse, becomes reckless and indifferent as to whether they are seen in the association.

Mr. OTTO: Then indirectly it is still consent.

Mr. HOGARTH: That is not consent, no. It is indifference.

Mr. OTTO: Put it this way. They both agree to have a divorce, and if it is not contested the guilty party does not contest the adultery.

Mr. HOGARTH: Well, it is a question of syntax.

Mr. OTTO: I put it to you that in an uncontested divorce the evidence that is needed in court is an accusation of adultery, an admission of adultery by the

party concerned, with corroborative evidence of somebody who says, "Yes, I committed the act of adultery."

Mr. HOGARTH: As a matter of fact, the only time you have to have such corroboration is when you are relying on admission. You can rarely get a divorce on admissions of adultery alone by the opposite party; they must be corroborated. In so far as establishing adultery in the first instance is concerned, you have to have the admission of the other party, you just have to have evidence from which the court will infer that adultery took place.

Mr. OTTO: I am saying to you that in an uncontested case the court is usually satisfied with the act of adultery if there is enough simple evidence—the accusation of adultery, the admission of adultery and the corrobarating evidence?

Mr. HOGARTH: Yes.

Mr. OTTO: If ground was, say, cruelty, do you think the court would accept an accusation of cruelty, an admission of cruelty, or would you say the court would try to be satisfied exactly what was cruelty in any given circumstances?

Mr. HOGARTH: I think the court would look into it and make sure that cruelty was established on the evidence.

Mr. OTTO: So in adultery it is a very simple thing, an admission, whereas the other grounds would require evidence by a psychologist or psychiatrist, because cruelty to one person may not necessarily be cruelty to another?

Mr. HOGARTH: That is so.

Mr. OTTO: Similarly with all the other grounds. I put it to you that if all these reforms were introduced, by and large most of the divorce actions would proceed on adultery?

Mr. HOGARTH: No, sir. Most of them would proceed on desertion; 98 per cent of them would proceed on desertion.

Mr. OTTO: I disagree, because we had evidence from an English barrister of some renown who said that although the new British act had been in force since 1947, 90 per cent—I believe he said—of divorces to this day are still based on adultery, and he admitted that it was because it is the simplest thing to prove. If you are a solicitor and a client says, "We want a divorce on the ground of cruelty" you would have to tell the client the evidence needed and the cost, whereas if one of the parties said the other spouse had committed adultery all you would have to say would be, "Where? Can we have a corroborative witness?" Taking those things into consideration, if you are a solicitor trying to do the best you can for a client, would you not then advise using adultery rather than cruelty?

Mr. HOGARTH: My view is simply this. First of all, I do not know what is going on in England from an adulterous point of view. However, from where I stand in New Westminster I would say that if the divorce reforms we anticipate went forward most actions would be based on desertion.

Mr. OTTO: Desertion?

Mr. HOGARTH: Desertion, because it is the most prevalent matrimonial offence.

Mr. OTTO: Desertion then would be a factual thing, just two parties separating, and there would be the question "Why desertion?" Who was responsible for desertion?

Mr. HOGARTH: This would have to be gone into.

Mr. OTTO: Again you are bringing evidence before the court to show this is the ground for the marriage breaking up. I want to continue a little further with a different aspect which you introduced, and that is the question of maintenance and alimony. Were you speaking almost entirely about maintenance for children or were you speaking of the wfie?

Mr. HOGARTH: Both.

Mr. OTTO: So what you are saying is—and most of the evidence presented here has been—that the grounds for divorce should really be the breakdown of the marriage without pointing out particularly which of the parties was responsible, and you agree with this in a great part of your brief.

Mr. HOGARTH: Oh no; that is one of the things we did not agree with. We agree with divorce by consent, which is similar.

Mr. OTTO: You want women's rights protected as individuals rather than as chattels or possessions?

Mr. HOGARTH: That is right.

Mr. OTTO: Nevertheless, on the other hand you say that marital offences should be maintained?

Mr. HOGARTH: Yes.

Mr. OTTO: But marital offences are based on the possessory idea of law, that a man possesses the body of his wife, and therefore any infringement of that gives him a cause for divorce, and vice versa. How can you justify those two points of view?

Mr. HOGARTH: First of all, I do not think marital offences are based on proprietary rights at all. I think marriage is based on contract, and that is not necessarily proprietary rights.

Mr. OTTO: Contract based on what?

Mr. HOGARTH: Mutual obligation to perform certain things in respect of their marriage.

Mr. OTTO: Mutual obligation?

Mr. HOGARTH: That is not proprietary.

Mr. OTTO: You argue that women should have the same status as men and at the same time you also argue that nevertheless they should be paid for the period of coverture, the period of being married?

Mr. HOGARTH: No. I say they should be paid if they are left responsible. First of all, if they have an estate of their own they should not receive maintenance; but I say they should be paid if the husband has committed a matrimonial offence, for the principal reason that they have to keep the children going, and somebody has got to keep them going.

Mr. OTTO: This is based on maintenance for the children, and of course part for the wife. That is fine. Let us suppose the couple have no children.

Mr. HOGARTH: Then if the wife divorces her husband and the court finds that as far as it is concerned the wife has adequate estate or adequate means to work herself, I would be very reluctant to impose maintenance payments on the husband.

Mr. OTTO: Let us suppose the wife started the marriage without any estate and wound up without any estate. Would you still say maintenance and alimony was owing to her?

Mr. HOGARTH: I am not too sure what position I would take there. I would mention the *McMann v. McMann* decision, a case in which the wife released her husband in 1935 when he was broke and successfully sued him for maintenance in 1950 when he became a very wealthy man. I do not think contemporary morality goes along with such decisions.

Mr. OTTO: I was rather amazed at your very vehement expression of opinion towards the collection of money. I realize the problem; as a practising solicitor I think there is a problem, but you are surely not putting forward a reactionary point of view in favour of debtors' prisons and this type of thing, are you?

Mr. HOGARTH: Pretty close, sir. I do not think the taxpayers of this country should pay maintenance to deserted women and children. Speaking as one taxpayer—and I am sure the proponents of this brief back me 100 per cent, because they are fed up with the suggestion that it should be done—why should the remaining taxpayers of the nation support a woman with three children who has been deserted by her husband?

Mr. OTTO: I only point this out because all our evidence has been directed towards a break-up of the marriage which is not the responsibility of either party, and the whole brunt of the evidence has been that the state has this duty. Consequently, I was rather amazed to hear a completely opposite point of view, which I understand is your clients' point of view and not yours.

Mr. HOGARTH: It is mine too; you bet.

Mr. BALDWIN: I have two very brief questions, both on rather novel points which have been made. When you suggest making the judgment of the court of one province applicable to other provinces, your idea would be simply that a copy of the decree certified by the judge or clerk of the court making the decree would be filed with the court of another province, whereupon it would have all the effect of a judgment?

Mr. HOGARTH: Of that province, yes.

Mr. BALDWIN: My second question has already been referred to by Mr. Otto. I assume that a condition precedent of the granting of judgment concerning maintenance and alimony would be a most careful study by the court of the circumstances of both parties?

Mr. HOGARTH: I would hope so, yes.

Mr. BALDWIN: You know as well as anyone that too many hurried judgments are given on alimony and maintenance, and before a man is put into the position where he has to go to prison because he cannot pay there must be a most careful study of the position of both parties.

Mr. HOGARTH: That is inherent in my remarks.

The CO-CHAIRMAN (*Senator Roebuck*): The division bell is ringing so I suggest that we adjourn right now, but not before I thank Mr. Hogarth in order to get that on the record.

The CO-CHAIRMAN (*Mr. Cameron*): Thank you, Mr. Hogarth, and I am sorry we have not the time in which to do so adequately.

The committee adjourned.

APPENDIX "41"

TO THE SPECIAL JOINT COMMITTEE
OF THE SENATE AND
HOUSE OF COMMONS
on
DIVORCE
COMBINED BRIEF
of
MOTHERS ALONE SOCIETY
ALL LONE PARENTS SOCIETY (ALPS)
CANADIAN SINGLE PARENTS
PARENTS WITHOUT PARTNERS

Vancouver, B. C.
November, 1966

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SUMMARY OF MAIN CONCLUSIONS AND RECOMMENDATIONS

This brief recommends and urges:

1. That the Parliament of Canada enact a "Divorce Act" providing for the comprehensive treatment of all matters pertaining to the dissolution of marriage and containing moderate and realistic grounds for divorce that can be adopted in whole or in part by appropriate legislation in the various legislatures of the Provinces of Canada.

2. That the said grounds provide that a divorce be available as of right to either husband or wife acting as a party Plaintiff who establishes that since the solemnization of the marriage the other:

(a) Has committed adultery;
(b) Has deserted the Plaintiff, either actively or constructively for a period of two years or where the evidence is conclusive for such lesser time as the Court may in its discretion deem appropriate;
(c) Has committed acts of cruelty upon the Plaintiff which have seriously impaired the Plaintiff's mental or physical health;
(d) Has committed any act of gross indencency to which the Plaintiff has not been an active or consenting party and without limiting the generality of the definition of "gross indency" the same shall be deemed to include acts of sexual perversion, homosexuality, lesbianism, bestiality, rape and sodomy;
(e) Suffers and continues to suffer from an illness of the mind which prevents the subject from honoring his or her marital commitments to the Plaintiff and their children and which said illness has caused the subject to be committed to a Mental Institution for a period of at least two years or which has caused the subject to be repetitively committed to a Mental Institution over a similar period of time;
(f) At the time of the commencement of the proceedings is serving a term of imprisonment in a Penitentiary and that two years of such sentence has been served.

3. It is submitted that the Courts should have a discretion to grant a divorce to any man and wife who, because of marital discord have been separated for two years or more and who consent thereto; provided, however, the Court is satisfied upon good grounds that:

(a) The respective spouses have made every effort to rehabilitate their marital relationship and for valid reasons have been unable to do so; and
(b) The public interest is best served by a dissolution of the marriage; and
(c) The custody, welfare and maintenance of the infant children have been adequately provided for according to a report to be filed by the Superintendent of Child Welfare (or such other comparative agency that may exist in the particular province in which the proceedings are being heard).

4. A provision that:

(a) Husbands and wives after separation may acquire a separate domicile in like manner and to like effect as if they were single persons; and
(b) The Superior Courts of civil jurisdiction of each Province adopting the legislation shall have jurisdiction in all claims for relief under the Act, provided either party is domiciled in that Province.

5. A provision for relief by way of Judicial Separation upon the same grounds that are provided for a dissolution of marriage as of right.

6. A provision for relief by way of decree of nullity of marriage upon the grounds presently existing and with the additional ground of wilful refusal to consummate.

7. A provision that the Court may from time to time, before making its final Order, make such interim Orders and make such provisions in the final Order as it may deem just and proper with respect to the custody, maintenance and education of the children, inclusive of placing them under the protection of the Superintendent of Child Welfare and in addition thereto, permanent maintenance for the wife.

8. A provision that Orders involving custody, maintenance and costs pronounced in any one Province pursuant to proceedings under the Act shall be enforceable in any other Province by the filing of a Court certified copy of the Order in the Superior Court of the latter Province and thereupon such a Judgment or Order should be deemed to be a Judgment of the latter Court.

9. A provision that:

(a) All Orders pertaining to custody, maintenance and costs include and contain liberty to apply to the Court in which the Order was made or in which the Order is sought to be enforced for a further Order reducing or relieving the Defendant from paying the amount stated therein, provided that until such application is made the said Order be enforceable without the necessity of any shew cause summons or contempt proceedings;

(b) That a breach of any Judgment or Order made pursuant to the Act pertaining to maintenance or custody would constitute an offence under the Act punishable upon Summary Conviction pursuant to the provisions of the "Criminal Code";

(c) That all Orders pertaining to the maintenance of a wife and/or children form a first charge on the income and property of the Defendant husband in priority to any other assignment, deduction or set-offs.

INTRODUCTION

10. This brief is submitted on behalf of the following Associations, which are respectively called:

Mothers Alone Society
Canadian Single Parents
Parents Without Partners
All Lone Parents Society (ALPS)

and a brief history of each Association is set forth on Schedule "A" annexed hereto.

11. Each Society was formed independently of the other but their work and objectives are, to a large extent, very similar. Some of the Groups have enlarged their objectives to consider the problems created by the death of a husband or wife and, although these members support this brief in principle the problems of these persons are, of course, not under consideration at this time.

12. As to the majority of members, they have but one matter in their lives in common:

All have suffered the bitterness, loneliness and despair of chronic and acute marital discord; and All have suffered from the unjust and socially anachronistic legislation that prohibits any relief from their tragic predicament.

13. Much might be said by experts in the field of law and social and political sciences that would assist your Committee from the point of view of the general

effect of the existing provisions of the Law pertaining to divorce but no one can be more expert as to the effect that the existing legislation has had on individuals and their children than the subscribers to this brief.

14. Each one has a personal knowledge of the futility of being joined by a marital covenant that has long since ceased to exist, morally, socially, financially, spiritually, physically or emotionally.

15. Each one has a personal knowledge of the endless frustration of trying to achieve relief by way of divorce, custody applications, maintenance proceedings or simple declarations pertaining to proprietary rights or property acquired during marriage when the opposing spouse shows no adulterous inclinations and otherwise has set out to evade and avoid all responsibility towards his or her wife or husband.

16. This brief is expressly designed to avoid a long repetition of personal histories simply upon the basis that the legislators of this Nation must be well aware of the effect of the hopelessly inadequate provision of the existing law.

17. It is accepted at the outset by all the proponents of this brief that stable marriages within the community are the greatest source of the Nation's strength and a bond in which the whole community has an interest; however, the subscribers to this brief proclaim that unjust and unfair laws which prohibit the dissolution of marriages which have no hope of making any contribution to the welfare of the community create bitterness, cynicism and a contempt for the State and Courts which reflects and permeates not only the individual personalities affected, and those that they are in daily contact with, but all fair minded men and women in the community.

18. The subscribers to this brief decry the fact that those who have obtained relief through perjured testimony and commonlaw relationships are, to a large extent, deemed by the public to be justified in their actions because the obstructions that are in their way are the apparent result of religious intolerance and political pressures flowing therefrom.

19. It is frankly submitted that it is commonly felt throughout the Country that the resistance to change is solely due to the political influence of the Roman Catholic Church which holds marriage to be indissoluble. It is said that this influence has been largely expressed through the elected members from the Province of Quebec who are considered in this regard to be the Political Arm of the Church. It is cynically suggested that the political parties of the Nation are prepared to accede to this point of view in order to be assured of support from that Province which has such a large Parliamentary representation.

20. The extent to which this belief is true is a matter of conjecture but the fact remains that it is believed to be true by many Canadians and has probably for years been a substantial contributing factor to disunity between Catholic French speaking and Protestant English speaking Canadians. With the greatest respect to this view, and insofar as it condemns the Catholic Church, its advocates would appear to be out of touch with the contemporary Catholic approach to legislation dealing with the family in the community. To suggest that modern Catholic leaders are anxious to impose upon persons of other religious persuasion their religious principles is erroneous.

21. The modern Catholic approach was well expressed in a recent edition of the "The B. C. Catholic" which reported extracts from a brief presented by the Catholic Bishops of Canada to the House of Commons Health and Welfare Committee studying proposed amendments to Section 150 of the "Criminal Code" which presently bans the sale of contraceptives.

22. On October 13, 1966 it was reported that that brief contained the following remarks:

> "The Christian legislator must make his own decision. The norm of his action as a legislator is not primarily the good of any religious group but the good of all society.
>
> Religious and moral values are certainly a great importance for good Government. But these values enter into political decisions only insofar as they affect the common good.
>
> Members of Parliament are charged with a temporal task. They may, and in fact, often will vote in line with what the Church forbids or approves because what the Church forbids or approves may be closely connected with the common good. Their standard always lies in this question:
>
> Is it for or against the common good?
>
> A willingness to honor this truth stressed by the Council and to trust the Christian legislator to fulfill his function in the light of his Christian conscience and his technical competence is the surest pledge of our desire to join with all men of good will in the building of a truly human world open to supernatural and Christian values."

23. Therefore, any impediment that might be said to arise from the suggestion that Roman Catholics in their contemporary approach are dogmatically and diametrically opposed to any divorce reform, is, with the greatest respect, untenable and must be considered to be coming from a reactionary or radical segment.

24. Another factor that might be said to be an impediment to change is the suggestion that adequate change would require the imposition of divorce laws upon the Province of Quebec which may or may not, according to the view of the majority of the people of that Province, desire same and the only alternative to this impasse is to amend the Constitution so that divorce and matrimonial causes come within Provincial jurisdiction. (In this connection see Bill C.41).

25. The subscribers to this brief want and plead for immediate relief. To them there is not time and no necessity to embark upon the intricate and endless considerations that come into play when Constitutional Amendments are being dealt with, particularly when the mechanics of such amendments are in the throes of change themselves.

26. It is submitted that to involve Constitutional questions without necessity is to invite a whole review of the present position of Provincial and Federal Powers which would be endlessly prolonged and would promulgate a problem that demands immediate solution.

27. Therefore, all that is herein contained is directed to the proposition that the majority of Canadians favor reform and reform can take place and should take place immediately without its progress being blocked or delayed by any considerations that do not arise out of the subject matter of divorce and matrimonial causes.

28. It is, therefore, a basic premise of this brief that divorce and matrimonial causes should emanate from the Federal Government in such a way that any Province can accept or reject the legislation in whole or in part as to the grounds for relief and that upon accepting same the Court Orders emanating therefrom for maintenance and custody become summarily enforceable in any other accepting Province.

29. It is felt that the elected legislators are responsible to the people who elected them to keep pace with social and moral changes within the community and to provide laws which reflect the mores of the community without adhering to reactionary pressures brought by any minority group in the community for

purposes of promulgating political power at the expense of the majority or for any other purpose whatsoever.

30. It is further submitted that for the past decade in Canada there has been an increasing concern with respect to the effectiveness of Parliament and among many persons, regardless of their marital status, the failure of Parliament to respond effectively, or at all, to the demands of the community in the field of marriage and divorce and in other allied fields, can be singled out as one of the principal reasons for this dangerous situation.

31. Speaking more specifically about the need for reformation, the exponents of this brief have acted upon certain basic premises with respect to the nature of marriage and marital discord.

32. Firstly, they suggest that it is not to be forgotten that a marital relationship imports responsibilities, objectives and duties and that many persons after entering into marriage by reason of native inability, personality defects, economic considerations and many other factors, absolutely refuse to accept and live up to any of the obligations thereby created.

33. It is further suggested that it is often impossible to detect in any given person the extent to which that person is capable of assuming a competent role in marriage as the defects of such person do not appear until the day to day tensions arise and the increased responsibilities exist.

34. It is further submitted that marriages die; and they die for a multiplicity of reasons of which adultery is probably, in many instances, the most remote.

35. It is further suggested that the theological import of marriage in the modern community is, in many cases, much less now than it was at the time our present divorce laws were formed and the tenets of most churches are compatible with the suggestion that, although it is vital to a happy marriage that it has spiritual and religious aspects, marriage is no longer, from a religious point of view, considered to be indissoluble when its continued existence brings about misery and unhappiness to those who are directly involved.

36. The exponents of this brief further suggest that the failure of a marriage often resolves itself into hatred and bitterness towards the opposite spouse and each will often take any action to prevent the freedom and eventual happiness of the other. In this respect, time and time again, errant spouses have used the law as a device to cause misery, hardship and loneliness merely out of spite and with a spirit of revenge.

37. It is further submitted that many persons remaining parties to a dead marriage could well, if free, remarry without problems and provide a happy and stable home environment for the children of the first marriage and those born of the second.

38. One of the most important elements under consideration is the fact that children reared by a "single" parent are in the main deprived of a balanced home environment by reason of the legal inability of the parent to provide a stable marriage, and the unhappiness, bitterness and lack of proportion and discipline that all too often results, tends to permeate their characters and all too often leads to juvenile delinquency and personality defect.

SPECIFIC COMMENTS ON CONCLUSIONS AND RECOMMENDATIONS

39. Bearing in mind the remarks heretofore made, this brief recommends and urges:

> That the Parliament of Canada enact a "Divorce Act" providing for the comprehensive treatment of all matters pertaining to the dissolution of marriage and containing moderate and realistic grounds for divorce

that can be adopted in whole or in part by appropriate legislation in the various Legislatures of the Provinces of the Dominion.

40. The basis of this proposal lies in the suggestion that as much as we might desire an homogeneous Nation, from a social point of view, there are marked differences in the social, religious and cultural attitudes of the people in the various Provinces.

41. In addition, although the Provinces have been precluded from effecting substantive changes in the laws pertaining to divorce, there has emanated from the various Provincial legislatures a Body of Legislation that is closely linked with problems pertaining to marital discord. These are reflected in Provincial Statutes with regard to the equal guardianship of infants, the Marriage Acts, Wives and Children's Maintenance Acts, Wives' Protection Acts, Adoption Acts, Dower Acts, Legitimacy Acts, Married Women's Property Acts and similar Statutes.

42. The above Statutes differ from Province to Province and in each Province they are an integral part of the Social Welfare and Proprietary Rights Legislation and the various programs pertaining thereto that have been accepted and acted upon over the years.

43. Accordingly, this proposal is designed to permit the Provincial Legislatures to determine, within a framework provided by the Parliament of Canada, to what extent the people of any Province should be granted rights to relief in the field of divorce, bearing in mind the present provisions of the ancillary law within the Provinces and the needs and desires of the people.

44. It is felt that the laws of divorce need not necessarily be the same in each Province but all should have a common Constitutional source.

45. The concept embodied in this proposal that Parliament pass legislation for adoption by the individual Provinces as they see fit is not new to Canadian jurisprudence.

46. Both the "Juvenile Delinquents Act" and Part II of the "Narcotics Control Act" are examples of such Statutes.

47. In this way the Federal Government retains broad control from a constitutional point of view over the basic provisions of the law, but at the same time, Provincial Legislatures can be left to determine the extent of its suitability and applicability in any Province.

48. The great advantage of this type of legislation would lie in the fact that there would be a consistency of judicial interpretation of the provisions of the Statute throughout the Nation and, secondly, there would be adequate machinery for the implementation and enforcement of maintenance and custody Orders made pursuant to the Statute.

49. In a sense this concept grants to the Provinces, the powers pertaining to divorce that were originally granted to the Federal Government. Historically, however, the Provinces have always had all or a part of these powers by reason of the failure of the Federal Government to act in the field with the exception of the limited amendments to the Federal legislation.

50. As the Constitution in terms of union in the various Provinces empowers the Provinces to continue with their existing legislative provisions, it is submitted that there is every justification to empower them to adopt or reject, in whole or in part, Federal Legislation when the Federal Legislature chooses to enter the field.

51. This type of legislation gives the Provinces selective control and, at the same time, avoids the necessity of consideration of amendments to the British North America Act.

52. This proposal will greatly concern your Committee in that it might well be said that the Legislature of the Province of Quebec will never adopt any legislation that broadens the grounds for divorce, therefore persons living in Quebec will have no relief whatsoever.

53. The subscribers to this brief are confident in the view that the contemporary approach of French Canadians in Quebec to their own economic, cultural and political problems, and the contemporary view expressed by the Catholic Bishops of Canada (supra) would result in the near future in an Act of the Provincial Legislature adopting some part of the Dominion relief provided.

54. This would only be attained, however, by pressure on the legislators of Quebec, brought from within Quebec, and such pressure will only exist when the present system of Parliamentary divorce is discontinued and the problems in this regard in Quebec become acute.

55. A similar, but it is submitted, less difficult, situation would no doubt arise in Newfoundland, but it is suggested that this Province would not take long in providing the appropriate machinery for the implementation of all or part of the Statute.

56. As an alternative, and as a compromise only, a part of the proposed legislation could provide for a form of Parliamentary or Exchequer Court divorce for persons domicled in any Province of Canada that had not adopted any of the provisions of the Federal Legislation. It would be then up to the Parliament of Canada in a sense to select what grounds it would deem adequate for the minority interests of the people in these Provinces, however, this alternative is not advocated by the proponents of this brief.

57. It has always been an anomalous function of Parliament that it should be active in the Judicial field of Matrimonial causes and it is respectfully suggested that the Parliament of the Nation should only provide the legislation in which the judiciary can act.

That the said grounds should provide that a divorce be available as of right to either husband or wife acting as a party plantiff who establishes that since the solemnization of the marriage the other:

(a) Has committed adultery;

(b) Has deserted the plantiff, either actively or constructively for a period of two years or where the evidence is conclusive for such lesser time as the court may in its discretion deem appropriate;

(c) Has committed acts of cruelty upon the plantiff which have seriously impaired the plantiff's mental or physical health;

(d) Has committed any act of gross indecency to which the plantiff has not been an active or consenting party and without limiting the generality of the definition of "gross indecency" the same shall be deemed to include acts of sexual perversion, homosexuality, lesbianism, bestiality, rape and sodomy;

(e) Suffers and continues to suffer from an illness of the mind which prevents the subject from honoring his or her marital commitments to the plantiff and their children and which said illness has caused the subject to be committed to a mental institution for a period of at least two years or which has caused the subject to be repetitively committed to a mental institution over a similar period of time;

(f) At the time of the commencement of the proceedings is serving a term of imprisonment in a penitentiary and that two years of such sentence have been served.

58. In dealing with the proposed grounds upon which a dissolution of marriage might lie, it should be noted that the proponents of this brief suggest that there should be two bases upon which divorce might be granted:

(a) Divorce as of right arising out of marital misconduct on the part of the other spouse; and

(b) A divorce in the discretion of the judiciary where each party consents and separation has taken place for a period of time and the interests hereinafter mentioned have been served.

59. This brief rejects the suggestion that the concept of matrimonial offences be discarded in its entirety, principally because of the imposition upon the Defendant in a divorce action of drastic consequences pertaining to maintenance custody and costs, and it is felt that these consequences should not be imposed without fault on the part of that person.

60. In short there is no justice in imposing upon a husband or wife the loss of the pleasure of their children, and upon the husband, high maintenance and costs, unless that spouse has done some act which is offensive in nature and which could be said to have brought about the Judgment or Order made.

61. It is further suggested that the rules of law pertaining to connivance, collusion and condonation and the discretionary relief when each spouse has been guilty of a matrimonial offence would continue to exist and be applicable to the various and sundry grounds proposed, although the import of these factors would, of course, in the main be obviously diminished.

62. Therefore, in the light of the above remarks, some comment might be made on each of the individual grounds:

ADULTERY

63. It is submitted that it is generally recognized that when adultery occurs during the course of marriage its far reaching adverse consequences upon the marriage are sufficient to warrant a dissolution. As adultery is now an acceptable ground for divorce, it is not anticipated that your Committee would ever recommend that it be discarded. It is, therefore, not the intention of the proponents of this brief to elaborate on this particular ground.

64. The defect in the concept that it be the only ground for divorce lies principally upon two premises:

(a) No relief can be granted until proof of adultery can be established and this proof is often extremely difficult to obtain; and

(b) Adultery does not as a general rule take place until after the separation of the spouses and after each has acknowledged that they have no intent of resuming their commitments under their marital bond.

65. There can be no doubt that adultery has serious consequences insofar as the marital bond is concerned, but the proponents of this brief find it almost ludicrous that an errant husband could commit many forms of sexual perversions short of adultery, inclusive of indecent assault on his wife and female children, acts of homosexuality and the like and yet only when he participates in one single natural act of sexual intercourse with someone not his wife a divorce is available (Provided of course his wife can prove the adultery).

DESERTION

66. All the pending bills which propose to broaden the grounds of divorce anticipate a desertion for some period of time as a basis upon which relief should be granted.

67. The proponents of this brief would suggest that both active desertion and constructive desertion as they are presently judicially defined be considered grounds, and that the prevailing judicial definitions of desertion would be utilized in determining the right to relief with respect to this particular ground.

68. It is suggested that desertion is probably the most prevalent matrimonial offence and the most realistic basis upon which a matrimonial bond should be dissolved.

69. If desertion is defined as the voluntary withdrawal from cohabitation by one spouse without excuse and contrary to the wishes of the other and that conclusive evidence exists to the effect that there is no intention of that spouse to return or endeavor to return, it is the suggestion of the proponents to this brief that there should be no necessity for any two year period or other period that the legislature might decide to lapse before relief can be granted.

70. One of the most drastic consequences of desertion is that it is almost always coupled with a withdrawal of support and a withdrawal of any exercise of parental control over the children. In addition there is always the factor of the evasion of the husband (should he be the deserter) to meet any responsibility in this regard, and it is respectfully submitted that a study of the work of any Family Court in a Metropolitan Area of the Nation would, in the vast majority of cases, indicate that desertion of one spouse by the other is the most prevalent matrimonial offence.

71. The results that flow from marital desertion by either spouse could be endlessly enumerated in this brief and it is submitted, are certainly extensive enought to be recognized as a form of social illness within the community.

72. Few people who are not engaged in Family Court work, Welfare work or Police work can truly appreciate the loneliness, bitterness and despair of a deserted wife who finds herself frustrated at very turn in endeavoring to obtain support from a husband whose whereabouts are unknown or, alternatively, who shifts from job to job, from place to place, without any regard whatsoever to his financial responsibilities. In addition to that, deserted wives are constantly faced with the argument that the cost incurred by the husband in keeping himself separate from his family, the vast accumulation of debts that occurred during the marriage and after the break-up thereof, and the limited source of income of the husband, makes it impossible for him to contribute substantially to the support of his wife and children.

73. More often than enough, many of the debts accumulated during the marriage have been guaranteed in good faith by the wife at the outset of the marriage and she is constantly called upon to pay from her limited resources, payment on these debts and economic recovery is almost completely impossible from any practical point of view.

74. In addition to this, the responsibility of raising children, particularly as they approach their teenage years, imposes upon a deserted wife an almost impossible task from a disciplinary, moral and economic point of view.

75. Recognizing the need of stable home environment for children and the need of some consistent source of support, together with their own emotional needs, many wives have sought out commonlaw relationships and even bigamous marriages to relieve them from their predicament.

76. These relationships, however, are inherently unstable and can eventually lead to tragic conclusions not only with regard to the parties themselves, but particularly with respect to the children.

77. An adequate solution to the problem of desertion, be it by the wife or the husband, would clearly lie in granting to the deserted spouse a divorce,

freeing them to marry on a more stable basis and consequently establishing a far healthier home environment for themselves and their children.

78. Although the above remarks emphasize the position of the deserted wife, the predicament of the deserted husband is probably, from many points of view, equally intense.

79. A husband who has been deserted faces extensive problems with regard to the care of his children and is often put to a fantastic expense to re-establish them in a home situation where their daily needs are properly met.

80. This brief further suggests that desertion does not normally occur until al the try and try again programs designed to rehabilitate the marriage have been exhausted.

CRUELTY

81. It seems inconceivable to the subscribers to this brief that a modern community would demand that a marital bond be sustained without cohabitation when cohabitation brings about a danger to the physical and mental health of the wife, and very often a similar danger to the physical and mental health of the children.

82. One of the dangers of broadening the grounds of divorce to include cruelty lies in the suggestion that the Judiciary might accept as a basis of cruelty the most trivial acts which could not, in any sense of the definition of the word, be considered to be cruel.

83. This could be guarded against by the insistence upon medical evidence showing the consequence of the acts deemed to be offensive.

84. It is respectfully suggested that a great many of the acts of cruelty which occur in marriage are the result of chronic alcoholism and are very often coupled with acts of desertion from time to time and, it is submitted, that the ground of cruelty and the ground of constructive desertion have very much in common in this regard.

GROSS INDECENCY

85. It is anamalous to the subscribers to this brief and certainly it must appear anomalous to the members of your Committee that sexual acts not encompassed within the definition of "adultery" pursued on an extra-marital basis consisting of the most flagrant perversions have never been grounds for divorce except those defined in certain Provinces as rape, sodomy and bestiality committed by a husband.

86. Homosexual and lesbian practices and sexual perversion, arising out of neurosis are as clearly immoral as the commission of an act of adultery and surely must be conceded to have the same effect on a marital bond.

87. The immorality of the nature of these acts is grossly amplified when they are perpetrated upon the female members of the family of the husband, including his wife, and it is appalling that divorce could not lie as a consequence thereof.

88. It is conceded that behaviour of this nature is perhaps relatively rare or, at least appears to be relatively rare, and possibly does not warrant extensive or detailed discussion, but in consideration of the subject matter of this brief these matters should not be overlooked or ignored as though they did not exist in the community or were not present in many cases of marital discord.

MENTAL ILLNESS

89. A considerable amount of time in the preparation of this brief was spent with regard to the problem of mental illness and the extent to which it should form a ground for divorce.

90. This ground has already been accepted in the English Jurisprudence (see proceedings Appendix IV) and is seen throughout the bills that have been proposed and are under consideration by your Committee.

91. The proposal that this brief suggests is somewhat different from that contemplated by the English Jurisprudence in that it does not contemplate a divorce upon this ground without the committal of the subject to a mental institution.

92. It is hoped that your Committee would consider any person suffering from incurable mental illness of an intensity sufficient to warrant his (or her) committal to an Institution, for all intents and purposes incapable of carrying out any of the obligations of the marriage, and similarly, incapable of embracing any of its benefits.

93. The loss of a spouse through divorce would be completely inconsequential to an incurably insane person.

94. It is submitted that one of the real problems that will confront your Committee will lie in endeavoring to define what is meant by the words "incurable mental illness" "incurably of unsound mind" or "unsound mind and unlikely to recover" and other similar descriptions as they appear in the various bills proposed and no doubt will be referred to in other briefs presented.

95. It is felt by this Committee that incurable mental illness or unsoundness of mind, such as epilepsy, can well come within these definitions, but at the same time, because it only on occasion prevents the subject from honoring his on her marital commitments, should hardly be considered a ground for the dissolution of the marriage.

96. Similarly, many mental illnesses can be well controlled by the use of drugs and it could hardly be said that such illnesses have been cured and, at the same time, they are sufficiently under control to permit the person sufficient control to be free in the community.

97. The subscribers to this brief felt that treatment for a mental illness taken by a husband or wife outside of a mental institution should not form a ground for a divorce as it apprently does in the English Legislation (see proceedings Appendix IV).

98. It is submitted that many persons are reluctant in the first instance to acknowledge that their abnormal conduct may be the first symptoms of the onset of incurable mental illness and if taking treatment or seeking medical advice pertaining to their condition were later to be used against them to establish that the incurable illness which eventually developed began at a particular time when they sought treatment, is part of a ground for divorce, such treatment would probably, in the first instance, in many cases be vigorously refused.

99. It is therefore suggested in this brief that there should be no ground for divorce unless a committal to a Mental Institution has taken place and unless the mental illness is of such an extent that it prohibits the patient from carrying out his (or her) marital commitments and that the committal and the condition have existed for a period of at least two years.

100. It is further suggested, and the experience of some of the subscribers to this brief, that many persons suffering from mental illness can go through repetitive committals to Mental Institutions and never become cured of their

sickness. These committals may last for periods of up to three or four months and are often coexistent with out-patient treatment and long periods on tranquilizing drugs.

101. It is therefore suggested that, where repetitive committals have taken place over a period of two years and the illness is such that it prevent the patient from honoraing his or her commitments in the marriage, a dissolution of the marriage should be available to the other partner.

102. The Committee suggests that, if a husband or wife was aware that a committal to a Mental Institution might bring about a dissolution of their marriage, it would encourage such person to seek medical treatment at an early stage in the condition and nothing in the Legislation, it is suggested, should discourage this course of action.

PENAL SERVITUDE

103. Almost all the pending bills contemplate this form of conduct, to some extent, to form a ground for divorce.

104. An interesting observation was made by The Honourable Mr. Justice Walsh at the second sittings of your Committee:

> "If the home is broken up while they are in prison, there is not much chance of rehabilitating them. That has to be weighed in the balance, the wife who has suffered as a result of her husband's criminal career, as against the possibility of redeeming him."

(see Tuesday, June 28, 1966, page 31)

105. The exponents of this brief contend that any wife or husband who seeks divorce on this ground is not likely prepared, regardless of any event, to be a person who would wait patiently for the return of her spouse to assist in the "possibility of redeeming him".

106. Those that would be of assistance for this purpose would never divorce their husbands in the first instance because of their committal to prison and the suggestion that a woman must wait so she can assist in the rehabilitation of her husband upon his return to the community and is disallowed the right to rehabilitate her own marital situation and that of the children is somewhat divorced from reality.

107. It may be that your Committe would choose to specify the dissolution of marriage on this ground should only lie if the penal servitude has been for certain particular offences and some consideration might be given to this aspect of this ground.

108. It would be anomalous indeed if a man, sentenced to five years for fraud, found himself subjected to divorce proceedings at the end of the first two years of his imprisonment when all the proceeds of the fraud had been used to purchase expensive gifts for his wife.

It is submitted that the courts should have a discretion to grant a divorce to any man and wife who, because of marital discord have been separated for two years or more and who consent thereto: provided, however, the court is satisfied upon good grounds that:

(a) The respective spouses have made every effort to rehabilitate their marital relationship and for valid reasons have been unable to do so; and

(b) The public interest is best served by a dissolution of the marriage; and

(c) The custody, welfare and maintenance of the infant children have been adequately provided for according to a report to be filed by the superintendent of child welfare (or such other comparative agency that may exist in the particular province in which the proceedings are being heard).

109. It is intended that this suggestion introduce a ground of divorce by mutual consent. It is interesting to note that as this brief is being prepared, a recommendation to this effect has been made by the Law Committee to the House of Commons in England.

110. In giving consideration to the history of divorce, Cartwright and Lovekin in their work on "The Law and the Practice of Divorce in Canada" (Third Edition) note that in the Civil Law a mutual consent was always a ground for divorce. They note further that under the Roman Law it was unthinkable to compel an unwilling party to marriage and just as unthinkable to compel an unwilling party to remain married. The authors quote "the Laws of Justinian" and mention that such laws permitting divorce by consent were not those of a pagan community, but those of a Christian Empire.

111. It must be conceded that in our contemporary community many marriages die for no other reason than the parties are basically and fundamentally incompatible. In these instances where often mature and morally responsible people are involved each spouse has tried and tried again to rejuvenate the affection and respect that each once held for the other or that each once thought they held for the other.

112. The husband, recognizing his obligation, provides adequate maintenance and support and each spouse shares as much respect and affection for the children as more happily married persons.

113. Often separation has taken place simply because the tensions of home life are reflecting adversely upon the children and the parties decide that in the interests of the welfare of their children it is best that they live separate and apart.

114. In these cases no heinous matrimonial offence has taken place. Neither party has shown a propensity towards immoral conduct which would lead to adultery and each, on many occasions, might well have strong moral and religious reasons why this should not be done.

115. Both the husband and wife in this particular situation might well desire to remarry and there is no reason to suspect that a new home so created could not be a happy one.

116. It is difficult if not impossible, to see what interest the State might have in the promulgation of this marital bond.

117. It is admitted that the State has an interest in the preservation of marriage; however, it is difficult to see what possible interest the State could have in endeavoring to re-unite or preserve the bond between two people who have absolutely no intention of resuming cohabitation.

118. This brief submits that each should be freed from their marital bond, providing all the ancillary obligations, such as custody, maintenance and propriety interests have been dealt with and each accepts and consents to the divorce.

119. This may appear to be a somewhat radical step but as much as it may be said to be radical, it must also be admitted that it is an honest step.

120. If divorces as of right can be obtained upon the commission of matrimonial offences without regard to the interests of the State and without a true

regard to the provisions for custody and maintenance, surely a discretionary divorce with consent should be available after all ensuing matters have been dealt with by agreement.

121. The important factor in considering this proposed ground is to emphasize that the divorce would be entirely discretionary. Discretionary divorces are a part of our present law when each party to the litigation has committed a matrimonial offence.

122. It is anticipated and suggested that the evidence that would support a divorce of this nature would, of necessity, involve a report from the Superintendent of Child Welfare in the same manner that is supplied in British Columbia under the provisions of the "Adoption Act" to ensure that a dissolution of the marriage would have no adverse effect on the children and would be for their ultimate benefit.

123. It is further suggested that the Court might be given the power to dispense with the consent of a spouse if the Court is of the opinion that the consent has been unreasonably withheld or is being withheld merely through spite or for no just cause whatsoever. It is submitted that if the Courts have the power under the various adoption acts to dispense with the consent of a mother and, in some instances, a father, to the adoption of a child, it is not too radical, a view to suggest they have the power to dispense with consent to a dissolution of marriage when the marriage is dead and one person merely wishes to keep it alive in name only for no just cause.

A provision that:

(a) Husbands and wives after separation may acquire a separate domicile in like manner and to like effect as if they were single persons; and

(b) The superior courts of civil jurisdiction of each province adopting the legislation shall have jurisdiction in all claims for release under the act, provided either party is domiciled in that province.

124. This relief has been partly provided by the Divorce Jurisdiction Act of 1952 and is contemplated in part in some of the bills presently pending before Parliament.

125. It is submitted that a modern society acknowledge the equal rights of women before the law and there is little or no justification for suggesting that a wife should take her husband's domicile any more than there is for the suggestion that the husband should take a wife's domicile.

126. It is suggested that after separation a married woman should be acknowledged to be legally entitled to retain her then existing domicile or to acquire a separate domicile of her choice in like manner and to like effect as if she were a single person.

127. Since World War II the movement of persons from Province to Province has become increasingly prevalent and it is not unusual for a person to acquire several domiciles in a life-time.

128. Similarly, after separation, it is not unusual for one party to move from one Province to the other and the criticism of the Divorce Jurisdiction Act in this regard lies in the fact that a domicile can well be established by a departing spouse without desertion and well within a two year period.

129. It is not contemplated in this brief that the rule of law that a divorce should be obtained in the Province of one's domicile is to be abrogated.

130. It is submitted that legislation of this nature should permit a husband or wife to seek recourse to the Courts of his or her own domicile and should claims for relief be commenced in separate Provinces by each, the husband and

the wife, those proceedings commenced second in time should be stayed until the first action is disposed of.

131. This brief anticipates that the Superior Courts of each Province adopting the legislation would have the jurisdiction in all claims for relief under the Statute, assuming, of course, that the party Plaintiff or Defendant was domiciled within that Province.

132. It is further anticipated, of course, that each Province would be free to establish in their rules of Court the particular procedures for divorce and matrimonial causes as is done in those Provinces with divorce courts at this time.

133. The proponents of this brief do not advocate that there be special divorce Courts or that divorce proceedings have any lesser degree of proof or formality than actions for damages in the Superior Courts of the Provinces.

134. As this brief is designed to endeavor to make divorce Orders, particularly with respect to maintenance and custody, enforceable in each Province of the Nation it is felt that it is desirable that the Judicial determinations take place in Courts of equal status throughout the Country.

A PROVISION FOR RELIEF BY WAY OF JUDICIAL SEPARATION

135. This cause of action which already exists in British Columbia is, with the greatest respect, considered to be almost completely useless save insofar as it is a judicial vehicle by which to obtain an injunction for the preservation of person or property. The end result of the action, however, rarely proves to be worth the legal expenses involved in having determinations of this nature in the Supreme Court.

136. The relief that would normally be brought in such proceedings can for the main part be readily obtained under the British Columbia Equal Guardianship of Infants Act, Wives and Children's Maintenance Act, Married Women's Property Act, Wife's Protection Act, and under Section 717 of the "Criminal Code" and the expensive Supreme Court proceedings completely avoided.

137. It is suggested, however, that some persons who have religious aversions to divorce or for those Provinces which might prefer merely to adopt this part of the Federal Legislation, some relief should be afforded to them by the inclusion of this cause of action which, it is suggested, should be based upon the same grounds as the divorce as of right.

A PROVISION FOR RELIEF BY WAY OF DECREE OF NULLITY

138. This brief proposes that all matters pertaining to the ceremony of marriage be omitted from Federal Legislation and the form and particulars thereof be left entirely in the hands of the Provinces as set out in Section 92(12) of the "B.N.A. Act". It further suggests that the present Provincial Statutory provisions for the settlement of disputes arising during marriage when same do not arise in divorce proceedings can be left entirely in the hands of the Provinces. In this regard it is submitted that such legislation as the Equal Guardianship of Infants Acts, Wives and Children's Maintenance Act, Married Women's Property Act, etc., continue to remain in effect as above noted.

139. However, it is urged that provision, for decrees of nullity be provided for in Federal Legislation on both the void and voidable basis that presently exist in the Provinces affected by the English Act of 1857.

140. In addition to this it is submitted that an additional ground should be added providing that a marriage might be deemed voidable upon it being established that there is a wilful refusal to consummate.

A provision that a court may from time to time before making its final decree make such interim orders and may make such provisions in the final decree as it may deem just and proper with respect to the custody maintenance and education of the children, inclusive of placing them under the protection of the superintendent of child welfare and for the maintenance of the wife.

141. This provision already exists in the Divorce and Matrimonial Causes Act of the Province of British Columbia.

142. It is felt that no legislation in the field of divorce can possibly be left devoid of granting to the Court appropriate powers to deal with these important aspects of the problem.

143. It is respectfully submitted that no constitutional question could possibly arise with respect to the inclusion of these matters in divorce legislation as they are necessary and incidental component of any claim for relief in divorce legislation.

144. It is emphasized again that this brief anticipates that there would be uniformity of judicial decisions pertaining to custody and maintenance and that Orders pertaining thereto would be enforceable in any Province of Canada and, therefore, the Constitutional authority for such processes should have its common ground in Federal Legislation.

145. It is anticipated that the present prevailing Judicial decisions pertaining to custody and maintenance would continue to apply and the root of such a provision in the Federal Statute would lie in very similar provisions to those found in the English Act of 1857.

A provision that judgments and orders for custody maintenance and costs pronounced in any one Province pursuant to proceedings under the Act shall be enforceable in any other Province by the filing of a Court certified copy of the judgment or order in the Superior Court of the latter Province and thereupon such judgment or order shall be deemed to be a judgment of the latter court.

146. It is respectfully suggested that at the present time the reciprocal enforcement of maintenance or judgment statutes that exist in many Provinces are cumbersome in their procedural aspects and create delays and difficulties that make recovery of maintenance provisions or enforcement of custody orders obtained in any divorce decree or similar order very difficult.

147. For instance, considerable amount of difficulty can be entailed arising out of the situation where the husband is given the custody of his children by virtue of a divorce order or decree in British Columbia and the wife, in complete contempt of such proceedings, spirits the children of the marriage off to Ontario or Nova Scotia, leaving the husband with only a cumbersome and difficult remedy to endeavor to have the children returned.

148. Similarly, the present procedure whereby maintenance orders must pass through the hands of the respective Attorneys-General of the Provinces before they can be enforced in a Province other than the one in which they were granted, creates long delays in their enforcement and often frustrates the very purpose for which the reciprocating acts were designed in the first instance.

149. It is respectfully suggested that if divorce, maintenance and custody orders are made by the Superior Courts in each of the Provinces and same are based on a common constitutional source the mere registration of a judgment in one Province from a Court in another Province should be a sufficient step to enforce the relief in the latter Province.

A provision that:

(a) All orders pertaining to custody, maintenance and costs include and contain liberty to apply to the court in which the order was made or in which the order is sought to be enforced for a further order reducing or relieving the defendant from paying the amount stated therein, provided that until such application is made the said order be enforceable without the necessity of any shew cause summons or contempt proceedings:

(b) That a breach of any judgment or order made pursuant to the Act pertaining to maintenance or custody would constitute an offence under the Act punishable upon summary conviction pursuant to the provisions of the "Criminal Code":

(c) That all orders pertaining to the maintenance of a wife and/or children form a first charge on the income and property of the defendant husband in priority to any other assignment, deduction or set-offs.

150. The proponents of this brief urge and insist that some teeth should be put in the laws of Canada pertaining to effecting the collection of maintenance payments owing to wives and children by errant husbands.

151. At the present time in British Columbia the methods of enforcement of maintenance orders coupled in the divorce decrees issued by the Supreme Court leave much to be desired.

152. In directing suggestions in this regard same might be forwarded as much to the Provincial Legislature as the Federal Parliament, however, it is to be pointed out that the Federal Parliament has the power to establish the legislation on a National basis which would make same enforceable in each Province of the Country.

153. In many instances in British Columbia today where wives are seeking claims for a dissolution of their marriage from their husbands they will forego their right to relief in the Supreme Court proceedings insofar as maintenance for their children is concerned in favor of bringing maintenance proceedings for their children under the Wives and Children's Maintenance Act where the Police Court or Family Court procedures are summary, less expensive, and in a sense more effective.

154. The principal defects in the enforcement of maintenance orders lies in the fact that, before enforcing such orders, either in a divorce decree or under the Wives and Children's Maintenance Act, the husband must first be called upon to come before the Court and shew cause as to why the money should not be paid.

155. It is a basic suggestion of this brief that this is an entirely unnecessary step and that the ability to pay should be presumed to exist so long as the order is outstanding and that the burden of securing relief from the amount prescribed in the order be placed upon the husband who can make the appropriate application before arrears arise or immediately upon the happening of the event that might bring them about.

156. It is felt that if a husband could be imprisoned for non-support by reason of his disobeying an order for maintenance a far greater effort would be made by most errant husbands to provide the necessary funds to meet the order, as the present law permits them to attend Court and offer any number of excuses as to why the order, in the first instance, was too high and as to how their debts and other liabilities have accumulated since their departure from the matrimonial home, making payment impossible.

157. Although maintenance orders are enforceable in British Columbia by registration in the District Land Registry Office against any title to properties that the husband might own it is not until a substantial sum of arrears arises that it is worthy of taking proceedings by way of execution process to realize on these funds and these processes become, in themselves, expensive and costly items for a wife who has been deserted to bear.

158. If the failure to make any one payment were deemed to be a summary conviction offence, there would be far fewer deserted wives on social welfare and the work of present welfare agencies and Family Courts substantially reduced.

159. In addition thereto, as you will note, it is suggested that orders pertaining to the maintenance of the wife and/or children should form a first charge on the income of the husband in priority to any other assignment, deduction or set off.

160. Nowhere has such legislation been more effective than when pronounced by the respective Governments of the Country in their favor with regard to effecting the deduction at source of income tax, workmen's compensation board assessments, unemployment insurance commissions and the like, and it is respectfully suggested that maintenance orders for wives and children should be of equal import to the legislators of this Nation.

161. The mere registration of a certified copy of a maintenance order issued in divorce proceedings with an employer of the husband should be sufficient to establish that the employer henceforth holds any wages that would normally become payable to the husband in trust for the recipients under the maintenance order.

162. The proponents of this brief are unable to estimate the number of persons at the present time in Canada who are recipients of welfare payments and who have been deserted by husbands who are using every conceivable method to avoid living up to their responsibilities to their deserted wives and children.

163. It is respectfully suggested that if some stringent and effective legislation were enacted on the Federal level, the welfare payments in the Dominion of Canada collectively would be remarkably reduced and the burden of paying these sums imposed upon those who should be meeting same in the first instance.

SUMMATION

164. This brief does not purport to be a comprehensive consideration of all the problems that confront your Committee.

165. Broadly speaking, it agrees with the concept that marital stability is created by mature preparation for marriage, adequate sources of counsel and advice during marriage, together with a genuine desire of each spouse to remain married to the other and an ability to adjust and accept the imperfections of the other when same appear.

166. It is further based upon the premise that mature persons who marry have a natural and human desire to form happy unions with their respective spouses, each accepting on a give and take basis, the imperfections of the other.

167. It is submitted, however, that when divorce proceedings are taken by either spouse, same are not a symptom of an unhappy marriage or an unstable relationship, they are the end result of the marriage and that all attempts to rehabilitate a marriage at this latter stage are in the main useless and, therefore, divorce proceedings except in exceptional cases should be final in their effect.

168. Divorce proceedings, it is contended, are the funeral of a marriage and not a symptom of its illness. Rarely are such proceedings taken without the parties having embarked upon exhaustive programs for rehabilitation as neither, as a general rule, likes to admit that the marriage is a failure.

169. It is submitted that if a marriage is dead it is in the best interests of the Community that it be buried and that legislation should, in the main, be directed to the finalization of the arrangement and should be devoid of unrealistic and altruistic attempts to force cohabitation between two persons who have long since by reason of the conduct of one or the other concluded that same is impossible.

170. The above remarks are not to suggest that the Provinces should not be encouraged to provide, in their educational and welfare programs, expert advice and assistance for young persons to prepare them for marriage and to married persons to encompass all fields of marital matters.

171. This brief suggests that in most Provinces, educational and welfare machinery is already in existence that could and, to some extent, is, active in theis field, but that because of the drastic change that would be necessary for the Federal Government Agencies to be formed on this level to enter into the matter, it is best left in the Provincial field at this time.

172. It is equally inconceivable to the subscribers to this brief that modern divorce legislation should be enforced in Courts or in legislative bodies that do not have ready access to the assistance of welfare agencies on a local level that can supply to the Court valuable and cogent evidence and opinion with regard to the important aspects of maintenance and custody of children.

173. Courts or legislative bodies such as the Exchequer Court sitting in Ottawa to hear Quebec and Newfoundland divorces or the Parliamentary Committees with regard to same, it is submitted, would tend to act in a vacuum far removed from the area where the direct and important evidence is readily available and must be taken into consideration if appropriate orders for all aspects of the dissolution of marriage are to be given consideration.

174. Accordingly, considering all the foregoing, this brief was designed and prepared and is respectfully submitted in the hope that our legislators will see that its objective is to further social justice and stability of family institutions and to bring about the relief of persons who find themselves in the dire straits of marital discord.

All of which is respectfully submitted.

Dated at Vancouver, British Columbia, this 24th day of November, A.D. 1966.

DOUGLAS AIRD HOGARTH, Esq.
Counsel on behalf of
Mothers Alone Society
Canadian Single Parents
Parents Without Partners, and
(ALPS) All Lone Parents Society

SCHEDULE "A"

MOTHERS ALONE SOCIETY

The Society was formed on the 18th of February, 1966 and was formerly called the "Society for Women Only".

Its basic formation was brought about when a number of women who found themselves divorced, separated or deserted felt that by joining together and forming this Association, a great deal of mutual assistance could be offered each to the other by sharing their common problems.

The general objectives of the group are to bring about improved welfare conditions for a deserted parent and the children of the marriage, to bring about enforcement of the Wives and Children's Maintenance Act through improved administration in the Family Court and to bring about more realistic divorce laws in the Dominion of Canada.

The group has been constantly active in endeavoring to offer constructive suggestions for an improvement in the Family Court in Vancouver and anticipates presenting a brief to the Department of Attorney-General in this regard.

At the present time there are thirty-five active members who live principally in the Lower Mainland of British Columbia.

PARENTS WITHOUT PARTNERS

This is an international non-profit, non-sectarian educational organization which is devoted to the welfare and interests of single parents and their children.

The Vancouver Chapter (No. 153) was formed in October, 1964 and the present membership is approximately sixty.

The meetings are held on the first and third Wednesday of each month at the Cambie Street Y.M.C.A. in Vancouver and a social evening is held on the third Saturday of each month.

The activities of the Group include parent-child activities, coffee hours and other social events.

Eligibility for membership in Parents Without Partners is confined to "single" parents who, by reason of death, divorce find themselves alone.

Membership in any one Chapter involves membership in the other Chapters so that assistance, when out of the City, can be obtained if it is required.

ALL LONE PARENTS SOCIETY (ALPS)

This Association was formed in April, 1965. Its membership is principally derived from the City of Vancouver and there are now sixty-eight active members.

The Group is incorporated under the "Societies Act" and makes extensive efforts to provide recreation and social events for its members and their children.

The educational aspects of the Association's functions consist of meetings at which guest speakers are invited to assist them and advise on the various common problems that confront them

The objects of the Society are quite numerous, but generally it is designed to bring together single parents and their children so that they may benefit from the knowledge and assistance of persons with similar problems and thereby enrich their lives and those of their children.

All the members of these various societies have found that, by discussing the problems with which they are faced with other persons who find themselves in similar circumstances, a great deal has been accomplished to give them a mature and proper perspective of their position and guidance and assistance as to sources of relief and help.

CANADIAN SINGLE PARENTS

This Association was formed in the Spring of 1965. The Charter Members were a group of persons who were formerly associated with Parents Without Partners.

The Group now has a total membership of seventy-two men and women. Of this membership, sixteen are widowed, thirty-four are divorced and twenty-two separated from their respective spouses.

The objects of the organization are very similar to those of the other Societies, principally to be of help to fellow members by group discussions with regard to the problems of raising children in a single parent home and other similar problems.

They also plan family activities of a nature that a single parent cannot provide and carry out a social program for the adult members.

The Association has four meetings per month. Two of these meetings are business meetings, one is a family activity meeting and the other is an adult social evening.

The organization meets in Vancouver, but its membership is not restricted to people of that city.

APPENDIX "42"

Brief submitted by the majority members of a Committee appointed by the Bar of Montreal to examine into the question of divorce.

BRIEF ON DIVORCE

The following brief on divorce and the social and legal problems relating thereto, with particular reference to the Province of Quebec, is respectfully submitted to the Special Joint Committee of the Senate and House of Commons on Divorce (the "Joint Committee") on behalf of those members of the Bar of Montreal who have practical experience with divorce matters in the Province of Quebec. While this brief is submitted with the knowledge and consent of the Bar of Montreal, it is not to be construed as representing the views of the Bar of Montreal, the majority of whose members is not in favour of divorce.

In accordance with the directions contained in the "Guide for Submission of Briefs and Participation in Hearings" furnished by the Joint Committee a summary of the main conclusions and recommendations of this brief is as follows:

Conclusions: The law of divorce applicable to persons domiciled in the Province of Quebec insofar as jurisdiction, grounds, procedure and the consequences thereof are concerned is unsatisfactory.

Recommendations:

1. The Federal Parliament should enact legislation under Head 26 of Section 91 of The British North America Act

(a) providing as grounds for divorce the following: adultery, cruelty, desertion, unsoundness of mind and conviction for certain indictable offences;

(b) providing as ancillary and necessarily incidental to its jurisdiction over matters of marriage and divorce, for the matters of

(i) custody of children where that matter has not previously been settled by final Judgment of a court of the Province of Quebec; and

(ii) alimony for support of the wife and minor children in her custody where the wife is the successful plaintiff in divorce proceedings, save insofar as the matter of alimony for such children may have been previously specifically determined by judgment of a court of the Province of Quebec;

(c) providing, *inter alia*, that the Exchequer Court of Canada shall have jurisdiction within the Province of Quebec for all purposes of such Act; and

(d) providing further that the date of the dissolution of the marriage would be the date of the judgment of the Exchequer Court, subject to the right of the losing party to appeal to the Supreme Court of Canada within thirty days of the date of such judgment and the right of the successful plaintiff to desist from such judgment at any time within the same delay of thirty days.

DIVORCE IN THE PROVINCE OF QUEBEC

Introduction. It has been stated recently before the annual meeting of the Canadian Bar Association in Winnipeg that "Canada is the most backward country in the English and French speaking world in legislation relating to divorce." If by "backward" it is meant to indicate the gap between the law and

the views and wishes of a majority of the electorate, the statement may well be an accurate assessment of divorce legislation insofar as the greater portion of the English speaking populace of the country is concerned. It is not, however, accurate for the majority of residents of the Province of Quebec who, by reason of religious conviction, do not accept or condone the institution of divorce. The Civil Code of the Province of Quebec continues to satisfy, insofar as can be informally determined, the view of the majority of the people of the Province of Quebec in providing in Article 185 that: "Marriage can only be dissolved by the natural death of one of the parties; while both live, it is indissoluble."

As the law applicable to the Province of Quebec includes federal statutes enacted within the jurisdictional confines of Section 91 of the British North America Act, divorces arising through legislative action of the Federal Parliament, and latterly by the Senate alone, are recognized as valid. Indeed while the institution of divorce may not be recognized or contemplated by the Civil Code, divorce leads to such civil law consequences as the dissolution of community of property which may have existed between the consorts as well as the termination of the mutual obligations of the husband and wife contracted by the mere fact of their marriage. Such obligations include the support due the wife by the husband during marriage.

Significant is the increasingly apparent disposition on the part of the chief religious discipline of the Province to recognize the rights of persons who do not subscribe to the religious views of the majority to avail themselves of recourses open to residents of other jurisdictions including, it is understood, the recourse to divorce.

Basis for Conclusion. The single conclusion set forth in the preface to this brief was that the law of divorce, in its varied aspects, as applied to persons domiciled in the Province of Quebec, is entirely unsatisfactory. The premises which in our view lead to such a conclusion are as follows:

(a) *Procedure*: While the current system of having the Senate act alone in providing legislation by resolution represents a distinct improvement over the pre-existing system, it remains unsuitable for the following reasons:

(i) *It should be a judicial and not a legislative process.* Although temppered by the role of a Judge of the Exchequer Court acting as a Commissioner, the urrent system remains in essence, a legislative process. The Senate Divorce Committee for example, is by no means obliged to accept the recommendation of the Commissioner, nor for that matter is the Senate obliged to follow and accept the recommendations of the Senate Divorce Committee. Authority to question the Commissioner and even to hear further evidence exists. In circumstances of controversial evidence, it is still conceivable that persons would be expected to render judgment on evidence and points of law who have no experience or specialized education for such tasks.

(ii) *The procedure is inefficient.* Under the current system, proceedings upon filing are carefully studied by a clerical staff which brings to the prompt attention of offending attorneys, any deficiencies in the documentation or procedure. The Commissioner on hearing the evidence, which may or may not be transcribed by the court stenographer present, then makes a written report in the form of a recommendation to the Senate Divorce Committee. The latter reports and makes recommendations in due course to the Senate and a resolution may then be adopted dissolving the marriage. A period for appeal then commmences and while, to the best of our knowledge, no appeals have as yet been taken, the procedure provided is too cumbersome to contemplate, involving a petition, draft bill and full parliamentary treatment by both Houses and Royal Assent.

(iii) *The procedure is too costly.* Several years ago, the Senate Divorce Committee adopted the practice of asking Petitioners the total costs of their proceedings. We are not aware of the consensus obtained but feel that costs to the Petitioners questioned may have been higher than acknowledged, it being highly unlikely that a final account would have been received as of the time of hearing. We would venture to say that the average cost of divorce proceedings is approximately $1,500 today. Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel to the Senate, in his excellent address to the Joint Committee in its first session cited an amusing yet tragic tale of a hawker convicted of bigamy in circumstances where it was evident that he was too poor to be able to afford a divorce. The judgment concluded by suggesting wryly that England was not a country in which there was one law for the rich and one for the poor. We fear that this grim tale might be told with as telling sociological significance a century later insofar as divorce for persons domiciled in the Province of Quebec is concerned.

The Parliamentary divorce system and latterly the Senate resolution system is, however, by no means completely to blame for the high costs of divorce. The factor of necessarily travelling to Ottawa for witnesses and counsel certainly increases the costs. The change to a system involving hearings within the Province of Quebec might reduce costs by approximately $400. It is also ironic to consider that while service of a subpoena, accompanied by payment of expenses for travel may in theory oblige the recipient to attend a hearing, he or she need not answer any questions, according to the standing evidence rule, if the answers relate to any adultery which may have been committed by such witness. While never morally condoned, what is the basis for regarding admissions of adultery as quasi incrimination? We are also of the view that the subpoena provisions are unrealistic in that a proper penalty system for persons who fail to respond to subpoenas does not exist.

The minor expense of notices in the Official Gazette of Canada might usefully be eliminated, the justification for such requirement being somewhat obstruse at this juncture, more especially in the view of the fact that the requirement of notices in local newspapers was dispensed with several years ago. A substantial reduction could also be made to the currently exorbitant filing fee. We see no justification for a fee of $210 being required and feel it could be reduced without great economic significance to the order of $25.00. Another major factor contributing to high costs is the necessity of negotiating, drafting and implementing as many as three agreements in many instances to secure the wife's position, the explanation for this situation being set forth under the heading "Particular Problems of Quebec Petitioners." Before leaving the subject of costs, we would like to make the observation that, in general, the fees charged by Quebec practitioners are not out of line with those generally charged by attorneys in Ontario for example. The fees in most divorces run from about $600 to $800. When it is considered that a major part of the attorney's time is spent negotiating and drafting agreements by reason of civil law complexities and not on the drafting of the proceedings or pleading of the case itself the fees are not, as far as we can determine, out of line by any means with fees charged elsewhere.

(iv) *The appeal system is unrealistic.* If the costs of divorce proceedings for the petitioner are accepted as being too high, consider the plight of the respondent who feels that the conclusion has been erroneous,

the evidence inconclusive and who wishes to appeal from the resolution of the Senate. A contested divorce proceeding is extremely costly in itself but the machinery of appeal would surely deter all but the very wealthy. The fact that an appeal might be taken suggests that such a case, for reasons of law and/or evidence, would merit close scrutiny, preferably by persons with some legal training. It is perhaps not presumptuous to suggest that what with rigorous parliamentary and extra parliamentary duties it might prove very difficult to find suitable members of both Houses to establish the committee which would be required to consider the evidence on an appeal.

(v) *General criticism of procedure.* As a closing observation on the subject of procedure we should like to make a general criticism of the role of and administration or procedure by the Senate Divorce Committee and the various officials concerned.

The trend in most jurisdictions of the world is away from formalism. In this regard we note the language of Article 2 of the new Code of Civil Procedure of the Province of Quebec which provides

> "2. The rules of procedure in this Code are intended to render effective the substantive law and to ensure that it is carried out; and failing a provision to the contrary, failure to observe the rules which are not of public order can only affect a proceeding if the defect has not been remedied when it was possible to do so. The provisions of this Code must be interpreted the one by the other, and, so far as possible, in such a way as to facilitate rather than to delay or to end prematurely the normal advancement of cases."

In our view the exact reverse has been the practice of officials in charge of supervision of procedural matters in parliamentary divorce and not infrequently to the prejudice of clients. We do not wish to be more specific in this regard but suggest that consideration be given to a relaxation of the present formalism in the rules and application of procedure.

(b) *The current grounds are inadequate.* It appears to be a widely held view that the exclusive ground of adultery, having its origin in biblical injunction, is entirely unsatisfactory being, it has been argued, but a very minor cause of marriage failures. If we consider the currently well publicized concept of "the marriage breakdown" as warranting consideration, it would appear that adultery is in fact a minor contributor.

Under the current system it is open to the Senate to grant a divorce for any ground that it may see fit. The prospect of a divorce being granted for any ground other than adultery is, however, extremely remote, when one considers not only precedent but the fact that the Act under which the Senate is currently authorized to dissolve or annul marriages (1963 12 Eliz. II) provides that the officer designated by the Speaker of the Senate (i.e. the Commissioner) "shall not recommend that a marriage be dissolved or annulled except on a ground on which a marriage could be dissolved or annulled as the case may be, under the laws of England as they existed on the 15th day of July, 1870, or under the Marriage and Divorce Act, Chapter 176 of the Revised Statutes of Canada, 1952." The scope for recommendation under the latter restrictions would extend only to adultery of husband or wife (the so called "double standard" having been removed by the Marriage and Divorce Act of 1952) insofar as divorce is concerned. It would require great fortitude and a fine disregard for costs to take divorce proceedings under the current system on any ground other than adultery.

Our concept of the meaning and application of the recommended grounds is as follows:

1. *Adultery:* No change is recommended in the current law respecting this ground, save and except that the provisions of Section 5 of the Marriage and Divorce Act of 1952 should apply to the petition of the husband as well as to that of the wife. That section as it presently stands, and in the absence of such precedent as would require the application of similar provisions to petitions of the husband, quite properly provides that the court "is not bound to pronounce a decree declaring such marriage to be dissolved where the wife may have been guilty of adultery, of unreasonable delay in presenting the petition, cruelty towards the husband, having deserted or wilfully spearated herself from the husband before the adultery without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery."

2. *Cruelty:* We have perused with great interest the remarks of E. Russell Hopkins, Esq., concerning the interpretation by the courts of England of the word "cruelty" as a ground for divorce. The jurisprudence reviewed by Mr. Hopkins seems to indicate that the common denominator for all instances in which cruelty has been recognized as a ground for divorce in England has been actual or reasonable apprehension of possible damage to the health of the petitioner. He stated, however, that "legal cruelty" had been broadly defined in England "as conduct of such character as to have caused danger to life, limb or health (bodily or mental) or as to give rise to reasonable apprehension of such danger."

We wish to express concern as to the apparent scope recognized for cruelty or "mental cruelty" as a ground for divorce in certain of the states of the United States. With the greatest respect of English jurisprudence and our possible misinterpretation of the evidence of Mr. Hopkins, it is our impression that under English law a divorce could be granted in circumstances of mere reasonable apprehension of mental damage. We can conceive of actual mental damage resulting from a form of actual cruelty which could justify a divorce but wish to make clear an objection to extending the ground of cruelty to any circumstance in which mere apprehension of mental damage would be sufficient.

3. *Unsoundness of Mind*: Here we would subscribe to the concept recognized by the courts in England subject to the proviso suggested by Mr. Justice Allison Walsh in his evidence before the Joint Committee to the effect that should the Petition be taken by the husband, adequate financial provision be made for the continued treatment and welfare of the insane spouse. In essence this ground may be relied upon where either spouse is incurably of unsound mind and has been under care and treatment during a period of at least five years immediately preceding the presentation of the petition.

4. *Desertion:* Once again we would refer with approval to the review presented by Mr. Hopkins of the jurisprudence of the English courts concerning the meaning of the word "desertion" as a ground for divorce. The essential requirements would be the fact of separation and a forsaking. The latter element was expressed as being not so much a withdrawal from a place but from a state of things. There must be an evident will to desert in addition to the physical fact of separation.

The period of separation resulting from such desertion should, in our view, be of not less than three years duration immediately preceding the commencement of proceedings leading to a divorce.

5. *Conviction for certain indictable offences:* In Mr. Hopkins' review of English jurisprudence, the subject of conviction for offences resulting in one of the spouses being sent to prison was raised in the context of "involuntary

desertion." It was stated that under current English law said circumstances would not lead to a finding of desertion. In our view conviction to the following indictable offences should constitute grounds for divorce: sodomy, bestiality, rape, bigamy. In addition, we are of the view that any conviction to imprisonment of twenty years or more or as a "habitual criminal" should constitute grounds for divorce.

Jurisdiction: The foregoing paragraphs purported to provide cursory elucidation for Recommendation 1(a) of this brief. Items 1(b) and (c) dealt with issues of jurisdiction. Our views in this latter regard are as follows.

Ideally, one court, a court of the Province of Quebec, would not only have jurisdiction to decide whether or not satisfactory evidence has been established warranting the granting of a divorce but would also have, as vitally ancillary thereto, jurisdiction over matters of custody, alimony and settlement of property rights as well. Public policy of the Province of Quebec being opposed to divorce, we cannot foresee legislation emanating from the provincial legislature in the immediate future covering such vital matters. It is our view that in the absence of such provincial legislation the Parliament of Canada should and could enact legislation ancillary to these subjects in order to protect the rights and interests of those who are affected by a divorce granted with respect to persons domiciled in the Province of Quebec.

The Exchequer Court of Canada should be given exclusive jurisdiction in respect of all matters pertaining to divorce in this province and this should be accomplished whether or not Recommendation 1(b) is followed. In our understanding, it is now the view in certain ecclesiastical, political and legal circles of this Province that as valid divorces may be granted under the laws of Canada to persons domiciled in the Province of Quebec, it would be better to have the courts of this Province charged with determining evidence. While public policy might not extend, at this date at least, to admit of amendments or additions to the Civil Code to recognize divorce and provide for its consequences, it might be appropriate at some future date to authorize, by delegation of federal authority, a Quebec court to have concurrent jurisdiction with the Exchequer Court of Canada to hear and determine applications for divorce. The social, political and legal ramifications of this question have not been researched however and thus no specific recommendation can now be made in this regard.

Particular Problems of Quebec Petitioners: Divorce practice in the Province of Quebec presents certain problems which can only be overcome by ancillary legislation action of the Parliament of Canada.

The chief problem is how to validly provide for and secure a property settlement and payment of alimony subsequent to the divorce when under the law of the Province of Quebec the consorts are by Article 1265 of the Civil Code precluded from benefitting each other during marriage except under the terms of a marriage contract and, the husband's obligation of supporting the wife terminates upon the dissolution of the marriage.

In essence, no agreement entered into between the spouses relating to alimony or property settlement prior to the divorce becoming final can be relied upon as being legally binding although there are theories as to such justifiable considerations for such an agreement as "fault" which are as yet untested by the courts. There is jurisprudence sanctioning an advance agreement as to the contents of the respective halves of the community of property which would be dissolved upon divorce but this is of limited and particular application. Practical solutions to this problem involve varied ways and means of assuring that the husband will in fact execute a similar agreement after divorce, in notarial form, usually in order to be completely safe by reason of the possible gift aspect. Such procedure is fraught with risk even for the knowledgeable practitioner and pity

the poor female who, with an inexperienced practitioner at the helm, proceeds to a divorce only to find too late that there is no means by which she can oblige her divorced spouse to provide for her support. We have all heard of such cases.

It is certainly in the interests of innocent children, the consorts and society at large to ensure an equitable property settlement and assurance of post-divorce support. If the parties are themselves desirous of accomplishing these ends, should not the law serve such objectives. As long as the court is satisfied that the agreement is not really an ill-conceived inducement to one of the parties to take divorce proceedings constituting thereby a breach of public order, there should be no objection. There is certainly no objection on the grounds of public policy to an agreement being entered into after the divorce.

The solution to these foregoing problems might ordinarily lie with the legislature of the Province of Quebec, relating as it does to the field of property and civil rights but if the federal law of divorce is to be updated, it seems logical and equitable that these special problems be dealt with in virtue of the ancillary powers of the Parliament of Canada.

It is appreciated that the constitutional law aspects of enacting valid federal legislation dealing with the foregoing matters, not to mention inhibiting political considerations which we must realistically note, render the likelihood of prompt action unlikely. It is with the foregoing considerations in mind that we make Recommendation 1(d) providing for an appeal period of thirty days, the successful plaintiff being able right up to the last day of the period for appeal to desist from the judgment rendered. In this way a notarial agreement respecting property settlement and alimony matters could be concluded at a date which would be, in virtue of the effective date of the dissolution of marriage, after the dissolution of marriage. We believe that in this fashion, the greatest hazard for petitioners domiciled in Quebec would be resolved.

As a further recommendation, applicable while Recommendation 1(b) is not enacted, we would suggest that a great deal of hardship could be averted if, as part of the procedure in hearing current divorce applications, the Commissioner would assure himself that where minor children are involved, there is either a final judgement establishing custody and visiting rights or that the parties have at least entered into a written agreement respecting this matter. Many wives now proceed with petitions without such matters having been settled formally, proceeding on the belief that the husband has accepted the status quo in this regard and that no difficulties will likely ensue. In the vast majority of cases there is no difficulty but we are aware of a case requiring the use of habeas corpus which arose from a post-divorce dispute respecting custody which went to the Supreme Court of Canada for final disposition. The law of the Province of Quebec is to the effect that once a divorce has been granted, both parties in effect have legal custody and therefore neither can be said to be "detaining" a child illegally. Thus all a husband, or for that matter the wife, need to do in such cricumstances is remove a child without authorization from the factual custody of the other and there is no recourse save a direct action in custody which might take a considerable period of time before final disposition. As the Civil Code does not contemplate divorce, so the new Code of Procedure does not provide any machinery for an expeditious disposition of a post-divorce custody dispute. The child rarely benefits from such parental "tugs of war."

CONCLUSION

The "disintegrating marriage" is a very real if lamentable feature of the increasingly complex sociological relationships of this century. For better or for worse, divorce is provided for by the laws of the land. From the foregoing we trust it is evident that the law of divorce for the Province of Quebec requires

extensive and immediate revision. The casualties of divorce, the consorts and the children, suffer enough from the very circumstances which lead to applications for divorce and it would seem that the role of the law should be to provide a recourse where the bonds of matrimony have become insufferable, in the context of specific grounds, plus protection for the rights and well being, insofar as is possible, of the innocent. It should be guided by a concept of responsibility under which the guilty party, as it were, will not unwittingly be rewarded for his transgressions by termination of certain of the major obligations arising from marriage.

We would be pleased to provide such elucidation with respect to this brief as the Joint Committee may require.

Montreal, January 19, 1967.

APPENDIX "43"

Minority report submitted by Bernard M. Deschênes, Q.C., member of a Committee appointed by the Bar of Montreal to examine into the question of divorce.

BRIEF ON DIVORCE

This brief on divorce with its legal and social implications, more particularly with reference to the province of Quebec, is respectfully submitted to the Special Joint Committee of the Senate and House of Commons with the cognizance and consent of the Montreal bar. The proposals which are submitted hereafter cannot, however, be interpreted as representative of the opinions of the Montreal bar.

Bernard M. Deschênes, Q.C.

For the great majority of the citizens of the province of Quebec, the family is the sole valid basis of society and anything which may threaten the security of this social unit is essentially bad. That is why marriage is there considered indissoluble and divorce "a vinculo matrimonii" a destructive system.

Our law, however, recognizes the fact that unfortunately many couples are unable, for numerous reasons, to continue living together. That is why the system of legal separation is worked out in such detail. This system makes provisions for all the consequences of separation, especially the decision of the judge as to the custody of the children, rights to visit them and take them out, alimony for the spouse and children, and also the decision on matter pertaining to the separation by contract or even to judgment on matters of contractual obligations. It is the real divorce "a mensa et thoro".

However, the religious and social principles of a large proportion of our population urge us not to exceed this limit and thus allow the dissolution of the matrimonial bond. Although the consequences of the separation are usually harmful to the married couple, the children and society, we are far from convinced that remarriage is a worthwhile solution to this state of affairs. On the contrary, in most cases, the unfortunate results of the separation will be so much the more aggravated. The economic problems will be even more numerous! The children will be even more disturbed by the arrival of a third or even a fourth unfamiliar person in the family circle. All hope of reconciliation, slight as it may be in many cases, will disappear!

However, divorce "a vinculo matrimonii" does in fact exist for the people of Quebec. That is a hard fact. On the other hand, those who are not prepared to permit the dissolution of the matrimonial bond in their own cases should allow this right to those who do not share our religious and social convictions just as they are preparing to allow it in the case of purely civil marriage which will shortly be introduced into our legislation.

When we declare that divorce is an evil in itself, we are stating that it is an existing evil and one that we must confront in an effort to restrict it as much as possible. It is in this spirit that we propose the following recommendations:

1. The grounds at present recognized by the Canadian Senate should not be extended. We acknowledge that adultery is a serious offense which one of the partners may commit against the other. However, we are not prepared to accept

the objection which is often raised in order to justify the extension of the grounds for divorce, namely, that the proof of adultery is often faked or fabricated for the purpose of obtaining a divorce, and we refer you to the evidence given by the Honourable Judge A. M. Walsh on page 31 of your discussions where he arrives at the conclusion that "in only 5 or 10% of the total number of cases *may* the proof be faked".

2. In the province of Quebec, jurisdiction in the hearing of divorce cases should be delegated to the Superior Court. This is the tribunal which already normally deals with all proceedings of a matrimonial nature. The judges on its bench are familiar with the social background of the parties and represent the principles which motivate the population as a whole. They are certainly more fitted to pass judgment on this delicate matter than a judge from another province sitting on the bench of the Exchequer Court would be.

It is true that the Honourable Judge Walsh who at present hears a large proportion of the cases originating in the province of Quebec is a native of that province, and we should give him tribute for carrying out his duties with insight and understanding.

But if the jurisdiction for hearing the cases originating in the province of Quebec was entirely entrusted to the Exchequer Court, there would be no guarantee that only the judges of this court who are aware of our particular problems and of our matrimonial law in general would be called upon to pass judgement on those cases.

On the other hand, the Superior Court would have the immense advantage of being able to deal at the same time with the consequences of the divorce as it now does in cases of legal separation. The judge would then be called upon to decide on the family problem as a whole and he would certainly be in a better position to decide on the divorce himself if he was also aware of all the side-issues and all the consequences.

Furthermore, in our desire to find the best possible solution to this problem, we would add that if ever a real family court were created it would be advisable to place the jurisdiction of divorce cases in its hands too.

The opinion has often been expressed that the Quebec legislators would never accept such a delegation of authority to the Superior Court. We submit that to date no serious attempt has been made in this direction and that neither the civil nor religious authorities would shy away from the idea of studying the problem and accepting the responsibilities it involves.

3. As a corollary to this delegation of authority to the Superior Court, it would be necessary to introduce into the Civil Code the right to alimony in the case of divorce as in that of legal separation, but only until remarriage occurs. In fact, this right of one partner relation to the other does not apply in the case of a divorce pronounced by the Senate. However, our tribunals maintain the right of an allowance for the children.

4. The Federal Government should not legislate on divorce except in matters concerning the grounds for divorce. We are familiar with the opinion that the provincial legislature alone cannot make valid amendments to the Civil Code in the matter of marriage, except as regards the ceremony, but we are unable to endorse it. In any case it would certainly not be appropriate and it is more than doubtful whether such a law would be valid if the federal authority legislated on matters ancillary to the divorce such as the custody of the children, the alimony and the settling of the rights of ownership. It would definitely be more logical for the provisions of the Civil Code relating to legal separation to be extended to cover divorce cases.

APPENDIX "44"

SUBMISSION
to
THE SPECIAL JOINT COMMITTEE
of the
SENATE AND HOUSE OF COMMONS
on
DIVORCE
by
THE MANITOBA BAR ASSOCIATION

24th. January A.D. 1967

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I PREFACE

The Manitoba Bar Association at the invitation of the Chairman of the Joint Committee struck off a special committee to prepare a brief.

The members of the committee were:

Mr. Harold Kemp Irving, Q.C., Chairman
Mr. Joseph O'Sullivan, B.A. LLB.
Mr. Joseph J. Wilder, B.A. LLB.
Mr. Rudolph Anderson, B.A. LLB.
Mr. Stephen J. Skelly, LLB. (Hons.)

The Brief is presented as an unanimous report with an addendum by each member who desired to do so, setting forth his own definition of Grounds for Marriage Breakdown.

As is the case with most committee work this Brief though presented as an unanimous report was the result of some compromise of views on the part of each of the members. Each member had very strong personal views but where a conflict of ideas arose, a way was sought to obtain an agreement. We were not always successful. This Brief sets forth those areas where it succeeded.

III SUMMARY OF RECOMMENDATIONS

A. Prologue

B. That bona fide residence of the Petitioner be sufficient to grant the court jurisdiction to hear a petition for dissolution of marriage.

C. That a Federal Marriage Act be proclaimed wherein all civil ceremony marriages must be performed by a civil ceremony then the marriage may have a religious ceremony in a church of their choice.

D. That a dissolution of marriage be granted on evidence of a marriage breakdown.

IV SUGGESTED REFORMS

A. *Prologue*

As far back as 1946 as evidenced by the Minutes of the annual meeting of that year the Canadian Bar Association on a motion by Judge Fuller and seconded by Mr. Coyne adopted the following Resolution:

> That it is advisable to amend the Dominion Divorce Laws to give the courts in addition to such grounds as already existed for granting dissolution, the following grounds:
>
> (a) Desertion without cause for a period of at least three years;
>
> (b) Gross cruelty;
>
> (c) Incurable unsoundness of mind existing for at least five years;
>
> (d) Upon legal presumption of death

and that provision be made that the legislation should be effective only in such provinces as may, by legislation action, adopt the same.

That was passed in 1946 and we are now entering the year 1967, and we still do not have any changes in our Divorce Laws. The Law on Divorce which we now have is based on the Matrimonial Causes Act of England passed in 1857 with the amendments as they stood at July 15, 1870.

Meanwhile, in England, A. P. Herbert, was able to introduce a Bill which amended the grounds for divorce incorporating in 1937 similar grounds to those set forth in the Canadian Bar resolution of 1946 and in England there have been amendments since 1937 as required which is the usual course of most living legislation.

The act of 1857 though dead in England still rules here.

B. *Jurisdiction*

It is common ground that the concept of domicile as applied to Canada with each of the ten provinces being considered as foreign country, one to the other is a cumbersome concept. The concept of domicile developed in England where nationality and jurisdiction for divorce purposes are one, becomes divisive in Canada and distorts the original concept of domicile thus working an unnecessary hardship upon Canadians. It is equally true, that Canadian domicile as such, is a concept which cannot be administered as readily as English domicile and there are many difficulties inherent in a Canadian domicile, and it would tend to detract from those Provincial rights which have now become firmly entrenched in the Canadian Constitution. It is therefore submitted that residence be substituted for domicile in order to give jurisdiction to a court. It is also submitted that the simplest method of doing this, is to amend the present Divorce Jurisdiction Act, by widening the meaning of residence and by this simple method allowing those Provinces to which it is applicable to have the right to hear matters of divorce where bona fide residence is established. This would also further the cause of equal rights for women.

C. Marriage Act

It is further submitted that there is a present difficulty in Canada dealing with divorce grounds because the marriage itself is not a purely civil matter. It is a mixture of religious and civil matters. This is so because in the first instance, although the State grants the Licence to marry it recognizes marriage ceremonies performed by different religious bodies. However, the state only recognizes a divorce granted by it. The state in granting the divorce becomes a party to a breach of faith where a party marries under certain church vows and then allows the State to dissolve the marriage on grounds contrary to the marriage ceremony. This difficulty could be avoided it is submitted, if the marriage ceremony in Canada be changed by a Federal Marriage Act so that all marriages, in order to achieve validity under the State Laws, must comply with the State regulations as to marriage, and every marriage would need go through a civil ceremony before this marriage would be recognized by the State, and once this marriage took place, then each couple could, according to their belief, enter into a religious ceremony of their own choosing. The state then would in its' dissolution of marriage only deal with that ceremony over which they have complete jurisdiction, and they would dissolve the State marriage, and not be in the position of interfering with religious beliefs.

D. Grounds for Divorce

It is also submitted that the grounds for divorce be widened. It is the submission of the Committee that adultery and cruelty and desertion are only symptoms of difficulties in a marriage and that a healthy marriage could survive these symptoms and more and therefore need not in themselves be grounds for dissolution. But where there is a complete breakdown of a marriage, even if those symptoms do not appear, dissolution should be allowed. For it is agreed that a marriage relationship which fosters hate and immorality, which in turn breeds hate and immorality, in the children or others in the family, affects the community as a whole. This is not to say that allowing the dissolution of a marriage where it has broken down will be a panacea to the ills of the community, but it does recognize that this is an unhealthy situation which should be dissolved as it does not promote the health and welfare of the community as a whole.

The marriage breakdown itself is a concept that is very difficult to define. But a definition must be arrived at in order to allow the courts to adjudicate upon the matter. The definition we have adopted is that put forward by Douglas F. Fitch as set forth in the Canadian Bar Journal Volume 9 No. 2 April 1966 issue Page 92 and is as follows: Permanent breakdown of marriage shall be proven by evidence that either:

(a) The Petitioner and Defendant have separated and thereafter have lived separate and apart for a continuous period, except for a period of co-habitation of not more than two months that reconciliation as a prime purpose, of not less than three years immediately preceding the date of the granting of the decree and there are no reasonable grounds for believing that there will be reconciliation or

(b) 1. The Petitioner and the Defendant have separated and thereafter having lived separately and apart for a continuous period of not less than one year immediately preceding the date of the granting of the decree and there are no reasonable grounds for believing that there will be a reconciliation, and

2. The Defendant has been guilty of adultery or has during the period of not less than one year habitually been guilty of extreme cruelty.

All of which is is respectfully submitted by the Manitoba Bar Association.

Mr. Fitch's definition above referred to was agreed upon by the Committee as a whole, but it did not reflect the opinions of the individual members accurately and it was decided that each member would be allowed to add to the definition and their individual additions are appended hereto.

ADDENDUM OF R. ANDERSON

I would recommend that a marriage breakdown evidenced by a separation of one year, there being no reasonable grounds for believing that there will be a reconciliation, would constitute a marriage breakdown and the Court having jurisdiction could grant a dissolution of the marriage.

ADDENDUM OF S. J. SKELLY

I sincerely believe that marriage breakdown is the ultimate basis for relief in divorce actions. I do not think it is possible to give a precise definition of marriage breakdown. All we can say is that a marriage has broken down when it is no longer possible for the parties to live together as husband and wife and when the marriage is no longer any benefit to society and to the parties to that union (including the children).

Consequently I do not consider that the grounds for relief suggested in the brief constitute a definition of marriage breakdown, they are tests for marriage breakdown. The suggestion has the merit that it does not rely solely on the matrimonial offence and therefore brings relief to a larger number of people. I do, however, feel that given the normal interpretation of "separated" i.e. by consent, there is no provision to cover the situation where there has been desertion. I would suggest therefore, that either desertion for 3 years prior to the petition be added as a ground, or the separation ground be expanded to cover this.

(I would respectfully refer you to the brief which I have personally submitted to your committee where I have proposed a wider beakdown ground, paras. 18-28. There is also a discussion of the disadvantage of combining marriage breakdown and offence grounds, paras. 36-40, and a discussion of marriage breakdown, *per se*, paras. 43-56)

OFFICIAL REPORT OF MINUTES

OF

PROCEEDINGS AND EVIDENCE

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LÉON-J. RAYMOND,
The Clerk of the House.

First Session—Twenty-seventh Parliament 1966-67

1966-67

PROCEEDINGS OF
THE SPECIAL JOINT COMMITTEE OF THE SENATE
AND HOUSE OF COMMONS ON

DIVORCE

No. 17

TUESDAY, FEBRUARY 21, 1967

Joint Chairmen
The Honourable A. W. Roebuck, Q.C.
and
A. J. P. Cameron, Q.C., M.P.

WITNESSES:

(1) *The Unitarian Congregation of Don Heights, Scarborough, Ont.:* Reverend Kenneth Helms, F. Stewart Fisher, Barrister at law.
(2) Professor Julien D. Payne, Faculty of Law, University of Western Ontario.

APPENDICES:

45.—Resolutions passed at the 4th Annual Meeting of the Canadian Unitarian Council in Winnipeg on May 8, 1965.
46.—Brief by Professor Julien D. Payne.
47.—Article by Christopher Lasch entitled *Divorce and the Family in America.*
48.—Article by Douglas F. Fitch entitled *As grounds for divorce let's abolish matrimonial offences.*
49.—Article by Donald J. Cantor entitled *The right of divorce.*
50.—Article by B. D. Inglis entitled *Divorce reform in New Zealand.*
51.—Article by R. T. Oerton and A. R. Green entitled *Marriage breakdown.*
52.—Article by G. R. B. Whitehead entitled *Divorce reform in Canada.*
53.—Article by Neville L. Brown entitled *Cruelty without culpability or Divorce without fault.*
54.—Article by David R. Mace entitled *Marriage breakdown or Matrimonial Offense: A clinical or Legal approach to divorce.*
55.—Article by Patricia M. Webb entitled *Breakdown versus fault—recent changes in United Kingdom and New Zealand divorce law.*
56.—Article by William Latey, Q.C. entitled *Divorce Law in Australia—federal uniformity.*
57.—Article by W. Kent Power entitled *Marriage and Divorce—United Kingdom—Royal Commission on Marriage and Divorce—Some points of interest for Canada.*
58.—Article by Zelman Cowen and D. Mendes Da Costa entitled *Matrimonial causes jurisdiction: The first Year.*
59.—Article entitled *Divorce—Australian statute establishes uniform federal law for marital actions—Matrimonial Causes Act 1959, Act No. 104 of 1959 (Austl.).*

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1967

25894—1

MEMBERS OF THE

SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS

ON DIVORCE

FOR THE SENATE

A. J. P. Cameron, Q.C. (*High Park*), *Joint Chairman*

The Honourable Senators

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Belisle	Denis	Haig
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FOR THE HOUSE OF COMMONS

A. J. P. Cameron, Q.C. (*High Park*), *Joint Chairman*

Members of the House of Commons

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Cantin	Langlois (*Mégantic*)	Stanbury
Choquette	MacEwan	Trudeau
Chrétien	Mandziuk	Wahn
Fairweather	McCleave	Woolliams—(24).

(Quorum 7)

ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the House of Commons: March 15, 1966:

"On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—that a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee."

"By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, an Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19, An Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bills be referred to the Joint Committee of the Senate and the House of Commons on Divorce."

March 16, 1966:

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces a *vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce."

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"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce."

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Goyer, Honey, Laflamme, Langlois (*Mégantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams."

LÉON-J. RAYMOND,
Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:
March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of A Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative."

March 29, 1966:

"With leave of the Senate,
The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into and report upon divorce in Canada and the social and legal problems relating

thereto, namely, the Honourable Senators Aseltine, Baird, Belisle, Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig and Roebuck; and

That a message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—
Resolved in the affirmative."

May 10, 1966:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19 intituled; "An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief".

The question being put on the motion—
In amendment, the Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative."

J. F. MACNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

TUESDAY, February 21, 1967.

Pursuant to adjournment and notice, the Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3:30 p.m.

Present: For the Senate: The Hounourable Senators Roebuck (*Joint Chairman*), Aseltine, Belisle, Fergusson and Gershaw—5

For the House of Commons: Messrs. Cameron (*High Park*) (*Joint Chairman*), Aiken and McCleave—3

In attendance: Peter J. King, Ph. D., Special Assistant.

The following wtinesses were heard:

(1) The Unitarian Congregation of Don Heights, Scarborough, Ontario: Reverend Kenneth Helms F. Stewart Fisher, Barrister at law.

(2) Professor Julien D. Payne, Faculty of Law, University of Western Ontario.

The following briefs and articles are printed as Appendices:

45. Resolutions passed at the 4th Annual Meeting of the Canadian Unitarian Council in Winnipeg on May 8, 1965.

46. Brief by Professor Julien D. Payne.

47. Article by Christopher Lasch entitled *Divorce and the Family in America.*

48. Article by Douglas F. Fitch entitled *As grounds for divorce let's abolish matrimonial offences.*

49. Article by Donald J. Cantor entitled *The right of divorce.*

50. Article by B.D. Inglis entitled *Divorce reform in New Zealand.*

51. Article by R.T. Oerton and A.R. Green entitled *Marriage breakdown.*

52. Article by G.R.B. Whitehead entitled *Divorce reform in Canada.*

53. Article by Neville L. Brown entitled *Cruelty without culpability or Divorce without fault.*

54. Article by David R. Mace entitled *Marriage breakdown or Matrimonial Offense: A clinical or Legal approach to divorce.*

55. Article by Patricia M. Webb entitled *Breakdown versus fault—recent changes in United Kingdom and New Zealand divorce law.*

56. Article by William Latey, Q.C., entitled *Divorce law in Australia—Federal Uniformity.*

57. Article by W. Kent Power Entitled *Marriage and Divorce-United Kingdom-Royal Commission on Marriage and Divorce-Some points of interest for Canada.*

58. Article by Zelman Cowen and D. Mendes Da Costa entitled *Matrimonial causes Jurisdiction: The first year.*

59. Article entitled *Divorce—Australian statute establishes uniform federal law for marital actions—Matrimonial Causes Act 1959, Act. No. 104 of 1959 (Austl.).*

At 5.40 p.m. the Committee adjourned until Thursday next, February 23, 1967 at 3:30 p.m.

Attest.

Patrick J. Savoie,
Clerk of the Committee.

THE SENATE

SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

EVIDENCE

OTTAWA, Tuesday, February 21, 1967.

The Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3.30 p.m.

Senator ARTHUR A. ROEBUCK and Mr. A. J. P. CAMERON (*High Park*), co-chairmen.

Co-Chairman Mr. CAMERON: Honourable senators and members of the House of Commons, we have a quorum. Our first brief today will be from the Unitarian Congregation of Don Heights.

It will be presented by the Reverend Kenneth N. Helms, who was born in Peoria, Illinois, 31 years ago. He was educated at Illinois Wesleyan University; graduated from Bradley University in 1958 as Bachelor of Science in Sociology; and graduated in 1962 from Meadville Theological Seminary, University of Chicago.

He is President and Chairman of the Human Relations Council, Muncie, Indiana; he is a member of the American Civil Liberties Union; he is religious adviser to Unitarian university students at Ball State University, Muncie, Indiana, and he is minister of the Unitarian congregation of Don Heights, Scarborough, Ontario.

He is accompanied by Mr. Franklin Stewart Fisher, who was born in Toronto 33 years ago. In 1954 he graduated from the University of Toronto. He studied at Osgoode Hall; and he was called to the Bar in 1958. He is an elected trustee of the County of York Law Association, and Chairman of the County of York Legal Aid Program. He has been Director of the United Nations Couchiching Conference for secondary school students since 1962. He is partner in the firm of Ludwig, Fisher and Holness, and practises in the city of Toronto.

Co-Chairman Senator ROEBUCK: Mr. Co-Chairman, before we start the more serious proceedings, I have a letter from Mr. R. B. Guss, whom members will remember, who addressed us at the last meeting, with Mr. Palmer.

His concluding sentence is:

> Will you please express to Senator Fergusson and the other senators our sincere thanks for the courteous attention.

Co-Chairman Mr. CAMERON: The Reverend Kenneth Helms will present the brief now.

Reverend Kenneth N. Helms, Minister of the Unitarian Congregation of Don Heights, Scarborough, Ontario: Honourable co-chairmen and members of the committee, before reading the brief, may I say something as to the background? Mr. Stewart Fisher, a member of my congregation, was the recipient of the proceedings of the work of this committee. He and I became interested in the

topic of divorce reform. We brought this to the attention of the members of the congregation. A small committee was established to study the proceedings and present a report to the congregation. At that time we received unanimous support for the brief now being presented.

Appended to the brief you will find the 1965 Unitarian Council's proposals on divorce reform, which were presented at the fourth annual meeting of the C.U.C. It is comparable in background, and I received permission of the Chairman of the C.U.C., which represents all Canadian Unitarian congregations, to append it to our brief, because of the similarity and the parallel in the interest expressed.

Unitarianism

While identified with the great evolution and reform that has taken place in all Christian churches since the Protestant Reformation, Unitarianism has carried the idea of the supremacy of the individual conscience to a logical conclusion, namely: by creating a religious movement that permits the individual to come to his own conclusions which are meaningful to him concerning the validity of God and the nature of man, without the assistance of dogma, creed or outside authority.

The result has caused Unitarians to evolve outside of Christianity in the direction of a more humanistic, scientific and democratic approach to religion.

Theologically, Unitarianism, as a term, is as ancient in its claims as monotheism itself, and its historical premise of the Unity of God was a decisive issue in the earliest doctrinal controversies within the Christian church.

Denominationally, Unitarianism came to prominence in the wake of the successive waves of humanism, rationalism, and reform that swept Europe in the 16th Century and has been a recognized denomination and received religion since the middle of that century.

Recently, Unitarianism has devoted its primary religious activities to the ethical and moral implications of the Naturalism, Humanism and Rationalism that have informed its spirit and that underly its present reliance upon the scientific method, as that method best suited to human inquiry, and democracy as the finest embodiment of those principles best suited to human institutions.

Co-Chairman Senator ROEBUCK: Would you mind giving us some information as to the numbers of either churches or congregations in Canada?

Rev. HELMS: Yes. The number of constituent members of Unitarianism in Canada at this point is 15,000. That is across Canada. It is not, as you can tell, a particularly large denomination.

Co-Chairman Senator ROEBUCK: How many churches would that be?

Rev. HELMS: I am sorry, but I am not sure.

Co-Chairman Senator ROEBUCK: Thank you.

Rev. HELMS: I would like now simply to summarize, or give you the summary as indicated on page 2 of this Unitarian Brief, and then I will turn the remaining portion of the brief over to Mr. Fisher.

This is the summary of the brief:

1. Support of marriage breakdown principal as opposed to matrimonial offences and grounds principal.
2. Test of marriage breakdown is not judicial enquiry but the judgment of the husband and wife as evidenced by consent or separation.
3. The question of divorce should be determined not by the attempt to preserve the institution of marriage at all costs but is to be deter-

mined in the light of the civil rights and liberties of husband, wife and family.

Co-Chairman Senator ROEBUCK: Thank you. Mr. Fisher?

Mr. Franklin Stewart Fisher: Thank you, Mr. Chairman. I would like to proceed now with the operative part of the brief. I might say that we did, after a great amount of documentation, attempt to confine this brief to the essential points in order to make it a real brief. I might say that it was also our intention not to come before this group, if we did not feel we had anything original to contribute. But after reading the briefs that were submitted to you we feel that the significant point of what we are trying to say to the committee is that we have found the briefs to accentuate the idea of the preservation of marriage at all costs. And this is a simple statement, I think, of the differences we have found. Our concern is with the individual liberties of the husband, wife and family. That has been our paramount consideration and, hence, the reason for our brief.

I would like to read from the brief, starting at page 3.

We, the Divorce Reform Committee of The Unitarian Congregation of Don Heights, owing no absolute allegiance to any authoritative body, creed or dogma and governed as free men and women by the dictates of our own conscience, our reason and the accumulated wisdom of our race, deplore the fact that man is in many cases imprisoned by the institutions that he has created and thinks in terms of reform within these existing institutions rather than questioning the validity of the institutions themselves.

I might add that I recently gave a talk on marriage, which I entitled "Of Human Bondage." The significance of that statement is the fact that as human beings we have institutions, and such still exist, which we created that are of human bondage and often, while we think in terms of reforming a particular institution, it seems to me that we must examine the very essence of the institution itself.

This is what we are requesting in the brief:

Realizing that the present divorce laws and nearly all of the submissions to the committee have as their paramount theme the preservations of marriage and the family, and as a result have been, in many cases, callously indifferent to the civil rights and liberties and the welfare, growth and happiness of the individuals within the marriage and family;

Acknowledging that where hate and fear have replaced love in a family relationship that it is in the best interest of the spouse, the children and therefore society to end the relationship—and this has been emphasized by many of the briefs submitted;

Aware that the present archaic laws relating to divorce do not reflect the change in the economic structure of the family and the changing religious and sexual attitudes of Canadians and are an interference by the State that is oppressive and seriously prejudices the happiness and well-being of men, women and children throughout Canada;

Realizing that the separation of Church and State is historically to be preferred and that the individual in a pluralistic and free society, whether part of a majority or a minority, must be free to follow the dictates of his own conscience with respect to legislating divorce laws and making use of them—and, interestingly enough, historically we have felt that marriage has been a religious institution which, in a pluralistic society, as most of your briefs have indicated, is an anachronism and something which should not continue. In unitarianism we

have found, by freeing individuals to follow the dictates of their own consciences, you can evolve into a sort of freedom situation, and we say that the same thing is true of marriage. If you allow individuals to create their own relationship, you will get the type of freedom in relationship which we are trying to get;

Recognizing that state interference in divorce is justified if it attempts to insure that none of the individuals in the family become wards of the state;

Therefore: We are proposing that, in legislating with respect to marriage and divorce, the paramount considerations must be:

1. The civil rights and liberties of the individual members of the family rather than the tendency to preserve the institution of marriage at all costs.

2. The enforcement of the obligations and responsibilities of spouses in order to prevent members of the family from becoming wards of the state.

Therefore, with respect to dissolution of marriage we are resolved that:

1. Subject to the question of support as hereinafter set out, marriage shall be dissolved upon the consent of both parties.

I have yet to find an answer to the proposition that, if two adult human beings wish to dissolve their union, the state has any interest to maintain it. I am referring, of course, to a couple without children. Children obviously complicate matters.

It is an unnatural interference with the cvil rights of individuals for the state to attempt to preserve a marriage that, on the voluntary admission of both parties, has broken down.

Of course, that is the principle of marriage breakdown that we are supporting.

2. Upon proof by either the husband or the wife that the spouses have been living separate for a total period of two years.

Very briefly, we found our real problems in coming to a decision in this area, and, if we are consistent, we consider this problem in the light of civil rights of the husband and the wife and we say this: If one partner of the marriage says he does not want to preserve the marriage and the other party says that she does, the feeling is that the—let us say it is the husband who does not want to preserve the marriage—the feeling is that it is his civil right not to want to preserve it. However, if the wife wishes to preserve the marriage, her civil rights have to be respected as well.

We felt that a two-year period was sufficient to allow the spouse who wished to preserve the marriage to attempt to keep the marriage going, by counselling or whatever means, was desired. However, if this is not possible, you do not have a marriage if you have one person who still refuses to go on with the marriage, and, therefore, you must dissolve the marriage. This seemed a fair type of compromise.

The next heading is "Support".

Support

3. Upon application to the court for dissolution, the court shall order the equal division of all property acquired during marriage by either spouse.

This is on the basis of a partnership relation. Any assets acquired in a partnership are, on dissolution, split in two, and I might say that the Ontario Government in its Law Reform Commission is attempting to do exactly this.

4. No dissolution of the marriage shall be granted unless and until the court is satisfied that arrangements, for the care and upbringing of every child of the marriage and of the family who is under the age of sixteen years, have been

made and are satisfactory or are the best that can be devised under the circumstances.

5. With respect to the support of the wife, the following factors should be taken into consideration:

(a) Whether she has the custody of the children.

(b) The wife's assets, income and ability to support herself.

(c) Payments by the husband during a period of rehabilitation of the wife.

Very simply, our feeling was that it is not in the interests of husband or wife to have the situation that now exists, where a husband will have to pay for an indefinite period or for all of his life for the support of the wife. We picked on the term "rehabilitation," because in fact that is the type of payment which a husband should be responsible for to attempt to rehabilitate the wife to take a useful place in society.

6. It is in the interest of the state to enforce the collection of support on behalf of members of the family. This is, in fact, one of the more serious things not being done today. In the City of Toronto there is something like $10 million paid out for the support of deserted wives and children and something like $56,000 being collected from the husbands who have the obligation to support them, and it is obvious we are not doing this as a society. I as a taxpayer have an objection to this. If I have to pay for somebody else's children who have become wards of the state I object to it.

Counselling

7. Skilled counselling services shall be made available for persons prior to marriage to include responsibilities of marriage, budgeting, sex, child care and family planning.

I might say this is one of the most important aspects of our brief. It is something which is entirely neglected, this type of counselling before marriage, which is so necessary.

8. Counselling should be available at every stage of the marriage.

I might add that there should not be compulsory counselling, which some have suggested, but the type which is available for those husbands and wives who wish it.

Again, as I say, and as Rev. Helms said, we have added as an appendix a resolution passed by the Unitarian Council that is similar to ours, but in fact we did not use it when we drew up our brief. We did not have any recourse to that. I think it goes to show that Unitarians seem to think alike in this area of divorce reform.

That is the conclusion of the brief. The thing we are attempting to show as being significant about our brief is that we must consider in any talk of marriage and divorce the civil rights of the husband, wife and children. That is the most important aspect of marriage.

Co-Chairman Mr. CAMERON: Thank you for your very interesting and informative presentation. It is our usual practice to have the members of the committee ask questions, if they are so inclined, and we trust that you will follow this pattern and try to supply the answers to the questions that are asked.

Senator BELISLE: With reference to page 5, paragraph 5 under (c), could I ask the honourable gentleman how long does he feel that a payment should be made towards the rehabilitation of the wife?

Mr. FISHER: This should vary in each instance. I think in the type of divorce which I see where the husband and wife sit down and work out the situation, the

husband would pay towards the tuition of the wife at a university or at a teachers' college for a year so as to allow her to take on high school teaching. In most instances we are not in a position to have the wife stay home and look after the children. That is not possible in our society. Most husbands do not make that kind of money. So we try to work it out that the wife becomes a self-supporting member of society so that she can take her own place in society.

Rev. Mr. HELMS: I might say that the 1965 resolution of the C.U.C. makes mention of the concept of domestic courts, which I think is what we are assuming in our presentation, but we felt it was not in keeping with the brief for us to enter into procedural arrangements or the arrangements envisioned by a court to carry out the proposal. But it does raise the concept of the domestic court where it would have to be considered from the point of view of making the spouse a self-supporting member of society.

Senator FERGUSSON: Referring to page 5, also, Mr. Chairman, in paragraph 3 there is a provision for an equal division of all property acquired during the marriage at the time of the application for dissolution. Would this mean that all property that either the husband or the wife had acquired should be divided? What would be the situation if one of them had inherited a large fortune? Should that be divided equally at the time of this dissolution?

Mr. FISHER: This is a difficult question. I think our feeling was that it was really what was acquired through the joint labours of the husband and wife rather than any windfall that might accrue to either one of them. This does not mean that the inheritance would not be made use of, because it certainly would be used for the support of the children. But really what we had in mind was whatever accrued to the partnership as the result of the toil of the two partners working together. I think we had more in mind the fact that the wife normally works in the home and certainly is not earning any salary, but she is certainly entitled to half of what the husband is earning.

Senator FERGUSSON: I quite agree, but I wanted clarification.

Mr. AIKEN: I have a question based on the same section on page 5. Would it be fair to say in respect of items 3, 5 and 6 that they are very general in nature and that they would be very difficult to work out in practice as part of divorce proceedings?

Mr. FISHER: Well, in fact as I understand it, 3, 5 and 6 come within the domain of the provincial government and they certainly do so in Ontario at the present time. There they have got out a very large volume of recommendations in this area, and in fact whether this committee intends to deal with anything more than the dissolution of marriage, I don't know. But I agree that the provinces are charged with the question of property, and I would think that this is more in their domain at the present time under the jurisdiction of the British North America Act.

Mr. AIKEN: Section 4 seems to be reasonable and it seems that this committee could deal with this as part of the divorce legislation. I also had a question on item 3, but I don't know how this could be carried out in practice—that the court could order equal division of property acquired during the marriage. It would be difficult to decide what had been acquired during the marriage as opposed to that which had been acquired before the marriage. Anybody who has had dealings with succession duties knows how difficult it is to try to show what had been acquired by the husband and by the wife individually. I quite agree with the comment that in practice this might prove to be extremely difficult. Likewise in paragraph 6 where you deal with enforcing the collection of support on behalf of the family. Could this be done other than in the provincial domain?

Mr. FISHER: We had a suggestion to show how this could be done. For example, there is no reason why somebody should not have a red social security card which would be presented on taking up employment, and this would mean an automatic deduction by the employer for the support of the children. You might say that this is an interference with the person's liberty, but I also consider it an interference if I have to pay for somebody else's children. I know I am paying today for a great number of children which the state is having to support.

Mr. AIKEN: Could this be done on a national basis?

Mr. FISHER: Yes. It has been my experience that a husband on having a judgment rendered against him does not mind, as a rule, supporting the children, but he objects to supporting his wife and he leaves for another jurisdiction in perhaps Alberta or Saskatchewan, and in my experience such judgments have been almost impossible to collect.

Mr. AIKEN: I can see the desirability of having some agreement on methods of collection. I know the Province of Ontario is moving towards assignment of these judgments by the deserted wife in a manner in which the province can enforce collection, but I find it difficult to think that we could do anything with it under federal legislation.

Mr. FISHER: I was trying to press upon the Provincial Law Reform Committee that they should make a presentation to this group. It seems to me they were talking about it. I don't know whether they have made a presentation or not, but they were thinking of making a presentation along these lines.

Mr. AIKEN: Again in the field of counselling, it would give rise to one of these joint jurisdictional problems that really, I feel, belong to the province except at the point where divorce becomes a possibility.

Mr. FISHER: We discussed this but found it was difficult to separate them. They all seem to go together. This applies particularly when you consider the individual liberties of the partners to the marriage.

Mr. AIKEN: Thank you for pointing out to me what the difficulties are here. I would appreciate it if there were some way of handling these suggestions, particularly the portions with regard to support. I have had experience in the family court and I agree entirely that there is not one in 20 of these orders that are actually collected if the husband does not want to pay. He just takes off and very freely takes employment somewhere else, even within the province, or outside the province, if they bother him too much.

Mr. MCCLEAVE: I wonder with regard to this property division if any thought had been given to a division of the debts upon dissolution of the marriage.

Mr. FISHER: I think the same thing applies.

Mr. MCCLEAVE: That they divide them equally?

Mr. FISHER: Well, it would seem to me if you are dividing the assets you would have to use them to get rid of liabilities.

Mr. MCCLEAVE: However, my main area of questioning is the conciliation field, so I do not let down the third-year law students at Dalhousie University who are preparing a brief feverishly for us, Mr. Chairman, and hope to have it here before the conclusion of our hearings.

It seems to me you do not make enough allowance for the fact that one party may be less willing to break up a marriage than the other, and the less willing one being able to persuade the more willing one to enter into the conciliation process.

Mr. FISHER: We have felt, again, the problem of there being any need for the marriage at all if one party is not interested. In other words, marriage, it seems to us, is the continuing consent of both parties to live together under that arrangement. If one party decides that he is not going to exist in that relationship, it just does not really matter what the other person thinks, as long as they are given the opportunity and their rights are well enough protected to give them sufficient time to persuade the errant spouse to come back to the family.

Mr. MCCLEAVE: I think the experience in the California and Los Angeles conciliation courts is that if you can possibly get both sides to agree to go to the counselling or conciliation table, the chances of saving the marriage are as high as 47 per cent. Once you go beyond that stage and writs and petitions are issued, the chances drop very rapidly.

Mr. FISHER: Our suggestion is that in the two-year period there would be a chance for it to be made available.

Mr. MCCLEAVE: If one party refused, this method would not really be effective.

Mr. FISHER: If you had some arrangement whereby if these parties took counselling they could speed up the two-year period, that is the only way perhaps you could get a reluctant spouse to go to counselling. Our belief is that you cannot coerce people to go to counselling.

Mr. MCCLEAVE: May I ask you if you, in your own ministry, have felt you have been able to avert the breakup of marriages by counselling yourself?

Rev. Mr. HELMS: I think it is possibly true that counselling, to an extent, would avert these breakups. It very much depends on the severity of the problem that is brought to a counselling situation. If it has been going on for a long time and is highly aggravated, then the possibilities are less if a great deal of animosity has been created. If they find themselves faced with particular problems and are in ruts, and it is possible to get them out of the ruts and that their thinking be realigned in a more open way, and through this kind of opening in counselling they themselves realize the possibilities of marriage—not really through any real, positive action by a minister or a counsellor, but just getting them out of the rutted ways of looking at it, you try to get them to open up communications so it does not terminate in a divorce. But I have not found any way of assuring, nor am I interested in assuring the continuation of an old marriage through persuasion. I think one of the most sobering effects to people thinking about divorce is a good, honest talk with a lawyer. It costs too much and the stakes are too high. They have to divide their debts and face accusations of adultery, and they say, "Well, maybe we will think about it twice." However, I am not saying this is really a healthy situation.

Mr. MCCLEAVE: I hoped we would have one group of witnesses before us who would never mention the word "adultery," but you have just destroyed my hope.

Rev. Mr. HELMS: That is the law as it stands, and I would much prefer to see it changed.

Senator ASELTINE: Does not paragraph 3 raise a constitutional question? Under the B.N.A. Act property and civil rights are both under the jurisdiction of the provinces.

Co-Chairman Mr. CAMERON: Mr. Aiken was discussing that with the witness.

Senator ASELTINE: I wondered if you considered that when you made this recommendation.

Mr. FISHER: Yes, we have, but feeling it was all so much part and parcel, we had to cover the whole spectrum of marriage. That included property. I agree it is a provincial matter, but we understand the province is making this particular recommendation.

Senator GERSHAW: With regard to your paragraph at the bottom of page 4, do you not think it would make divorce altogether too easy? It just says if both consent to it, and then you speak of civil rights. Is it not primarily the duty to make the marriage a success? Might it not just be a temporary disagreement that would resolve itself and the marriage could go on? It seems to me it is making divorce a little too easy.

Mr. FISHER: The feeling now is you have at the present divorce by consent. That is, in fact, what we operate under now. The only trouble is that consent involves some discussion of adultery between the husband and wife. It does exist at the present time.

As far as making divorce too easy, I would answer that by saying that divorce statistics on the rise are not necessarily a bad thing. I would think, on the contrary, they may very well mean that two people who are in human bondage are working at a marriage, and they are allowed to be free to attempt to establish a decent relationship. Divorce statistics show the second marriage has a far better chance of success than the first because the first was usually contracted by very young people for the strangest reasons. People who marry for the second time do it soberly and with a great deal of thought. In fact, the third point we are making is that it is not up to the state to interfere and decide whether marriages are being gotten out of easily or not. It is a matter for the individuals themselves to decide, whether their relationship is going to continue or whether it should end. The state really has no right to interfere. In other words, we are not suggesting the Government has a right in this matter. We say they do not have a right in this matter of interference with two adult individuals, where there are no children, to say they should stay married if both do not want to. I have yet to hear any reason why these two human beings should stay together.

Senator BELISLE: I think I heard a while ago one of the witnesses expressing a concern for what is real religious bondage. I wonder if the honourable gentleman would say what he is referring to on page 5 when he mentions "counselling." Is he referring to religious or legal counselling? Are you referring to counselling by the courts or counselling by the churches?

Rev. Mr. HELMS: The expression "human bondage" has been added to the text.

Senator BELISLE: I think Mr. Fisher used the word "bondage".

Rev. Mr. HELMS: Whether or not this counselling had to be worked out directly from the religious standpoint?

Senator BELISLE: Yes.

Rev. Mr. HELMS: I would have to say the words "human bondage" are not my own in this instance. Again, what I think both you and I and the congregation felt was that we were dealing with this matter more directly from the point of view of the continuation of the marriage by the partners, and we were not getting into court arrangements. What I intended was counselling services and the use of those services in the marriage early on. We have family counselling service agencies available to the community today. I am less interested, quite frankly, in whether that counselling comes from a qualified minister, if he is engaging himself in consultations on marriage and marital problems, or from a secondary agency. The important thing is that the man be qualified, and that the people who receive this kind of counselling be able to receive it, and have it

provided. So, I cannot choose between religious counselling and secular counselling. The responsibility for and the availability of the counselling are the important things. I cannot distinguish between them.

Senator BELISLE: In other words, you feel that counselling by the Department of National Welfare, for example, would be the equivalent of counselling by a recognized minister?

Rev. Mr. HELMS: Frequently, sir, it is superior because those people are better qualified—although, not necessarily. But, if there are qualified people in these secular arrangements so-called, then the advice given by those people, because of their very educational qualifications, is superior to the advice given by a minister.

Mr. FISHER: I think that the individual should have a choice as to whether he goes to the minister of his own church, or to somebody quite apart from the Church.

Senator BELISLE: Do you not think that a counsellor from the Department of National Welfare would have only a degree in social welfare, while a minister would have much more than that.

Rev. Mr. HELMS: Yes, he has a B.D., or what is generally known as the degree of Bachelor of Divinity, and I am not sure what that qualifies him for. Again, I think the important point is one of qualification, and I say that in the instance where a minister is qualified for marital counselling, or any other kind of counselling, it is important in the ministerial discussion or counselling session that increasing emphasis be placed on the fact that if the minister finds himself in the area of psychiatric counselling or marital counselling that is beyond his capacity, then he should refer the matter. He should not deal with anything that is beyond his capacity. Therefore, the concept in any counselling should be one of qualification. If the matter requires referral to a secular agency then it is important that that should be done. I think it is important for the minister himself.

Senator BELISLE: Then my last question is: Who should pay for it?

Rev. Mr. HELMS: Who should pay for what?

Senator BELISLE: The counselling?

Rev. Mr. HELMS: As it stands right now, in the instance of most ministers, there is no pay, so the state may be assured that ministers do not get paid for this kind of counselling. When it comes to secular agencies, like the Family Counselling Service and many others, I suppose they are already provided for. Any extension of their funds would have to come from taxes or other sources of revenue. It might be interpreted as a broadening of some agencies, particularly those concerned with marriage and divorce, particularly in those matters where referral from family counselling is necessary. We are short in the area of qualified psychiatrists who are able to get into the backgrounds of people who are in marital trouble. There ought to be supplementary provisions to cover this area of marriage, and the money for that will have to come from taxes. Tax money is being allocated to other less important matters. At the present we have no proper procedure for the alleviation of the distress of people with marital problems, or of dealing with it intelligently.

Co-Chairman Mr. CAMERON: Are there any other questions? If not, I will ask Senator Roebuck to say something at this time.

Co-Chairman Senator ROEBUCK: I should like to say something at the conclusion of this most interesting presentation. Mr. Fisher, I think you were entirely right when you decided to come and not repeat what somebody else has

been saying, but to give a real presentation of your own thoughts. You have given us a very great deal to think about.

When you appeal to us on your basic principle of freedom you ring a bell, of course, in both the House of Commons and the Senate. We take no second position to anybody in our love for freedom, or feeling that too much freedom usually has to be cured by more freedom, but we always append to that the thought that freedom must be limited by the equal freedom of all others. If we could bring greater freedom to the marriage relationship, and to all those people who are engaged in it, we would do a great service for the people of Canada.

The details are another matter. You will agree with me, I think, that we as a committee have a very difficult problem on our hands. But, as I have said before, you have really given us something to think about. On behalf of the committee I thank you for coming here. We appreciate this demonstration of your public spirit in coming here and giving us of your time and your thoughts, and those of your congregation.

Co-Chairman Mr. CAMERON: I should like to introduce to the committee Professor Julien David Payne, who was born in Nottingham, England, on February 4, 1934. Professor Payne is married and has two children.

He attended the Faculty of Law of King's College, University of London, England, as an undergraduate from 1952 to 1955. He was awarded a research scholarship, and undertook graduate studies at the same college from 1955 to 1956.

From 1956 to 1960 he served as a lecturer at Queen's College, Belfast, Northern Ireland. From 1960 to 1963 he served as Assistant Professor at the University of Saskatchewan. In 1963 he was appointed a member of the Faculty of Law of the University of Western Ontario, where he presently holds the position of Associate Professor. In 1965 he was appointed as Research Associate to the Ontario Family Research Project, and he is still serving in that capacity.

He was called to the Bar, and enrolled as a solicitor of the Province of Ontario, in 1965. I might add that he is also the editor of the second edition of *Power on Divorce.*

Professor Julien David Payne, Faculty of Law, University of Western Ontario: Mr. Chairman, I think that having regard to the fact that time is of the essence, it would be easier on the committee and myself—

Co-Chairman Mr. CAMERON: Just a minute. I forgot to state—and I was instructed to do so—that Professor Payne would appreciate it if members of the committee would ask questions as he goes along, if questions arise in their minds, rather than waiting until the end. Professor Payne will be glad to answer questions at the end of his presentation, but if during the course of it questions arise in the minds of the members of the committee then I would ask them not to hesitate to ask them of the Professor.

Professor PAYNE: First, I should like to say that I am here in a personal capacity. I do not represent any organization or association.

Mr. MCCLEAVE: Perhaps by the time you are through you will be able to write a third edition of *Power on Divorce*, and include in it a lot of new grounds.

Professor PAYNE: I should perhaps state that if I did rewrite *Power on Divorce* I would not be motivated by the financial consideration. The financial consideration alone would be sufficient reason to recommend no change in the Canadian divorce laws.

Perhaps I could be allowed to raise these thoughts, and explain my reasons in answer to questions from the committee. If that is agreeable perhaps we can proceed more quickly than we otherwise would.

The first matter to which I direct my attention in this report is grounds for divorce, and I think the wisest procedure is to take each in turn. I would suggest, therefore, that you refer to page 29. By way of generalization let me say that the first 28 pages of this report or brief discuss general considerations which constitute the premise upon which I propose certain recommendations for change.

The first recommendation is that adultery be retained as an independent ground for divorce. Unless any questions are directed to me I think it unwise to devote too much attention to the reasons for individual recommendations. Therefore, in the absence of questions I will proceed to the second ground for divorce, which is rape, sodomy, or bestiality.

These grounds are presently recognized in Canada in several jurisdictions, but they are available only in the case of a wife's petition. I would suggest that they be made available at the instance of either the husband or the wife—that is to say, that either spouse should be entitled to petition for divorce on proof of rape, sodomy or bestiality committed by his or her partner.

To the issue of cruelty as a ground for divorce I will devote more attention because it does raise some very substantial questions. At the present time the concept of cruelty in matrimonial cases in Canada generally conforms to the definition adopted by the House of Lords in England in the case of *Russell v. Russell* [1897] A.C. 395. In that case it was said that in order to establish matrimonial cruelty in England for purposes of divorce, also for judicial separation and ancillary remedies such as alimony and maintenance, it was essential to establish injury to health or reasonable apprehension thereof.

In the first part of my brief I suggest that this definition be extended to include intolerable and insulting conduct, and that in all cases where cruelty is alleged in a petition for divorce the court should be satisfied that the party seeking matrimonial relief cannot be expected to live with the other spouse after he or she has been guilty of the intolerable, insulting or injurious conduct alleged in the petition.

In suggesting this extended definition of cruelty, I would make reference to the legislation which presently exists in the provinces of Alberta and Saskatchewan, where, for purposes of judicial separation and alimony, cruelty is defined by statute in a manner not dissimilar to the manner that I recommend.

In Alberta and Saskatchewan, cruelty is defined to include injury to health and reasonable apprehension thereof, and also insulting or intolerable conduct, being of such a nature that renders marital consortium impossible.

I am not actually quoting from the statute, I am paraphrasing its contents, and it is referred to in page 33 of the brief.

The second issue concerning the definition of cruelty is that of intention, and here I favour adopting the attitude which was favoured by the English House of Lords in the case of *Gollins and Gollins* [1963] 3 W.L.R. 176, which has been brought to the attention of this committee on previous occasions. In that case the House of Lords emphasized that in cruelty the primary concern of the court should be directed to the consequences of the conduct complained of rather than the culpable intent of the respondent. I would suggest that any definition of cruelty should conform to this principle established by the House of Lords.

Co-Chairman Senator ROEBUCK: In that case the husband would not go to work, and the wife supported him for a considerable length of time until at last her health failed her. Is that not so?

Professor PAYNE: I think the principle defined is clearly that the culpable intent of the party is not all important, that the all important consideration is the effect of the conduct complained of on the petitioner—is it intolerable, does it render marital consortium impossible? If so, then the courts are inclined to find

cruelty, notwithstanding the absence of wilful or malicious misconduct, or indeed intentional misconduct.

Perhaps I might add that the decision in *Williams v. Williams* [1963] 3 W.L.R. 215 applies the same principle as *Gollins v. Gollins* in holding that insanity may constitute no defence to a charge of cruelty. I think this is reasonably clear. Cruelty as a ground for divorce exists not to punish the offending spouse but to afford protection to the innocent spouse.

Mr. McCLEAVE: Why argue there should be a statutory definition, when it seems to me that the *Gollins* case and the *Williams* case and other recent cases, at least in the English jurisdiction, form a pretty broad ground within which one could work?

Professor PAYNE: I felt in presenting the brief it was important to propound ideas rather than to draft any form of legislation. Certainly it may be rather difficult, and perhaps impossible, to incorporate the effect of *Williams v. Williams* in a statutory declaration. On the other hand, I believe that if one wishes to adopt the proposal I have submitted in defining cruelty in a manner extending beyond the definition of *Russell v. Russell*, then statutory legislation is vital. The courts could not expand the definition in *Russell v. Russell* without statutory authority so to do, and on this particular issue I think a statute would be required and it would have to indicate whether cruelty went beyond injury to physical or mental health.

Mr. McCLEAVE: Then you say that *Russell v. Russell* has been frozen as a statutory definition?

Professor PAYNE: In Canadian law I think the position is that the *Russell* formula is applied in all cases where matrimonial cruelty becomes an issue. The only exceptions known to me are in the provinces of Alberta and Saskatchewan where the statutory definition goes beyond *Russell v. Russell* to include not only injury to health, but also intolerable and insulting conduct, being of such a nature as renders continuance or maintenance of marital consortium impossible.

Co-Chairman Senator ROEBUCK: Is it not in the *Williams* case that the judge said that cruelty is not possible of definement, but it was possible to recognize it when one sees it?

Professor PAYNE: I think that is true. It is difficult to define cruelty, but I think the example in Alberta and Saskatchewan clearly indicates that some aspects of this particular concept can be set out in statutory form.

Co-Chairman Senator ROEBUCK: I suppose not to exclude other ideas of cruelty?

Professor PAYNE: That is the case. It would not be a comprehensive definition; it would build on the common law of Canada and of England, and it would qualify that common law if my proposal were acceptable by expanding the common law definition of cruelty as set out in *Russell and Russell*, where cruelty is confined to cases involving injury to physical or mental health.

Co-Chairman Senator ROEBUCK: Why do you think *Russell and Russell* is binding on us in Canada?

Professor PAYNE: I think the Canadian courts have clearly indicated they intend to follow and have indeed followed *Russell and Russell* without question.

Mr. McCLEAVE: In Nova Scotia there are judges at least who tend to follow the expansion in this field in the English cases. I suppose it is just because the cases have not gone on to appeal and been reported?

Professor PAYNE: The expansion in the English cases has been through the concept of intention in the context of cruelty.

Mr. McCLEAVE: But particularly in *Gollins*?

Professor PAYNE: Yes, certainly. But intention to injure is not required, and this is quite consistent with *Russell and Russell*. *Russell and Russell* does not speak of the intention element in the concept of matrimonial cruelty; it looks to whether the conduct complained of causes injury to health. These are two independent issues, and it may be that neither, or one or both, of my recommendations concerning these independent issues may be acceptable to this committee.

Mr. McCLEAVE: What is the definition of cruelty in England?

Professor PAYNE: In the English act cruelty is not specifically defined; the statute impliedly affirms the principle set out in *Russell and Russell* which requires injury to health or reasonable apprehension thereof.

Mr. McCLEAVE: It says cruelty does it not?

Professor PAYNE: It says cruelty.

Senator ASELTINE: I think in the bill you brought in in 1938 here in Canada it was defined as being according to the law of England at a certain time.

Co-Chairman Senator ROEBUCK: We defined it at that certain time.

Senator ASELTINE: I have not the bill here; I should have brought it with me.

Co-Chairman Senator ROEBUCK: If we defined it as you did in your bill it would include the *Gollins* and the *Williams* cases.

Senator ASELTINE: I am certain it would.

Mr. AIKEN: In view of the fact that we do not now have cruelty defined in divorce, obviously we are going to have to legislate if we are to include it. Would you suggest that the legislation be broad in terms and use the word cruelty, or go much further than that?

Professor PAYNE: My position would be that it is essential that the legislation go beyond the common law if you are of the opinion that injury to health should not be the sole criterion. I am of the opinion that injury to health or reasonable apprehension thereof should not be the only case in which cruelty can be established, it should be capable of being established in cases where the court finds as a fact that the conduct of the respondent is so intolerable that the petitioner cannot be expected to continue or resume matrimonial cohabitation.

Co-Chairman Senator ROEBUCK: Is not that the law of England now?

Professor PAYNE: No. The law of England is more restricted. The law of England today requires proof of injury to health, bodily or mental, in order to establish matrimonial cruelty. I suggest that we expand this definition to include cases which do not involve injury to health, but do involve conduct which renders matrimonial consortium impossible.

Mr. AIKEN: We have had evidence from a psychatrist in connection with mental cases, which goes very much along the lines we are discussing now. In other words, it is not the intemperance of the partner involved at all in mental cases: it is the actual conduct and the result of that conduct that is essential.

In such cases they recommend that insanity not be used as a ground but that it be some other, such as either cruelty or desertion in the case of being confined in a mental institution.

Professor PAYNE: Perhaps it would be appropriate if I spoke to this at a later time, when I speak to my specific recommendation on insanity as a ground for divorce.

I come now to page 34, the introduction of desertion as a ground for divorce. I have indicated the nature of the definition which I favour, in paragraph 79, on page 35.

I think it is very important that the offence of desertion should be so defined that the spouses are not deterred from resuming cohabitation in an attempt to secure an enduring reconciliation.

I accordingly recommend that desertion as a ground for divorce in Canada should be constituted by an unjustified withdrawal from matrimonial cohabitation for a period of not less than three years immediately preceding the commencement of proceedings, or, alternatively, an unjustified withdrawal from matrimonial cohabitation for periods amounting in the aggregate to three years or more, over a period of five years immediately preceding the commencement of proceedings, provided that the respondent has persisted in the unjustified withdrawal from matrimonial cohabitation for a continuous period of at least one year immediately preceding the commencement of proceedings.

This recommendation was favoured by most witnesses giving evidence before the Royal Commission on Marriage and Divorce, which sat in England from 1951 to 1955.

I should perhaps observe that my strong preference would be to remove the necessity for introducing desertion as a ground for divorce, by including cases of desertion in what I call the separation provision, and I will speak to that in a moment.

I further submit that where desertion constitutes a ground for matrimonial relief, the courts should be empowered to make a finding of continuing desertion notwithstanding that the respondent is or has become insane. This is in accordance with the enactment in England and I think it would be a proper matter to be taken into consideration in Canada.

By way of generalization, I should say that subject to qualification in the case of matrimonial cruelty, it is clear that the matters I have discussed up to this time tend to reflect the matrimonial offence concept.

I think this admits of qualification in the light of my recommendation concerning matrimonial cruelty as a ground for divorce. Furthermore, I would suggest that it is an over-simplification to regard adultery, cruelty and desertion as offences which merely reflect a concept of guilt or innocence.

These grounds for divorce not only reflect culpable conduct but they reflect culpable conduct which has resulted in rendering further matrimonial cohabitation impossible or intolerable.

I think it is improper to regard them as offences per se and I remark to this effect in paragraph 81.

In subsequent paragraphs, I consider various types of conduct which, by no stretch of the imagination, could be regarded as falling directly within the matrimonial offence concept.

On page 36 of the brief, I recommend that presumed death constitute a ground for divorce.

In this context, legislation exists in a number of foreign jurisdictions, including England, which permit a spouse to obtain the remedy of divorce, on proof of facts which give rise to a presumption of death of the other spouse.

It is quite clear that this remedy or ground for relief will only be resorted to in isolated instances, but I feel that specific legislation should be introduced in Canada empowering the courts to decree dissolution of marriage in such cases.

Senator ASELTINE: We have it in several of the provinces.

Professor PAYNE: This does not exist in any Canadian jurisdiction. It cannot exist, because presumed death was not introduced as a ground for divorce in England until 1937, and it has never been independently introduced in the Canadian provinces prior to Confederation, and it has never been adopted by the federal Parliament in Canada since Confederation.

Senator ROEBUCK: No, but it is used in law in several cases.

Professor PAYNE: I think the position in the Canadian provinces today is that a certificate of presumed death may be available. This is rather distinct from a certificate of presumed death which is attached to a decree of divorce which empowers the petitioner to remarry and to remain remarried notwithstanding that the spouse, presumed dead, reappears.

Such a decree constitutes a guarantee that, in a case of presumed death, the petitioner will be protected in the event of such reappearance.

Mr. AIKEN: The provisions in the Ontario Marriage Act, as I understand them, protect the spouse who remarries, from the charge of bigamy.

Professor PAYNE: This is the position in Canadian law at the moment.

Senator ROEBUCK: That is in the Code.

Mr. AIKEN: You have said something about provincial legislation which permits a second marriage to remain a marriage regardless of reappearance.

Professor PAYNE: No, no. My recommendation would empower the courts in the Canadian provinces, not only to presume death but to decree divorce on such presumption.

Mr. AIKEN: It would be a divorce just as effective as if a person had appeared and put in a defence, but in this particular case the marriage is dissolved?

Professor PAYNE: The ultimate effect would be to ensure the right of remarriage without subsequent possibility of that marriage being impugned on the ground that the presumption of death was proved in the light of subsequent events to be false.

Mr. AIKEN: I am sorry, I misunderstood your statement. I thought you said there was such a provision in the provinces. My only knowledge was that it went towards permitting the marriage licence to be issued and protecting the spouse against the charge of bigamy at a later date.

Mr. MCCLEAVE: We have that in a Nova Scotia statute recently, that on a person being missing for a number of years presumption of death can be granted, for general or specific purposes. It has never been used, to my knowledge, since I secured the first action revolving around marriage, but it has never been contested in the courts as to whether this was an effective way of getting a dissolution of marriage.

Professor PAYNE: I think it would be ineffective, since the Nova Scotia Legislature has no power to legislate on divorce.

Mr. MCCLEAVE: You are raising considerable doubt in my mind. Perhaps I should be solving my clients' difficulties here instead of in Halifax.

Senator ROEBUCK: Is not the word "divorce" rather inappropriate?

Mr. MCCLEAVE: Dissolution.

Senator ROEBUCK: Or even dissolution of a marriage which does not exist, if the person is dead. If the person is dead, there is no marriage and it cannot be dissolved or divorced. What is required is some phraseology whereby the judge says that the man is presumed dead and the wife may remarry.

Professor PAYNE: I think you have this terminology in Section 14 of the English Act, which may be acceptable to this committee and to the Federal Parliament.

Mr. AIKEN: You could say that it is presumed to have been dissolved and is hereby declared to be dissolved.

Professor PAYNE: In Section 14, "any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may...present a petition to the court to have it presumed that the other party is dead and to have the marriage dissolved, and the court may, if satisfied that such reasonable grounds exist, make a decree of presumption of death and dissolution of marriage."

I am quoting from Section 14, which is reproduced in paragraph 82 of the brief.

The next ground which I recommend for introduction in Canada I call "living separate and apart."

I would recommend that divorce be available in Canada to either or both spouses where the husband and wife have lived separate and apart for a period of not less than three years immediately preceding the commencement of proceedings provided that the court is satisfied of the following conditions:

(1) There is no reasonable likelihood of a resumption of matrimonial cohabitation;

(2) The issue of a decree will not prove unduly harsh or oppressive to the respondent spouse;

(3) Satisfactory arrangements have been or will be made to provide for the maintenance of the respondent spouse and any children of the family.

If I may speak to these provisos, I should perhaps say something of each. On the condition which speaks of no reasonable likelihood of a resumption of matrimonial cohabitation, my inclination would be towards the view that, where separation for three years is established to the satisfaction of the court, the court faced with that proof would then infer that there was no reasonable likelihood of a resumption of matrimonial cohabitation. I think this would be quite legitimate as an inference if there was a separation of three years or more.

Senator ASELTINE: Is that a ground in England?

Professor PAYNE: It is not, but I would suggest that in essence though not in detail the conclusion which I arrive at in my brief is supported by the conclusions or opinions expressed by the Law Commission in England in their report entitled "Reforms of the grounds of Divorce, the Field of Choice." I think it is quite clear that a reading of the entire report of the Law Commission indicates that the members of that Commission are in favour of introducing a living-apart provision to constitute a ground for divorce which shall not provide the exclusive criterion but which is to be placed in the statute books to supplement the existing grounds in England. Indeed, from what I have said previously, you will quite clearly see that my recommendation, in effect, mingle the concept of fault with the doctrine of marriage breakdown.

It is sometimes argued that it is inconsistent and illogical to have fault and non-fault grounds co-existing. It may be illogical. I will not speak to the logic of it, but it works. There is evidence of this in a variety of jurisdictions, and it seems to meet the needs of society in the present day, where in many cases marriages cannot be dissolved, notwithstanding that they have ceased to exist in substance, albeit not in law.

On the second condition referred to in Paragraph 83—

Co-Chairman Senator ROEBUCK: Just before you leave number one. Why is it necessary for the court to assume that there is no reasonable likelihood on the ground that they have already been separated for three years? The fact that an application is being made, and the applicant says that there is no likelihood of resumption, is that not sufficient on which to base a judgment?

Professor PAYNE: I think it is a sufficient basis for a provisional presumption. There may be cases, however, where the presumption could be rebutted. I certainly would not go so far as to suggest that it be a conclusive presumption, because that in fact would be to eliminate the proviso which I think is desirable in this context. So I would be inclined to say that the court should be entitled to infer that the resumption of matrimonial cohabitation is unlikely, but I would not go so far as to recommend that it be a conclusive presumption or that the proviso be eliminated.

Now, on the second condition, that the issue of a decree will not prove unduly harsh or oppressive to the respondent spouse, I think in principle a great deal can be said in favour of this condition. The difficulties arise primarily in determining when the issue of a decree will prove unduly harsh or oppressive. I certainly would not wish to precisely indicate the circumstances in which I would be inclined to the view that the decree would prove unduly harsh or oppressive.

It may be that some greater degree of precision would be necessary, if this proviso were produced in any statutory form.

I would draw the attention of this committee to criticisms of the proviso, which deals with the decree causing undue hardship to the respondent spouse, which appear in articles written by members of the Judiciary in commenting upon the Australian Matrimonial Causes Act 1959.

Chief Justice Burbury of the Supreme Court of Tasmania and Mr. Justice Selby, Judge in Divorce in the Supreme Court, New South Wales, both strongly criticized this formula which is in fact adopted in the Australian legislation.

Perhaps I should add that in the Australian legislation it must be shown that the undue hardship arose because of the conduct of the petitioner. This is quite explicitly spelled out in the Australian legislation.

The Law Commission in England adverted to this proviso and were again somewhat critical in their attitude towards it. They did agree that in principle a discretion should be reserved to the court. They proceeded to attempt to be more specific in defining what circumstances would be necessary for the exercise of discretion to take place, but it is my contention that their formula is as imprecise as that which presently exists in Australia, and that quite clearly certain problems will be presented to the courts if such a proviso is introduced in Canadian legislation.

Co-Chairman Senator ROEBUCK: Have you the reference to those two Australian cases?

Professor PAYNE: They are not cases, senator; they are articles which have been published by the two judges to whom I have referred. The first article by Chief Justice Burbury appears in 1963, Volume 36 of the Australian Law Journal, Page 283, and if you have any difficulty in obtaining a copy of this I would be pleased to forward a copy to you. The second article by Mr. Justice Selby is found in Volume 29 Modern Law Review, Page 473.

As I said earlier, they were very critical of the inadequacies or lack of precision attaching to the proviso in the Australian Act which relates to the issue whether the decree will prove unduly harsh or oppressive. If I could direct the committee's attention to the conclusions of the Law Commission in England, in Paragraph 119 of their report they suggest that the discretion should be for-

mulated as follows: "The Judge may in his discretion refuse to grant a divorce if satisfied that having regard to the conduct and interests of the parties and the interests of the children and other persons affected, it would be wrong to dissolve the marriage, notwithstanding the public interest in dissolving marriages which have irretrievably broken down."

As I stated previously, it is my opinion that that formula is no less imprecise than that adopted in the Australian legislation, and I find it difficult to project or suggest a more precisely defined formula, but would emphasize that I feel that a discretionary power should vest in the courts to refuse a decree in circumstances which are deemed to cause undue hardship or oppression to the respondent spouse, such hardship or oppression being caused by the conduct of the petitioner.

Co-Chairman Senator ROEBUCK: If you allow the court to deny an application on the ground that it should not be granted, would you leave it just in that undefined state?

Professor PAYNE: Probably the courts would wish for more guidance than is presently available in my recommendation. I think, however, that it is very difficult to introduce more precise legislation which gives effect to the reasoning which underlies that proviso, and I would suggest that here a certain amount of confidence must be reposed in the judiciary to resolve whether the issue of a decree is unjust, unduly harsh or oppressive in the particular light of the facts before the court.

Co-Chairman Mr. CAMERON: Would you like to illustrate what you would consider as being unjust, unduly harsh or oppressive?

Professor PAYNE: I think it might be partly covered by my third condition which appears on page 37 and which says that the court must be satisfied that satisfactory arrangements have been or will be made to provide for the maintenance of the respondent spouse and any children of the family.

Co-Chairman Mr. CAMERON: But what I am interested in are the words "unduly harsh or oppressive".

Professor PAYNE: If we look at proviso 3 it might be suggested that undue harshness might arise in the case of a person losing pension rights by reason of divorce proceedings. It is perhaps not difficult to decide what is harsh or oppressive in a financial context, but it is more difficult to define it in a context which does not involve financial considerations. In giving a ruling as to where to draw the line, I think I would need to be faced with a specific fact situation so as to look at the totality of the circumstances and only then would I be able to say that whether the issue of a decree would be unduly harsh. It would be easier to apply the concept than to define it more precisely.

I concede that the enactment of a living-apart provision as a ground for divorce represents a radical departure from the principles underlying the present grounds for divorce in Canada. I refer to this in paragraph 86 of my brief. It would permit the institution of divorce proceedings by a spouse who is *ex facie* partly or primarily responsible for the failure of the marriage. It could be argued and probably has been argued that a spouse who *ex facie* has been responsible for the breakdown of the marriage ought not to be allowed to proceed for divorce. If the committee were of this opinion, they might be inclined to favour the view adopted by the New York Joint Legislative Committee on Matrimonial and Family Laws which expressed the opinion in its 1966 report that voluntary separation should constitute a ground for divorce. I am of the opinion that this would be unwise. Divorce should not be confined to cases where the parties have separated and continue to be separated by consent, nor should it reflect the notion of guilt. I give reasons for this in paragraph 86. I suggest that allowing

the *ex facie* guilty spouse to proceed is not unreasonable, if one bears in mind the proviso to which I have referred earlier. I suggest further that it is often an oversimplification of the social facts to imply that a marriage breaks down because of the faul of only one of the spouses. I also suggest that where a marriage is irretrievably broken down and where it is a mere shell which has legal substance but no factual substance, then it is in the public interest that the marriage should be dissolved subject to the satisfaction of the provisos referred to in paragraph 83 to which I spoke a moment ago.

I now turn to the question of incurable insanity as a ground for divorce. In the light of what I said in connection with the recommendations concerning living apart as a ground for divorce, it might well be contended that it is unnecessary to create an independent ground for divorce in cases of incurable insanity. It might well be considered that if separation, whether voluntary or involuntary, whether involving fault or no fault on the part of the petitioner, is admitted as a ground for divorce, then this is sufficiently broad to include the case where a marriage has in fact ceased to exist by reason of post-marital insanity which is incurable. The reason I include the ground specifically in my recommendations is because of the experience in a number of American jurisdictions where the courts have held that cases of incurable insanity fall outside the ambit of living-apart provisions. It may be that I suggest incurable insanity as an independent ground for divorce, notwithstanding my recommendation on living apart as a ground for divorce, out of excessive caution. I do attempt to state the case for introducing insanity as an independent ground for divorce but fully realize that very difficult problems may arise from the introduction of such a ground. I advert to this in my brief and I point out that it introduces invidious distinctions between cases where marriage breaks down by reason of the mental incapacity of a spouse and cases where the marital consortium is destroyed by physical disability. I point out that it is difficult to justify a distinction being drawn between mental and physical illness from a medical standpoint. The justification, however, for introducing the incurable sanity ground is similar to that which I have stated when dealing with the living apart provision.

I suggest that if you have incurable insanity as a ground for divorce, it should require proof that the incurable insanity has existed for three years and it should also require proof that the person of unsound mind has been detained in a mental institution, hospital or other institution for a definite period subject to limited interruptions. In fact, I suggest that the provisions presently existing in the Matrimonial Causes Act (England), 1965 might constitute a model for legislation in Canada. The only radical change between that act and my recommendation is that I would recommend a period of three years rather than a period of five years.

Co-Chairman Senator ROEBUCK: When you say "incurable insanity", is it not a fact and within your knowledge in this regard that doctors will not declare insanity incurable unless it is of a very extreme type where the brain is destroyed or something of that kind which cannot be expected to be restored?

Professor PAYNE: I would say this is probably the case. It is certain that even if you have evidence of it adduced, you are only dealing with a limited number of petitions in the context of incurable insanity. Certainly, difficulties do arise in adducing medical evidence in proof of the fact of incurability. I concede that these difficulties exist, and it may be that a better approach would be to ensure that cases of what we call incurable insanity fall within the "living separate and apart" provision. If this could be ensured, I would prefer this as a technique, because I do feel that invidious comparisons can arise if we isolate mental health, leaving cases of physical disability or physical ill-health in a separate category affording no ground for matrimonial relief.

Co-Chairman Mr. CAMERON: What about the phrase "persistent mental illness" in lieu of "incurable insanity"?

Professor PAYNE: I think these phrases are both difficult to apply in the court room, because they necessarily involve a question of degree and opinion evidence. The material question is: "Is the person of such an unsound state of mind that the marriage is destroyed?" I believe an answer to this question requires opinion evidence, and I think the difficulties will not be any the less according to which formula you adopt if you favour insanity as an independent ground for divorce.

Co-Chairman Senator ROEBUCK: Instead of using "incurable insanity," would it not be better for the court to use the phrase "the probability of recovery is unlikely or sufficiently unlikely"? I know you would not get in any case, except the most extreme ones, medical evidence to establish that insanity was incurable. They do not know what the future is bringing forth, but they might say that the possibility of continued cohabitation is extremely unlikely.

Professor PAYNE: This might help. I am by no means sure it will eliminate the problem—; it may reduce the problem—if such a formula were adopted in place of that presently accepted in England. If it does, I am certainly in favour of dealing with it in that manner.

As a matter of preference, I would wish for the courts to include cases of insanity under a general "living-separate-and-apart" provision. I think this is where it belongs. I do not think it belongs in a separate category. It may be that my recommendation for insanity as an independent ground is presented out of excessive caution in light of the experience in certain American jurisdictions. You might quite properly regard the experience in American jurisdictions as irrelevant and my fear that the Canadian courts may follow the American decisions may lack substance. Hopefully it does, because I do feel cases of insanity could more properly fall subject to a "living-apart" provision. On the other hand, if a "living-apart" provision proved unacceptable as a ground for divorce in Canada, I think a case could be made whereby "incurable insanity" or "proof of mental illness running over a period of years with little likelihood of recovery" should constitute an independent ground for divorce. I think this reflects the fact that incurable insanity, like other events, may cause a marriage to break down and terminate in fact.

I think the function of the law of marriage and divorce should be to give effect to social realities by trying to maintain a balance between respect for the law as an institution and respect for marriage as an institution.

These are general considerations to which I have not addressed my attention in discussing the specific proposals as yet. They do constitute the bulk of the comment in the first 28 pages of the brief, and I have not got involved in a discussion of the general considerations which led to the formulation of specific recommendations. That summarizes the contents of the brief so far as the grounds for divorce are concerned.

Perhaps I might conclude this portion of my testimony by referring to the bars to matrimonial relief.

At the present time there are three absolute bars to matrimonial relief which apply in divorce proceedings across Canada: collusion, connivance and condonation.

Collusion has not been defined by statute and it is very difficult to define it in an absolute sense. Judicial definitions which have been adopted must be interpreted by reference to the facts of the particular case, and a general definition is therefore rather difficult to formulate.

I think that one of the primary objections to collusion as an absolute bar is that it tends to discourage spouses from attempting to resolve their matrimonial problems by mutual agreement. I am not suggesting in any way that the spouses should be free to determine the availability of the right to a divorce by mutual agreement, but rather they should have the power and right accorded by law to resolve certain of the ancillary problems which arise in a divorce case. Where a marriage has broken down the parties may be prepared to reach agreement on matters such as custody and maintenance. They should be free to do this without any fear of an allegation of collusion. At the present time, it is my opinion that they are not free to do anything without running the risk of a finding by the court of collusion.

Co-Chairman Senator ROEBUCK: That is not the case in our parliamentary court. The fact the parties agree, for instance, to the division of property and that sort of thing, usually after the adultery has been committed, has not been considered by us in recent years, and I am sure the same observation applies to Senator Aseltine in years gone by.

Senator ASELTINE: That is correct.

Senator ROEBUCK: Collusion has been found by me, at all events, to be an agreement to do something evil, such as to fabricate evidence or to commit adultery for the purpose of a court case.

Professor PAYNE: I think this may well be true in divorce proceedings conducted through the Senate. Generally speaking, however, I do feel that at the present time a solicitor may find it very unwise to suggest that the spouses get together to resolve their differences—that is, differences other than the issue of, "Shall there be a divorce or not?"

Mr. AIKEN: When you have 25 or more high court judges, each with a certain amount of discretion as to what collusion is, it means that there are many interpretations that people may run into.

Professor PAYNE: That is right. This is another general definition. Your case may be a test case—

Mr. MCCLEAVE: It is not like cruelty which is incapable of definition, but when you can smell it it is there.

Co-Chairman Senator ROEBUCK: I do not think that that is entirely true.

Professor PAYNE: I refer to my discussion of the *Shaw* case in *Power on Divorce*. That was quite clearly, in my estimation, a case of where the dissenting judge expressed the right conclusion. The unfortunate thing was that his was the dissenting judgment. The fact that there can be a division in the Court of Appeal shows up the difficulties in determining whether the respective spouses may resolve any issues arising incidentally to the contemplated divorce. The point is quite clearly established that one can have collusion in a good case—that is to say, in a case where the grounds for divorce quite clearly exist. I think the solution to the problem may be found in my recommendation that collusion be made a discretionary bar to divorce—

Co-Chairman Senator ROEBUCK: You would not make it discretionary if the parties colluded for the purpose of producing evidence of adultery, or because of want of evidence of adultery they fabricated it?

Professor PAYNE: I think in that situation one could regard it in two ways. One could either say that quite clearly the parties have not established a case according to the pleadings, and therefore the petition is dismissed, in which case you do not need to use the concept of collusion—you could just say that the plaintiff had failed to prove his or her case—or leave it as falling within the court's discretion. I am sure that the experience in England, where collusion is a

discretionary bar, would evidence a strong inclination toward—in fact a practice of—refusing to grant relief where there has been corruption and a defrauding of the court by manufactured evidence. I would certainly not concede that manufactured or trumped-up evidence should afford a remedy in the divorce courts. I do feel, however, that collusion should not be retained as an absolute bar to relief. It is too uncertain. It is a deterrent to attempts at reconciliation between spouses who are encountering marital difficulties. It is for this reason that I recommend that it be adopted as a discretionary bar, and that it be not retained as an absolute bar to matrimonial relief.

I further suggest in the alternative—although I might say that the alternative must be regarded as second best—that if a decision is taken to retain collusion as an absolute bar to divorce or other matrimonial relief then an attempt must be made to define this concept so that persons counselling their clients—I am referring to lawyers specifically here—will know what the legal position is. I think the lawyer practising today acts at his peril if he attempts to get the clients together in order to resolve problems which are incidental to the contemplated divorce.

Senator ASELTINE: I do not think you need to define it. We have got along pretty well in the courts, and in our own committee here, without a definition.

Co-Chairman Senator ROEBUCK: I do not think, however, it would be difficult to define it as a conspiracy between the parties for something evil, unlawful, corrupt, and so on. It has to have such an element in it before it is collusion. For instance, we have had many cases in which the husband has paid the expenses of the suit or the application. That is not collusion. He ought to pay them. At times when he is—

Senator ASELTINE: I thought that cases like that in the provincial courts did not affect the judge in any way at all.

Professor PAYNE: The cases in the courts of Canada, I believe—I will check on this—tend to suggest that if the husband pays the wife's costs this fact may not be regarded as collusive. In the converse situation where the wife pays the husband's costs—and this may be sensible from an economic standpoint, if the wife is earning a high income—then this is regarded by some courts as evidence of collusion. The danger of collusion being inferred by the court also arises where the parties seek to determine rights of custody and visitation, rights to the matrimonial home, rights to the division of property, et cetera.

I think quite clearly the courts should refuse matrimonial relief through divorce in cases where the evidence has been fabricated or where the grounds alleged in the petition do not exist, but I think there are other circumstances in Canadian judicial decisions which have been deemed to involve collusion and where it might well have been better for the court to exercise its discretion and grant the relief. A particular case to which I would refer here is the *Shaw* case, which I mentioned earlier.

On the issue of connivance, which is defined as an act done with corrupt intention to promote or encourage the commission of adultery, there has again been difficulty encountered, in my opinion, in applying the concept. Particular difficulty has arisen in cases which involve what is known as "passive acquiescence." I accordingly recommend that connivance also constitute a discretionary bar to matrimonial relief. If the courts follow the practice which I think is likely to be followed, they will refuse relief in the cases of *active* promotion of the commission of the offence complained of in the petition.

I further recommend that condonation, which can be regarded as forgiveness by a spouse of a matrimonial offense and a reinstatement of the other spouse into the matrimonial relationship, also constitute a discretionary, and not

an absolute, bar to relief. It is quite clear that under the present concept, the law of condonation effectively deters the spouses from any attempt at reconciliation. I think the position has to be changed in law if we are to encourage and promote attempts at reconciliation between the spouses. I think it is very important that steps be taken to amend the law of condonation so as to give effect to a policy which is aimed at promoting reconciliation in cases of matrimonial dispute.

Co-Chairman Senator ROEBUCK: Is not the purpose of the law with respect to condonation the determination not to allow one of the parties to hold over the head of the other the offence which, in our law, he or she has condoned or forgiven?

Professor PAYNE: This is the purpose.

Co-Chairman Senator ROEBUCK: So that if the parties decide to live together again the past is closed, according to our present law and understanding. The past is closed, and the parties are on an equal basis, unless the evil one commits some other offence?

Professor PAYNE: This is the position in law, and the effect of it is that a solicitor says to his client: "If you attempt a reconciliation and it fails then your remedy to divorce, which is presently available, will be lost to you." In other words, far from having any incentive in the legal regime which would encourage a solicitor to promote reconciliation, the law of condonation hampers and deters attempts at reconciliation between the parties. The law of condonation as presently established in practice precludes any attempt at reconciliation where the parties are uncertain of the prospect of the attempt proving successful.

Senator ASELTINE: And to resume co-habitation?

Co-Chairman Senator ROEBUCK: Would there not be exactly the reverse situation if somebody is advising the two parties that they should try it out, or to give it another try, and they knew it was discretionary on the part of the judge to call that condonation or not to call it condonation. I think I would advise against their trying it.

Professor PAYNE: I think the point of my recommendation is that the court may find condonation but nevertheless exercise a discretion and grant relief under the circumstances.

Co-Chairman Senator ROEBUCK: What you are saying is that in those circumstances one of them may hold over the head of the other while living together the possibility of reviving the old story to the detriment of a spouse, but may or may not be able to do it depending on the judge?

Professor PAYNE: I think that what happens in practice is that when a lawyer is employed by a client, he makes clear to his client that if a resumption of cohabitation occurs in an attempt to secure a reconciliation, and such resumption of cohabitation does not have this beneficial result, then the remedy of divorce is lost. This opinion I certainly accept, and it is shared by the Denning Committee which reported in 1947 on Procedure in Matrimonial Causes in England; by the Harris Committee in its 1948 report, and by the Royal Commission on Marriage and Divorce, 1951-1955, and would seem to reflect the opinion of members of the Bar with whom I have spoken.

Mr. AIKEN: From the viewpoint of a practicing solicitor who is asked for a legal opinion, you don't cohabit if you want to get a divorce.

Professor PAYNE: That is my impression, and that is why I suggest a discretion.

Mr. MCCLEAVE: Would it not be simpler to have in the law something that could be used as a ground for the petition that nothing would be done without an honest attempt of reconciliation for a couple of months?

Professor PAYNE: This is what they have done in England. It has its dangers and puts the parties on trial for two months or less. It gives them an opportunity to make a single attempt at reconciliation. If they attempt reconciliation for one day and then they give up, the period is closed to them and the opportunity for attempting reconciliation is no longer available under the English statute. Under the recommendation I propose, the discretion may more effectively promote or encourage attempts at reconciliation.

Mr. MCCLEAVE: Yours is a 25 per cent formula before a petition is lost?

Professor PAYNE: I am thinking of it in the light of grounds such as adultery, cruelty, bestiality. Certainly I do not think any traditional bars should attach to the "living apart" provision.

I would be inclined to the opinion that condonation should not constitute an absolute bar, but only a discretionary bar, and that no specific period should be designated for trial reconciliation. I think this method adopted in England is unfortunate, and I would hope my suggestion of a discretionary bar would prove to be more beneficial. It is difficult to know if it will be. This is something that has not been put to the test in jurisdictions of which I am aware, but I think it moves in the right general direction.

Co-Chairman Mr. CAMERON: It is now twenty minutes to six. Are there any questions on collusion, connivance and condonation?

Senator ASELTINE: I have some questions on other matters.

Co-Chairman Mr. CAMERON: Do you wish to ask them now? We hope that Professor Payne will be back.

Senator ASELTINE: I should like to get the benefit of his experience, and also to question him with respect to the doing away of parliamentary divorce.

Co-Chairman Mr. CAMERON: You will have that opportunity. I think Mr. Aiken has a question.

Mr. AIKEN: I wonder if Professor Payne would like to discuss the question of divorce within three years of marriage?

Professor PAYNE: I think it would be convenient to discuss that separately. The reason I discussed condonation, connivance and collusion today was to make it quite clear that my proposal is that these bars, and indeed, the traditional discretionary bars, presently applying throughout Canada, should not apply to the "living-apart" provision.

Co-Chairman Senator ROEBUCK: I am greatly impressed, Professor Payne, not only with your brief but your presentation; it is extremely practical, knowledgeable and right to the point. I shall look forward to your next appearance before us to continue your thought. In the meantime, please accept from me and the rest of the members of the committee our thanks for what you have done.

Professor PAYNE: I am most grateful—

Senator ASELTINE: May I add that over the weekend I read this brief from cover to cover, and I am very much pleased with it. It think it is one of the best expositions of the whole subject I have ever had the privilege of reading. I shall be delighted if Professor Payne comes back again.

Mr. MCCLEAVE: I hate to call the professor a "legal Batman"; but this is our first serial witness, and I think he should be commended.

The committee adjourned.

APPENDIX "45"

THE FOLLOWING RESOLUTIONS WERE PASSED AT THE 4th ANNUAL MEETING OF THE CANADIAN UNITARIAN COUNCIL IN WINNIPEG ON MAY 8, 1965.

1. Divorce Reform

WHEREAS the grounds for divorce in Canada, which reflect the social needs and mores of an earlier era and which differ from Province to Province, require that individuals fit their situation to the gounds (i.e. adultery), rather than the grounds being adaptable to the individual situation; and WHEREAS marriage is a legal contract developed historically as a means of protection for woman and child; and WHEREAS in the context of modern Canadian society, the protection of woman and child no longer requires that a man and woman continue in a personal relationship they wish to end; and WHEREAS the nurture of the child, while best accomplished under the conditions of wholesome family life can seldom be well provided for under circumstances of undue tension or hostility between the parents; and WHEREAS society has no interest other than the well-being of the persons involved in forcing two persons who no longer care to co-habit as man and wife to continue legally in this relationship;

THEREFORE BE IT RESOLVED that the Canadian Unitarian Council 1965 Annual Meeting requests the governments concerned to amend their divorce laws along the following lines:

1. That in cases where both parties desire a divorce and there are no children, the divorce be granted upon the second application, after a six-months' waiting period following an initial joint application, subject to the following provisions concerning support:

(a) if the parties agree upon support for either spouse, or agree to dispense with support, the provisions of such agreement should become part of the decree of divorce;

(b) if the parties do not agree upon the question of support, this issue should be heard by and ruled upon by a domestic relations judge, such ruling to become part of the decree;

(c) such hearing should be in camera, unless an open hearing is requested by one of the parties;

(d) during the six months' waiting period counselling services should be made available to the parties but not be obligatory.

2. That in cases where one party only desires a divorce and there are no children, the divorce be granted upon the second application after a one-year waiting period following an initial application, subject to the same provisions concerning support as under 1. above, and the further provision that no penalty or financial burden be placed upon the applying party because of the initiative taken by such party. Counselling services should be made obligatory during the one-year waiting period.

3. That, to protect the interests of children, an Authority be established and competently staffed to confer with all parents applying for divorce concerning plans for custody and support of minor or dependent children.

4. That, in cases involving minor or dependent children, divorce be granted upon the second application of either or both parties after a one-year waiting period following an initial application, subject to the following provisions concerning custody and support of children and support of spouses:

(a) where both parents and the Authority referred to under 3. above agree upon proposals for the custody and support of children as serving the best interests of the children, these proposals should become part of the decree of divorce;

(b) where, in the view of either parent or the Authority, proposals for custody and/or support are not the best possible provision for the children, the issue of such provision should be heard by and ruled upon by a domestic relations judge, such ruling to become part of the decree of divorce,

(i) in such hearing, the Authority and/or either parent may call upon any source of information including social agency, welfare or other organization, or police report—which may aid in determining the best provision for the children, and

(ii) such hearing should be in camera, unless an open hearing is requested by one of the parents and approved by the Authority;

(c) provision for the support of either spouse, or for dispensing with such support, should be established as under 1. above and become part of the decree of divorce.

APPENDIX "46"

BRIEF TO THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

by

Julien D. Payne.

Definition of Scope Of this Brief

(1) It is noted that the Order of Reference of the Special Joint Committee of the Senate and House of Commons on Divorce is couched in broad general terms. This writer proposes to confine his attention to the following issues:

1. Grounds for Divorce;
2. Bars to Matrimonial Relief;
3. Protection of Children in Matrimonial Proceedings;
4. Alimony and Maintenance;
5. Marriage Guidance and Matrimonial Conciliation;
6. The Court which should exercise Jurisdiction in Matrimonial Proceedings
7. Domicile as a Basis of Jurisdiction in Matrimonial Causes;
8. Void and Voidable Marriages;
9. The Need for Sociological Research.

1. GROUNDS FOR DIVORCE

The Present Grounds For Divorce In Canada

(2) Adultery is a ground for divorce at the suit of either husband or wife in each of the Canadian provinces wherein divorce is permitted through judicial process.[1]

(3) Rape, sodomy and bestiality are additional grounds for divorce in a suit by a wife in those provinces wherein The Divorce and Matrimonial Causes Act, (Eng.), 1857, applies.[2]

(4) In Nova Scotia there are additional grounds for divorce, namely, cruelty, impotence and kindred within the degrees prohibited by 32 Hen. XIII, ch. 38.[3]

(5) In New Brunswick and Prince Edward Island additional grounds for divorce include frigidity or impotence, and consanguinity within the degrees prohibited by the aforementioned statute. Since the New Brunswick statutes do not specifically include bestiality as a ground for divorce, it has been held that no decree of divorce shall be issued on proof of such offense.[4]

General Considerations

(6) Before setting out specific proposals for revision of the divorce laws in Canada, the writer purposes to examine certain general considerations.

The Function Of The Law Of Marriage And Divorce

(7) At the outset, it is essential to recognise that any revision of the law of marriage and divorce must seek to promote and maintain stable and healthy married life and safeguard the interests and welfare of children.

(8) As the Gorell Commission observed in its Report on Marriage and Divorce:[5]

> "In considering what law should be laid down in the best interest of the whole community, the Senate should be guided by two principles:
>
> (i) No law should be so harsh as to lead to its common disregard.
>
> (ii) No law should be so lax as to lessen the regard for the sanctity of marriage."

(9) Any extension of the grounds of divorce in Canada will inevitably result in an increase in the divorce rate. It is submitted, however, that such resulting increase is not inherently evil if the remedy of divorce is available only in circumstances where the marriage has in fact irretrievably broken down.

(10) This writer accepts the conclusion expressed by Dr. J. P. Lichtenberger that:

> "Divorce legislation has the function of regularising procedure in the interest of an orderly society, of safeguarding the rights of persons and of property when marriages for any reason have broken down, and when indirectly applied to the improvement of marital and impinging social and economic conditions, it can do much to forestall family disorganization and its consequence, divorce. But when it is applied directly to the control or diminution of divorces after marriages have already been destroyed, its effects are practically nil, and if too stringent and too rigidly enforced, it may easily create greater ills than it cures."[6]

Objections To Present Grounds For Divorce in Canada

(11) Recognition of adultery as the only ground for divorce in Canada tends to bring the administration of Justice into public disrepute. There are no doubt cases where the spouses commit the matrimonial offence of adultery specifically in order to obtain a divorce and there is a strong probability that many of the undefended cases, which constitute more than ninety per cent of all divorce cases, result from consensual arrangements or involve the nondisclosure of material facts to the court.[7]

(12) The limitation of the grounds for divorce in Canada to the offence of adultery tends to promote the formation of illicit unions and the birth of illegitimate children. There are presently in Canada many thousands of persons who, finding that the existing law offers no relief, are taking the law into their own hands by entering into "common law" unions and rearing children in conditions in which neither mother nor child has adequate social or financial protection. Many illicit unions have the quality of an enduring marriage and it is

a grievous hardship to the parties and their children that they are denied the opportunity for lawful wedlock and legitimate birth.

(13) Even if a marriage has irretrievably broken down, this fact cannot be recognised in Canada by the issue of a divorce decree unless one of the spouses has committed or is prepared to commit adultery or perjury. In the words of nine members of the Royal Commission on Marriage and Divorce which sat in England in 1951-1955: "We think it may be said that the law of divorce...is indeed weighted in favour of the least scrupulous, the least honourable and the least sensitive; and that nobody who is ready to provide a ground of divorce, who is careful to avoid any suggestion of connivance or collusion and who has a co-operative spouse, has any difficulty in securing a dissolution of the marriage."[8]

(14) Legally innocent spouses may refuse to petition for divorce from their legally guilty partners fr many reasons ranging from moral or religious conviction to indolence or mere spite and such refusal my be persisted in notwithstanding the total and irreparable breakdown of marriage and the artificiality of the legal concept of guilt and innocence.

(15) The results ensuing from the present grounds for divorce in Canada, whether measured in terms of personal frustration, extra-marital unions, illegitimate births or abuse of the legal process, are extensive and socially damaging.

(16) In criticising the existing divorce laws in Canada, it may be appropriate to quote from the judgment of Sir Gorell Barnes, P., in *Dodd* v. *Dodd*[9] since his criticisms of the English law existing in 1906 would seem directed at the same general conditions which presently prevail in Canada. Sir Gorell Barnes, P., stated:

> "That the present state of the English law of divorce and separation is not satisfactory cannot be doubted. The law is full of inconsistencies, anomalies and inequalities amounting almost to absurdities; and it does not produce desirable results in certain important respects. Whether any, and what, remedy should be applied raises extremely difficult questions, the importance of which can hardly be over-estimated, for they touch the basis on which society rests, the principle of marriage being the fundamental basis upon which this and other civilised nations have built up their social systems; it would be most detrimental to the best interests of family life, society and the State to permit of divorces being lightly and easily obtained, or to allow any law which was wide enough to militate by its laxity against the principles of marriage...This judgment brings prominently forward the question whether, assuming that divorce is to be allowed at all,...and reform would be effective and adequate which did not abolish [judicial] separation..., place the sexes on an equality as regards offence and relief, and permit a decree being obtained for such ble and frustrate the object of marriage; and whether such reform would not largely tend to greater propriety and enhance that respect for the sanctity of the marriage tie which is so essential in the best interests of society and the State. It is sufficient at present to say that, from what I have pointed out, there appears to be good reason for reform and that probably it would be found that it should be in the direction above indicated."

The opinion expressed by Sir Gorell Barnes, P., in *Dodd* v. *Dodd, supra,* was endorsed by the majority of the members of the Royal Commission on Divorce and Matrimonial Causes which sat in England under the chairmanship of Lord Gorell in 1909-1912. The majority of members expressed the conclusion that judicial separation was a socially unsatisfactory remedy in cases where

married life had become intolerable and rejected the view that adultery should constitute the only ground for dissolution of a marriage. The majority recommended that desertion for more than three years, cruelty, incurable insanity, incurable drunkenness, and imprisonment under commuted death sentence should constitute additional grounds for divorce.[10] The Minority Report, signed by the Archbishop of York, Sir William Anson and Sir Lewis Dibdin agreed in substance with most of the Majority's recommendations, but, whilst accepting additional grounds of nullity, emphatically rejected the proposal to extend the grounds of divorce.[11]

Alternative Bases of Divorce Law

(17) There are four possible bases for divorce, and any one or more of them might conceivably be adopted as the underlying basis for a revision of Canadian divorce laws:

1. *The Doctrine of the Matrimonial Offence*

The present divorce laws in Canada are premised upon "the doctrine of the matrimonial offence", which imports that no spouse may obtain a divorce unless his or her partner has been guilty of a specified offence.

2. *The Doctrine of Marriage Breakdown*

The "doctrine of marriage breakdown", if adopted as the sole criterion for divorce, implies that there should be a single comprehensive ground which would allow divorce to be granted to either spouse upon proof that the marriage has irretrievably broken down.

3. *Divorce by Mutual Consent*

The essential characteristic of divorce by consent is that the spouses should be entitled to seek a divorce provided that they have mutually and voluntarily resolved to terminate their marriage.

4. *Divorce at the Option of Either Spouse*

Divorce at the option of either spouse implies the right of a spouse to unilaterally terminate at will his or her marriage status.

Effect Of Divorce Grounds Upon Divorce Rate

(18) It is commonly assumed that the number of divorces will depend upon the number and definition of grounds provided under the legal regime. This assumption, however, has been categorically denied by leading sociologists and scholars. See, for example, J. P. Lichtenberger, "Divorce Legislation" (1932) 160 Annals 116:

> "The only perceptible result of changes in legal grounds is the redistribution of divorces on the basis of available grounds, without any effect upon their number. This is attested to by the fact there is not the slightest connection between the number of grounds in the several (American) states and their respective divorce rates."

See also R. Neuner, "Modern Divorce Law: The Compromise Solution" (1943) 28 Iowa L. Rev. 272:

> "The number of divorces is not dependent on the number and definition of the divorce grounds. This statement must be qualified however. If a jurisdiction recognises only one or two narrowly defined divorce grounds—the best example is New York with adultery as the only

ground—the number of divorces granted every year is much smaller in those jurisdictions which adhere to the traditional scheme of divorce grounds. But if a system of various divorce grounds is adopted, it does not make much difference how they are defined; the legislator thereby loses control of the divorce situation."

Two Fundamental Issues:

(1) *Fault Or Failure As The Criterion for Divorce?*

(2) *General Clause Or Enumerated Grounds?*

(19) As Professor Otto Kahn Freund observed in (1956) 19 Mod. L. Rev. 573 at p. 585, "[In considering proposals for divorce law reform] there are in fact two problems which it is advisable to distinguish. One is the problem of 'fault or failure', i.e., whether the law should dissolve a marriage only if in some sense its disintegration was due to the 'guilt' of either spouse, or whether the objective fact of disintegration should suffice. The other problem is that of 'general clause or enumeration of grounds', i.e., whether the proof of specific defined sets of facts should be required and sufficient or whether the court must be satisfied as to the general deterioration of the marriage, each single event being only an incident serving as evidence. These two problems are quite different. Thus it is possible to affirm the 'failure' principle *in toto* or in part, i.e., to reject the doctrine of the 'matrimonial offence' as the basis or the only basis of divorce and yet to argue in favour of a formulated ground or grounds of divorce which alone will enable the Court to terminate the marriage. This the present [English] law does in cases of insanity and this was the essence of the Bill which Mrs. Irene White, M.P. introduced in the House of Commons but withdrew when the Government undertook to appoint the Royal Commission. It was to the effect that, in addition to the traditional matrimonial 'offences', it should for either spouse be a ground for divorce that he or she had been separated from the other for seven years, that there was no reasonable prospect of reconciliation, and that suitable financial arrangements had been made for the protection of the wife. If this were accepted the law would still be based on the enumerative principle but it would embody the 'failure' in addition to the 'fault' idea. On the other hand, one can cling to the 'fault' principle, ...but formulate a 'general clause', e.g. that the marriage will be dissolved if through the fault of either spouse or both spouses the marriage has disintegrated to such an extent that the spouses can no longer be expected to cohabit. It has been a pretty general experience that where legislation fails to provide a general clause of this kind, the courts will provide it. One (or two or more) of the formulated 'matrimonial offences'...will, under the pressure of social facts be 'interpreted' by the courts until it comes at least close to being an equivalent of a 'general fault' clause. This has happened in France...,in many of the states of the United States with 'extreme', 'intolerable' and other kinds of cruelty...and in England with 'constructive desertion' and to a small extent with 'mental cruelty'."[12]

(20) It is of interest to note that it is not uncommon, even in jurisdictions wherein a general clause has been statutorily introduced, for such a clause to be supplemented by other defined grounds for divorce. For example, section 142 of the Swiss Civil Code provides:

> "If so deep a destruction of the marital relationship has occurred that continuance thereof cannot fairly be expected from the spouses, either spouse may sue for a divorce. [But] if the deep destruction can overwhelmingly be ascribed to one, the other only of the couple can sue for divorce."

This general clause, however, is supplemented by additional grounds for divorce which include adultery, infamous crime, severe cruelty, desertion, and incurable insanity.

(21) Similarly in Western Germany there is a general clause which provides as follows:

> "Where the domestic community of the spouses has ceased to exist for three years, and where by virtue of a deep-seated and irretrievable disruption of the matrimonial relationship, the restitution of a community of life corresponding to the nature of marriage cannot be expected, either spouse may apply for divorce. [But] where the spouse who makes the application has been wholly or overwhelmingly responsible for the disruption, the other spouse may object to the divorce. Such objection is to be disregarded where the maintenance of the marriage is not morally justified considering a proper estimate of the character of marriage and the total behaviour of both spouses. The application for divorce is to be refused where the properly understood interests of one or several minor children of the union demand the maintenance of the marriage."

This general clause, like that in the Swiss Code, is also supplemented by additional grounds for divorce which include adultery, mental derangement, and incurable contagious loathsome disease.

(22) A similar pattern of divorce legislation may also be found in Sweden. Thus Professor Wolfgang Friedmann in his book entitled *Law in a Changing Society* at pages 213-214 observes:

> "Among the contemporary Western systems, the Swedish Marriage Law of 1920 has probably gone farthest in the admission of the breakdown principle. Apart from the possibility of joint application by both spouses for a separation decree on the ground of 'profound and lasting disruption', which the Court has to accept without examination, a separation decree may also be granted on unilateral application, where the court finds that there has, in fact, been a profound and lasting disruption. Divorce can always be obtained one year after a judicial separation decree, provided the spouses have, in fact, lived separate during that year. Moreover, divorce may be obtained, without foregoing judicial separation, on certain 'breakdown' grounds, most important of which are actual separation for three years or mental insanity for more than three years without hope of recovery. These grounds for divorce stand side by side with a number of 'fault' grounds, so that the Swedish law combines in a sense the principles of consent, breakdown and fault."

(23) It may well be contended that a general clause, whether based on the fault or non-fault concept, tends to uncertainty and imposes too great an onus upon the Court. This conclusion may well be reflected:

(i) in the experience of Australia, New Zealand, and American and European jurisdictions which have introduced the marriage breakdown concept through specific "separation provisions" rather than under a general clause providing, for example, that a marriage shall be dissolved on proof that the disruption of the marriage is irreparable and attempts at reconciliation would be impracticable or futile, and

(ii) in the traditional pattern of legislation adopted in Australia, New Zealand, and in the American and European jurisdictions which define specific offences in addition to or in substitution for a general fault clause.

(24) I should be realised, however, that whilst the general clause, whether premised upon fault or non-fault, imposes greater demands upon the court, it has the advantage of recognising that marriage and divorce involve complex human and social relationships which cannot simply be reduced to the objective fact of "separation" or to designated and specific offences premised upon a simple equation of guilt and innocence.

Objections to Divorce Law Regime Based Exclusively on a Fault Concept

(25) The arguments against retaining or promoting a divorce law regime premised exclusively upon the fault concept are substantial. They include the following:

(i) The fault grounds for divorce do not in the majority of cases represent the real cause of the marriage breakdown. The doctrine of the matrimonial offence, with its consequential emphasis on legal guilt and innocence, is artificial for in real life it is comparatively rare to find total innocence on one side and total guilt on the other. Marriage breakdown cannot be reduced to a simple equation of guilt or innocence and these concepts cannot be effectively measured or evaluated.

(ii) The refusal of divorce except on proof of a matrimonial offence precludes the State from recognising social realities in certain cases where the marriage has broken down. The argument that the State has an interest in promoting the family relationship becomes meaningless when the family relationship is no longer performing any useful function in promoting orderly adjustment between the sexes and the proper rearing of children.

(iii) The fault concept with its corollary of the adversary system tends to promote unnecessary friction and tension between spouses who find it necessary to have recourse to the divorce court.

(iv) The doctrine of the matrimonial offence places undue emphasis upon the past conduct of the spouses and does not effectively take into consideration the prospect of a viable future marital relationship.

Marriage Breakdown—A Triable Issue?

(26) It is sometimes contended that the introduction of marriage breakdown, in any form, as a basis for divorce imposes an impossible task upon the court. In the words of nine members of the Royal Commission on Marriage and Divorce which sat in England in 1951-55: "To determine whether or not a marriage had broken down is really not a triable issue."[13] This opinion, however, would seeem untenable in the light of experience in Australia, New Zealand, and American and European jurisdictions wherein the "marriage breakdown" concept has been effectively applied as a criterion for divorce under the "living apart" statutes.[14]

(27) It should further be observed that the "marriage breakdown" concept has already been effectively applied by Canadian Courts in relation to the discretionary bars to divorce and the absolute bar of condonation. With respect to the discretionary bars to divorce, the Canadian Courts have consistently followed *Blunt* v. *Blunt*[15] which establishes that the circumstances that govern the exercise of the discretion "in the petitioners' favour" are as follows:

(i) the position and interest of any children of the marriage;

(ii) the interest of the party with whom the petitioner has been guilty of misconduct, with special regard to the prospect of their future marriage;

(iii) the question whether, if the marriage is not dissolved, there is a prospect of reconciliation between husband and wife;

(iv) the interest of the petitioner, and in particular the interest that the petitioner should be able to remarry and live respectably; and

(v) the interest of the community at large, to be judged by maintaining a true balance for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist upon the maintenance of a union which has utterly broken down.

(28) Although the considerations formulated in *Blunt* v. *Blunt, supra,* were directed to the discretionary bar of the petitioner's adultery, they would appear applicable in respect of all the discretionary bars to divorce.[16]

(29) It is significant to observe that the application of the considerations set out in *Blunt* v. *Blunt, supra,* enable the Canadian Courts to give legal effect to the fact of marriage breakdown by granting a divorce to both parties. Thus, where each spouse has instituted proceedings for divorce on the ground of the other spouse's adultery and the respective charges have been proved, in the absence of collusion, connivance or condonation, the court may exercise any of the following powers:

(i) it may exercise its discretion "in favour of" one party while dismissing the action of the other;

(ii) it may refse to exercise its discretion "in favour of" either party in which case both actions will be dismissed; or

(iii) it may exercise its discretion "in favour of" both parties and grant a decree to each of them.

In recent years there has been an increasing tendency to adopt this third alternative in order to avoid any possible prejudice to the parties in subsequent proceedings.[17] It is accordingly apparent that the Canadian Courts presently recognise and give legal effect to the fact of marriage breakdown notwithstanding that the grounds for divorce are premised upon the "offence concept".

(30) With respect to the absolute bar of condonation, it is well established that a matrimonial offence which has been condoned may be revived by subsequent matrimonial misconduct on the part of the offending spouse. Such misconduct which operates to revive the original offence need not itself constitute a ground for matrimonial relief; it is sufficient if the misconduct is such as if persisted in would render a continuation of marital consortium impossible.[18] It is thus evident that, in determining whether a condoned offence has been revived so as to justify the issue of a divorce decree, the court will examine the subsequent matrimonial misconduct complained of with a view to discovering whether in fact the marriage has irretrievably broken down.

Legislative Recognition of Marriage Breakdown as a Ground for Divorce

(31) Recognition of marriage breakdown as a basis for matrimonial relief through divorce proceedings has been directly admitted in one form or another in Australia, New Zealand, in twenty-six jurisdictions in the U.S.A., and in several European countries. Such recognition is usually afforded under the so-called "living-apart" statutes.

Australia

(32) In Australia section 28 (m) of the Matrimonial Causes Act (Aust.), 1959 provides that a decree of divorce may be granted by the court on the petition of either spouse where "the parties to the marriage have separated and thereafter have lived separately and apart for a continuous period of not less than five years immediately preceding the date of the petition and there is no reasonable likelihood of cohabitation being resumed."

(33) For the purposes of section 28 (m), the parties to a marriage may be taken to have separated notwithstanding that the cohabitation was brought to an end by the action or conduct of only one of the spouses and even though such conduct constitutes desertion. A decree of divorce may also be granted on the ground specified under section 28 (m) notwithstanding that there was in existence at any material time:

(i) a judicial decree suspending the obligation of the parties to the marriage to cohabit; or

(ii) an agreement between the parties for separation.

(34) In certain circumstances, however, the Court must or may refuse to grant a decree on the ground of separation. Thus, section 37 of the Matrimonial Causes Act (Aust.), 1959, provides as follows:

"37.—(1) Where, on the hearing of a petition for a decree of dissolution of marriage on the ground specified in para. (m) of section 28 of this Act (in this section referred to as 'the ground of separation'), the court is satisfied that, by reason of the conduct of the petitioner, whether before or after the separation commenced, or for any other reason, it would, in the particular circumstances of the case, be harsh and oppressive to the respondent, or contrary to the public interest, to grant a decree on that ground on the petition of the petitioner, the court shall refuse to make the decree sought.

(2) Where, in proceedings for a decree of dissolution of marriage on the ground of separation, the court is of opinion that it is just and proper in the circumstances of the case that the petitioner should make provision for the maintenance of the respondent or should make any other provision for the benefit of the respondent, whether by way of settlement of property or otherwise, the court shall not make a decree on that ground in favour of the petitioner until the petitioner has made arrangements to the satisfaction of the court to provide the maintenance or other benefits upon the decree becoming absolute.

(3) The court may, in its discretion, refuse to make a decree of dissolution of marriage on the ground of separation if the petitioner has, whether before or after the separation commenced, committed adultery that has not been condoned by the respondent or, having been so condoned, has been revived.

(4) Where petitions by both parties to a marriage for the dissolution of the marriage are before a court, the court shall not, upon either of the petitions, make a decree on the ground of separation if it is able properly to make a decree upon the other petition on any other ground."

(35) It should be observed that section 40 of the Matrimonial Causes Act (Aust.), 1959, provides that no decree for the dissolution of marriage shall be issued if the petitioner, in bringing or prosecuting the proceedings, has been guilty of collusion with intent to cause a perversion of justice. The absolute bars of condonation and connivance and the traditional discretionary bars would, however, appear inapplicable to a petition for divorce on the ground specified in section 28 (m): see Matrimonial Causes Act, (Aust.) 1959, sections 39 and 41.

New Zealand

(36) Section 21 (1) of the Matrimonial Causes Act (New Zealand), 1963, provides that a petition for divorce may be presented to the court on any of the following grounds:

"(m) That the petitioner and respondent are parties to an agreement for separation, whether made by deed or other writing or orally, and that

the agreement is in full force and has been in full force for not less than three years.

(n) That—

(i) The petitioner and respondent are parties to a decree of separation or a separation order made in New Zealand, or to a decree, order, or judgment made in any other country if that decree, order, or judgment has in that country the effect that the parties are not bound to live together; and

(ii) That decree of separation, separation order, or other decree, order, or judgment is in full force and has been in full force for not less than three years.

(o) That the petitioner and respondent are living apart and are unlikely to be reconciled, and have been living apart for not less than seven years."

(37) In respect of the grounds set out in section 21 (1) (m) and (n), *supra*, section 29 of the Matrimonial Causes Act (New Zealand), 1963, provides that the court shall dismiss the petition if the respondent opposes the granting of the decree and it is proved that the separation was due to the wrongful act or conduct of the petitioner.[19]

(38) The Court is also afforded a general statutory discretion to refuse a decree of divorce on the grounds set out in section 21 (1) (m), (n) and (o) notwithstanding that the petitioner has proved his case, provided that the court shall not, in the exercise of that discretion, refuse to grant a decree by reason only of the adultery of either party after their separation: Matrimonial Causes Act (New Zealand), 1963, section 30.

United States of America

(39) Twenty-six jurisdictions in the United States of America have qualified the traditional concept that divorce shall be granted only to the "innocent" spouse on proof that the respondent has committed a matrimonial offence by introducing statutory provisions whereby a divorce may be granted to spouses who have lived separate and apart for a specified number of years.

(40) The "living apart" provisions which have been enacted in the American jurisdictions have taken a variety of forms and include:

(i) Provisions whereby the courts may, without regard to fault, grant a divorce at the suit of either spouse, where the spouses have lived separate and apart for a specified period pursuant to a judicial decree or order of separation.

(ii) Provisions whereby the courts may grant a divorce to either spouse where the spouses have voluntarily separated and lived apart for a specified period.

(iii) Provisions whereby the court may grant a divorce where the spouses have lived separate and apart for a specified period but where such relief is available only to a spouse who was not at fault in causing the separation.

(iv) Provisions whereby the court may grant a divorce to either spouse where the spouses have lived separate and apart for a specified period, regardless of whether the separation was voluntary and/or attributable to the fault of either spouse.

(41) The above provisions have been examined in detail by Professor Walter Wadlington in an article entitled "Divorce Without Fault Without Perjury" which was published in (1966) 52 Virginia Law Review at pages 32-87.[20] It is accordingly unnecessary for this writer to duplicate Professor Wadlington's

research by detailing the operation of "living apart" provisions which have been enacted in the majority of American jurisdictions. The writer would, however, take this opportunity to endorse the following conclusion which was expressed by Professor Wadlington:

> "Of the [provisions] just outlined, the non-fault separation category [namely, category 4] would best effectuate a broad breakdown approach to divorce at this time—Several key features make the non-fault separation statute preferable at this stage. It has been proven workable in practice in the courts, and when properly drafted avoids the judicial injection of still prevalent fault concepts. If the separation time is reasonable, it can afford an opportunity for reconciliation and insure against precipitate action; at the same time, it is simple and quick enough to discourage the parties from resorting to other divorce routes which may promote perjury with respect to grounds or jurisdiction. By assuring that the parties have lived separately for a specified minimum period, it applies only to the marriage which has ceased to function and therefore should be dissolved, and it makes the dissolution process relatively painless by avoiding as much as possible (alimony disagreements sometimes to the contrary) the need for fixing blame or publicly airing private misconduct to the future detriment of the immediate parties and other family members".

European Countries

(42) A brief summary of the extent to which living apart provisions have been introduced in Europe as a ground for divorce may be found in an article entitled "Living Apart As A Ground For Divorce",[21] the relevant sections of which read as follows:

> "In Europe, living apart by the spouse is a ground for the granting of an absolute divorce in a number of countries, and the distinction is often made between a private separation and a living apart pursuant to permission granted either by an administrative authority or pursuant to a decree of divorce from bed and board.
>
> For example, in Denmark, a decree of absolute divorce may be granted after a husband and wife have been *de facto* separated for four years, and in Germany an absolute divorce is available where the period of living apart has endured for three years.
>
> The more common practice in Europe, however, in those countries where a legal separation may be granted by an administrative authority, or a divorce *a mensa et thoro* by a court, is the conversion of the separation or divorce from bed and board into an absolute divorce, after such period of time as is specified by statute.
>
> In Denmark, a legal separation granted by an administrative authority may be converted into an absolute divorce two and a half years after the decree of separation, or eighteen months thereafter, provided the spouses agree. Out of all divorces granted in Denmark, half were in this category of conversion. In Sweden, a separation may be granted on the motion of both spouses, and converted, after one year, into a divorce. This was done in 5,549 of the 6,748 divorces granted in Sweden in 1948. In Norway the period is two years, but if the divorce is requested by both spouses, the time is reduced to one year.
>
> In the Netherlands, also, a separation can be requested by mutual agreement of the spouses any time after two years from the date of the marriage, and it can be converted into an absolute divorce after five years if there has been no reconciliation. The court, however, must attempt a reconciliation during the proceedings for conversion.

In Switzerland, divorce is permitted without a finding of fault on the part of either of the spouses, but the judge in lieu of divorce may order a separation of from one to three years if he believes there is a chance of reconciliation, and after such period, or after three years if no period was fixed by the court, either spouse may request a divorce. In Turkey the period of time is similar to that in Switzerland, after which conversion may be sought. Under the former law of Hungary, a divorce after five years' separation, without declaration of fault on the part of either party, was permitted.

While in France, Belgium and Monaco, a divorce from bed and board is not permitted by consent of the parties, but only for specified grounds involving fault on the part of the defendant spouse, such legal separations are generally granted more freely by the courts than are absolute divorces, and they may be converted into an absolute divorce on petition of either party at the expiration of three years. Originally in France, the conversion could only be sought by the defendant in the separation case. The reason for this rule was the policy that a judicial separation was intended to be only temporary, since it was an anti-social situation, which should be terminated after an appropriate period by reconciliation, or if that was impossible, by conversion into an absolute divorce. It was considered wrong to permit one spouse to force the other to remain indefinitely in a status which was not a marriage, but where celibacy theoretically was enforced. Therefore, the defendant was permitted to convert the legal separation into an absolute divorce after three years. Later in 1884, the right of requesting a conversion was given to both spouses, and this is the law in France today."

General Comment In respect Of Legislative Recognition Of The Breakdown Concept In The Aforementioned Jurisdictions

(43) The preceding analysis will have indicated that Australia, New Zealand, many American jurisdictions and several European countries have enacted "living apart" provisions which reflect a realistic recognition of the fact that no useful purpose is achieved by the state insisting upon the legal continuance of the marriage bond in circumstances where the marriage has irretrievably broken down.

(44) To view the preceding analysis in perspective, however, it should be observed that whilst the legislative introduction of the marriage breakdown principle through "living apart" provisions has made substantial inroads upon the traditional offence concept in divorce proceedings, the vast majority of countries still theoretically adhere to the "doctrine of the matrimonial offence". Thus as Professor W. Friedmann, observes in his book entitled *Law In A Changing Society* at pages 214-215:

"Most of the contemporary laws still base their law of divorce on a number of enumerated 'faults': adultery, cruelty, desertion, violence, and the like. Some legal systems tend towards general definitions, others prefer the enumeration of a large number of specific offences, such as cruelty to children, gambling, drunkenness, sexual misconduct, etc. Adultery is the backbone of all the legal systems which make 'fault' the basis of their divorce jurisdiction.[22] The only major open deviation now made in the law of England and Scotland—and all the British Dominions except Canada, in thirty American states, and in nine out of seventeen European countries, sampled in the Report of the (Morton) Commission—from the principle of 'fault' is the recognition of insanity as a ground for divorce (usually after a specified number of years). Here,

divorce is granted because fate—not fault—has made the continuation of the marriage impossible in anything but name."

(45) But Professor Friedmann further observes:

> "It would, however, be highly unrealistic to judge the present state of marriage and divorce by the enumeration of the grounds of divorce as stated in the various legal systems...Judicial interpretations have to a large extent condoned or sanctioned practices designed to satisfy the letter of the law, while violating its spirit...In the States in which the fault principle remains exclusive or predominant,...theories and concepts remain outwardly unchanged, but their meaning is altered...[Thus] where, under the pressure of social facts, divorce grounds are enlarged from adultery to 'cruelty', 'violence', 'desertion' and the like, it is still possible to proclaim that the principle of fault i.e. the exclusive dependence of divorce on the proof of guilt on the part of the other side, has been preserved. In fact, however, the reality of the law is transformed, either by processes of elastic interpretation, or by downright fictions reminiscent of the earlier history of the common law."[23]

(46) The previous analysis will have indicated that it is not uncommon for fault and non-fault grounds to co-exist under the same statute. Moreover the distinctions between statutory fault and non-fault grounds are frequently blurred by judicial interpretation and techniques.[24]

Judicial Recognition of the Factor of Marriage Breakdown in Jurisdictions wherein the Traditional Fault Concept is Endorsed by the Legislature.

(47) Even in jurisdictions where matrimonial offences provide the only basis for divorce, the courts have tended to qualify the fault concept by interpreting offences such as cruelty and desertion in such a way as to render them substitutes for a general clause envisaging destruction of the marriage.[25] Thus the Report of the Royal Commission on Marriage and Divorce, Cmd. 9678 (1956), para. 153 states:

> "Conduct by one spouse of a grave and weighty nature which makes married life unbearable for the other spouse may at the present time be pleaded before the court in one of several ways. If such conduct is accompanied by injury to health and the court is satisfied that the other spouse needs protection it will constitute legal cruelty, for which the remedy of divorce is immediately available. If one or more of the requirements of legal cruelty are lacking, but nevertheless there was present an intention, actual or presumed, on the part of one spouse to bring the married life to an end and to drive the other spouse from the home, the conduct will amount to constructive desertion, which, if persisted in for three years or more, will also give a right to divorce...."

(48) The recent English decisions in *Gollins* v. *Gollins* [1963] 3 W.L.R. 176 and in *Williams* v. *Williams* [1963] 3 W.L.R. 215 would tend to reinforce the conclusion expressed above since the House of Lords therein concluded that, in determining whether matrimonial cruelty has been committed, the courts should look not to the culpable intent of the allegedly cruel spouse but rather to the effect of his or her conduct upon the other spouse. The courts in England have thus established that in cases of alleged matrimonial cruelty the factor of marriage breakdown is as important, if not more important, than a mere determination of the issue of fault.

Should Marriage Breakdown Constitute The Only Ground or Criterion For Divorce?

(49) If Canada should elect to follow the example of the ten jurisdictions in the United States of America[26] which have staturoty provisions whereby a divorce may be granted by the court to spouses who have lived separate and apart for a specified period, such relief being available without regard to whether the separation was voluntary and/or attribuable to the fault of either spouse, then the question arises whether such provision should constitute the exclusive criterion for divorce. It may be argued that the introduction of such legislation in Canada would logically preclude the co-existence of statutory grounds for divorce premised upon a fault concept.[27]

(50) It is submitted that the Canadian Parliament should strive to remedy grievances rather than seek to achieve theoretical perfection or logical harmony. Therefore, the real issue to be resolved is not whether the introduction of "non-fault separation" legislation is logically inconsistent with the co-existence of statutory grounds for divorce based upon proof of a "matrimonial offence" but rather whether such legislation would eliminate the need for grounds premised upon fault.

(51) It is generally conceded that in jurisdictions where divorce is based exclusively upon proof of a matrimonial offence, the commission of such an offence, is in many cases merely symptomatic of the fact that the marriage has broken down. It would nevertheless appear unrealistic to abandon the fault concept *in toto*. As Mr. Justice Scarman has observed in an address entitled "Family Law and Law Reform".

> "Although it is true that white innocence and black guilt are seldom to be found in married life, comparisons of innocence and guilt do reflect genuine human experience and are necessary if divorce laws are to be administered justly and in the interests of the children. Since, therefore, one cannot wholly exclude from judicial consideration the doctrine of the matrimonial offence, I suggest that the wisest course is to use it properly to advance the objective we have in mind. I believe that society recognizes that a spouse should be able to get a divorce when he or she has been deserted, has been treated with cruelty, or has had to face the infidelity of adultery. Why should a spouse, if in a position to prove any of these three situations, have to go further and prove irretrievable breakdown, or consent, or failure of attempts at reconciliation? The ordinary man's sense of justice revolts at any such requirement. The law would do well to keep in touch with the ordinary man's idea of what is right and proper, and, though the lawyer can argue that the logical way to handle matrimonial offences is solely as evidence of underlying breakdown, I think this argument, if carried to a logical conclusion, would fail to win general approbation and would certainly impose a very much greater strain on the administration of justice than our limited resources in legal man power could meet.
>
> Where the ordinary man criticises the law is in its exclusive reliance on the doctrine of the matrimonial offence.—I think that we could well follow the Australian and New Zealand precedent [*see supra*]—and that if we did so the ordinary man's objection to the substantive law of divorce would be largely met—
>
> If one could add to the existing grounds for divorce that of separation or irretrievable breakdown one would be able at the same time to eliminate a number of other anomalies and defects—. It may be that in a reformed divorce law divorce would never be available as of right but only when the Court was satisfied that proper arrangements had been made for

the care and upbringing of the children and that reconciliation was impossible. Such discretion could well be a valuable part of the law and would be wholly different from that which the Court now purports to exercise in respect of the adultery or other offence of the petitioner".

(52) It should be noted that the conclusion of Mr. Justice Scarman regarding the co-existence of matrimonial offences and marriage breakdown through non-fault separation provisions as grounds for divorce would appear to be reflected by legislation not only in Australia and New Zealand but also in jurisdictions in the United States of America and in Europe.[28]

Dangers Of Fault And Non-Fault Grounds Co-Existing

(53) Where fault and non-fault grounds for divorce co-exist in a single jurisdiction, there is some danger that the courts will apply the same techniques irrespective of the nature of the ground for relief. Thus Professor Lawrence Rutman observes in an article entitled "Departure From Fault" (1961) 1 J1. of Family Law 181:

> "The living-apart statutes express, on the surface at least, an exclusion of fault considerations in about half of the (American) states. In practice...this has not been the case. The introduction of technical terms, the reiteration of traditional jargon and the lack of continuity in thought are apparent in almost all the cases."[29]

Marriage Breakdown Through Living-Apart Statutes As Ground For Divorce: Effect On Divorce Rate.

(54) It is sometimes contended that the introduction of marriage breakdown, through non-fault separation provisions, as a ground for divorce would strike at the foundation of marriage in that it would result in a veritable flood of divorces. There is little doubt that immediately following the introduction of any new ground for divorce, there would be a substantial number of divorces sought to relieve the suffering which has been endured under the present Canadian divorce laws.

(55) The experience in Australia, however, where non-fault and fault grounds co-exist under the Matrimonial Causes Act, (Aust.), 1959, would indicate that the inclusion of marriage breakdown as a ground for divorce through non-fault separation provisions will not undermine the status of marriage nor result in any overwhelming flood of divorces. Thus, D. M. Selby, Judge in Divorce of The Supreme Court of New South Wales states:

> "Since the (Matrimonial Causes) Act came into force, separation has run a consistent third place in popularity as a ground for divorce, as the following statistics of decrees of dissolution of marriage pronounced in Australia indicate:

	1961	1962	1963	1964	1965 (to June 30)
Desertion	3,638	3,645	3,531	3,468	1,735
Adultery	1,855	1,548	1,676	1,833	893
Separation	350	1,272	1,495	1,687	747
Total on all grounds	6,712	7,245	7,476	7,917	3,806

An analysis of these figures could support various speculations. Whilst the total number of decrees granted in 1961, 1962, 1963 and 1964 have increased each year, the decrees granted on the ground of desertion fell slightly each year from 1962 but those on the ground of separation

have risen each year. Whatever the reason for these trends, it is doubtful if they have any significance. The separation figures could be most misleading if an attempt were made to draw an inference from them. It may well be that they are swollen as a result of an accumulation of cases in which the ground of separation existed before 1961 but was not available as a ground for divorce until the coming into operation of the Act. Experience has shown that a number of suits brought on the ground of separation would have succeeded if brought on the ground of desertion. Less frequently, but from time to time, suits brought on the ground of separation could have been based on the ground of insanity. One conclusion may justifiably be reached. The inclusion in the Act of the ground of separation has not brought the flood of divorces which was so confidently prophesied."[30]

(56) It is relevant to observe that the Australian statistics should be analysed and evaluated in the light of section 37(4) of the Matrimonial Causes Act (Aust.), 1959, which reads as follows:

"37 (4) Where petitions by both parties to a marriage for the dissolution of the marriage are before a court, the court shall not, upon either of the petitions, make a decree on the ground of separation if it is able properly to make a decree upon the other petition on any other ground."

Distinction Between Marriage Breakdown And Divorce By Consent

(57) It is sometimes suggested that the inclusion of "marriage breakdown", in any form, as a basis for divorce is equivalent to the introduction of divorce by consent.[31] This contention, however, would seem invalid since divorce by consent implies that the spouses shall act as the sole judges of their own cause whereas divorce on proof of marriage breakdown requires an objective judicial analysis of all the material circumstances to determine whether the marriage has in fact broken down.

(58) Divorce by consent further implies that the State reserves no right to refuse a divorce sought pursuant to agreement between the spouses even though the marriage is viable and its termination would create a situation detrimental to the interests of the children of the family. Divorce on proof of marriage breakdown, on the other hand, implies a right, indeed an obligation, in the State to refuse matrimonial relief in cases where the marriage is found to be viable. It may be noted incidentally that the introduction of divorce on proof of marriage breakdown implies a further obligation on the State to provide adequate marriage guidance and conciliation procedures to persons contemplating marriage and to spouses who have encountered or are encountering serious marital difficulties.

Divorce By Consent

(59) The writer proposes to examine two questions, namely, (1) Does divorce by consent actually exist in Canada? (2) Should divorce by consent be sanctioned by express statutory enactment?

(60) It is unrealistic to assume that any divorce regime can effectively preclude divorce by consent. As C.P. Harvey, Q.C. observed in an article entitled "On the State of the Divorce Market" (1953) 16 Mod. L. Rev. p. 130: "A valid marriage... is the only condition precedent to divorce which cannot be circumvented somehow". This conclusion is confirmed in a study which was undertaken more than twenty years ago in respect of the actual operation of divorce in New York, wherein the then present grounds for divorce were confined to adultery.[32]

The findings of this study may be summarised in the following observations published therein:

> "The body of divorce law prevailing in New York, viewed *a priori*, would seem to offer fertile soil for the growth of collusion. ...Factual study seems to support abstract speculation upon this point. Although statistics which may directly prove the number of collusive divorces are, and will, from the very nature of collusion, remain unavailable, several factors may be indicated which tend conjointly to substantiate its generally assumed prevalence. Prominent among these factors is a huge number of cases which are uncontested on the merits, and consequently tried with the aid of formulated questions of the 'black book' in a short space of time, without benefit of adequate cross-examination. Similarly persuasive are the large percentage of co-respondents who remain unnamed, the surprising state of undress in which the defendant and co-respondent are generally found, and the close relationships generally existing between the defendant and witnesses for the complainant. And the unusually short period commonly intervening between the alleged adultery and the service of process would constitute at least a suspicious circumstance. ...
>
> The situation seems to demand legislative inquiry, and at least a subsequent contraction, if not a complete bridging, of the gap which now exists between the legal rules and prevailing *mores*."

The conclusions set out in the above study would appear equally tenable today. Thus in the 1966 Report of the Joint Legislative Committee on Matrimonial and Family Laws to the Legislature of the State of New York the following statements appear:

> "The New York one-ground adultery divorce law was out-of-date one hundred years ago...Within the state the one-ground divorce law invited a peculiarly nasty combination of faked evidence, perjury and legal chicanery. ...In 1947 New York Supreme Court Justice Henry Clay Greenberg estimated that seventy-five percent, at the very least, of New York Divorces were based upon 'phony raids'. ...Professor Henry H. Foster ...said before the committee, 'In the ninety odd per cent of divorce cases that are uncontested, judges and counsel engage in make believe, observing a ritual that lasts but a few minutes. Such is a travesty on the administration of justice and almost a criminal neglect of the social responsibility that a just society would assume. ...In 1945, the Committee of Law Reform of the Association of the Bar of the City of New York recommended a liberalisation of our divorce laws so that we may thus eliminate what has come to be recognised as a scandal, growing out of wide-spread fraud, perjury, collusion, and connivance in the dissolution of marriages in this state.' ...And one of the state's senior judges, Judge Meier Steinbrink said, 'These uncontested cases are not only a farce, they are utterly disgraceful, because the evidence is always the same. ...Nor does the process take long—so quick are the judges in the matrimonial courts to clear their calendars and their consciences. ...I have timed myself—one every seven and a half minutes—and that is how I happen to dispose of an average of seventy-five a day'. In Chenango County the committee was told, perhaps because of a more leisurely upstate pace, that the average default divorce takes one minute longer, that is eight and one-half minutes.
>
> Another judge, Supreme Court Justice Benjamin Brenner observed, 'I firmly believe that our dissolution laws engender disrespect and contempt for law itself because the rule of law is perverted in the conduct and practice prevalent in unopposed matrimonial hearings. Judges are

> often compelled to become silent participants in undisputed divorce proceedings based upon pre-arranged raids. ...While there are legitimate divorce cases in which adultery is discovered..., a very substantial number of undefended suits end in decrees founded on collusion or perjurious testimony, since the evidence is uncontested and must be presumed to be true. Disrespect for the New York matrimonial law is often reflected in the judge's own feeling of frustration or chagrin, which he must experience in the course of such un-contested trials.'[33]

(61) In the light of the preceding studies, it may be contended that it is not unlikely that many of the divorces presently granted in Canada are in fact divorces by consent, because, in the undefended cases, which represent more than ninety per cent of all divorce cases, it is practically impossible for the court to detect whether there has been collusion, and further, the ground for divorce may be provided by one party in circumstances which do not amount to legal collusion. If this contention is accepted, then clearly it brings the law in Canada into disrepute and requires such revision of the divorce laws as will reduce the gap between legal theory and social practice.

(62) It is submitted, however, that marriage should not be regarded as a mere contract in which no one is concerned except the spouses. The children of the marriage, if any, are interested parties in the maintenance of a stable and healthy family life and the community at large also has a primary interest in promoting the stability of married life which is the cornerstone of our society. It is further submitted that the promotion of such marital stability is inconsistent with the formal recognition of divorce by consent. It is accordingly concluded that the State should continue to regulate the termination of the marriage status and that divorce should not be available merely at the will of both spouses.

Specific Proposals For Reform Of The Grounds For Divorce In Canada Adultery As A Ground For Divorce

(63) The commission of adultery by one spouse is almost universally recognised as entitling the other spouse to petition for the marriage to be dissolved. Adultery has long been recognised as a ground for divorce in Canada.

(64) This writer accepts the opinions expressed by eighteen members of the Royal Commission on Marriage and Divorce which sat in England in 1951-1955 and accordingly recommends that adultery should be retained as a ground for divorce in Canada. Eighteen members of the Royal Commission expressed the following opinions;

> "115. Some English witnesses suggested that the law should be modified in respect of proceedings based on the commission of a single act of adultery. There were two proposals, namely, that relief should be denied entirely or that the court should have a discretion to delay granting relief so that the possibilities of reconciliation might be explored. It was said in support that a single act of adultery need not necessarily denote that the marriage has completely failed and should be dissolved; often, on learning of the adultery, the injured spouse may take proceedings in a fit of anger or pique or because he or she has been influenced by the advice of relatives and friends. If relief were to be refused or delayed, husband and wife would have time to try to resolve any underlying difficulties and might well come together again.
>
> 116. We have considered possible ways in which the law could be altered on one or other of the lines proposed. One course would be to say that divorce should be granted only on proof of an adulterous association. That, in our view, would amount to substituting a new ground of divorce for that of adultery. As one witness put it: 'The offence is adultery and as

far as the offence is concerned it does not make any difference whether it is a course of conduct or an isolated act'. Moreover, no relief would then be available, as in our opinion it should, to the person whose spouse has committed promiscuous acts of adultery.

117. Another course would be to say that only repeated acts of adultery should give ground for divorce. To this there is the practical objection that to obtain evidence of repeated acts of adultery might be very expensive, and sometimes impossible, if a spouse were particularly adept at concealing his adultery. But the real difficulty lies in deciding what should constitute 'repeated acts of adultery'. Could it be said of two acts of adultery separated by an interval of, say, five years that the element of repetition was present? Faced with this problem, the court might be led to set up a test under which, say, three acts of adultery within a reasonable period would constitute 'repeated acts'. The dividing line would be most arbitrary and we feel that no distinction can properly be made between the first and any other act of adultery. Every such act is inimical to the marriage relationship, and the adaption of any dividing line might lead to the view that a spouse could commit one or two acts of adultery with impunity. The position of the injured spouse must also be considered; he may feel that it would be impossible to resume life with his adulterous spouse after the commission of one act of adultery, particularly when a child is born as a result.

118. There remains the alternative suggestion that the court should have a discretion to delay granting a decree of divorce when the sole ground put forward is the commission of a single act of adultery. It would be difficult for the court to decide in what circumstances relief should be delayed; as we have said, as a matrimonial offence one act of adultery cannot properly be distinguished from another. Moreover, we do not think that the proposal would achieve its object of promoting reconciliation. Apart from the fact that at this final stage, when the case has been tried and the adultery proved, the prospects of a successful reconciliation must be very slight, we are satisfied that the element of compulsion should not be introduced into any machinery designed to bring about reconciliation.

119. In our view, and this was confirmed by several witnesses, the commission of an isolated act of adultery, where otherwise the marriage relationship is comparatively stable, is more often than not forgiven. We consider it preferable that the injured spouse should be left, as at present, with the choice of deciding whether to forgive the commission of a single act of adultery or to found divorce proceedings upon such conduct. We accordingly recommend that there should be no alteration in the law relating to adultery as a ground of divorce in England and Scotland."[34]

(65) If it were considered advisable to permit divorce in Canada on proof of adultery only in circumstances where the court is satisfied that the offence has rendered the marriage irretrievably broken down and attempts at reconciliation would be impracticable or futile, the definition of cruelty hereinafter proposed[35] would seem sufficiently wide to enable the court to grant a divorce on the ground of cruelty where one spouse has committed adultery and the attendant circumstances are of such a character that the petitioner cannot reasonably be expected to be willing to cohabit with the respondent.

Adultery: Artificial Insemination By Donor

(66) If it is proposed to retain adultery as ground for divorce in Canada, it may be necessary for the Committee to examine whether the artificial insemination of a wife by a donor without the husband's consent should constitute a separate ground for divorce. There has been a conflict of judicial opinion on the

question whether the artifical insemination of a wife by a donor constitutes the matrimonial offence of adultery.[36]

(67) It may be noted that the Royal Commission on Marriage and Divorce which sat in England in 1951-55 recommended that the artificial insemination of a wife by a donor without the husband's consent should constitute a separate ground for divorce at the instance of the husband.[37] This recommendation was endorsed by the Departmental Committee on Human Artificial Insemination which sat in England in 1958-1960.[38]

Rape, Sodomy and Bestiality as Grounds for Divorce

(68) Rape, sodomy and bestiality are presently recognised as grounds for divorce at the suit of a wife in those Canadian provinces wherein the provisions of the Divorce and Matrimonial Causes Act (Eng.), 1857, apply.[39]

(69) For reasons corresponding to those set out in paragraph 64, *supra*, it is submitted that these offences should constitute independent grounds for divorce in Canada at the suit of the innocent spouse.[40]

(70) It is further submitted that equality between the sexes should be legally secured in respect of these offences and that divorce should be available to a husband or a wife whose spouse has committed any such offence.[41]

Cruelty As A Ground for Divorce

(71) Matrimonial cruelty constitutes a ground for judicial separation and alimony in most Canadian provinces and is a ground for divorce in Nova Scotia.[42] Matrimonial cruelty also constitutes a ground for divorce in England[43] and in forty-six jurisdictions in the United States of America.[44]

(72) Except in Alberta and Saskatchewan,[45] "cruelty" in relation to matrimonial causes has not been defined by statute and the governing principle which has been consistently applied in the other Canadian common-law provinces is that established by the decision in *Russel* v. *Russel* [1897] A.C. 395, wherein five out of nine Law Lords held that in order to constitute cruelty in matrimonial proceedings, the acts or conduct complained or must have caused "danger to life, limb or health, bodily or mental, or reasonable apprehension of [such danger]."[46]

(73) In Alberta and Saskatchewan, cruelty is statutorily defined for purposes of judicial separation and alimony to include not only conduct which creates a danger to life, limb or health, but also any course of conduct which in the opinion of the court is grossly insulting or intolerable, or of such a character that the person seeking matrimonial relief could not reasonably be expected to live with the other spouse after he or she has been guilty of such conduct.[47]

(74) It is submitted that cruelty should be introduced as a ground for divorce in the Canadian provinces and that it should be defined as meaning "any conduct that creates a danger to life, limb or health, bodily or mental, or a reasonable apprehension thereof and any conduct that in the opinion of the court is grossly insulting or intolerable: Provided that the conduct complained of shall be of such a character that the person seeking the divorce cannot be expected to be willing to continue or resume matrimonial cohabitation."

(75) It will be observed that this definition extends the criterion of cruelty adopted by the House of Lords in *Russell* v. *Russell, supra,* and is similar to the statutory definitions of cruelty adopted in Alberta and Saskatchewan. It may be of relevance to observe that the above proposed definition has received the approval of the Canadian Bar Association. Furthermore, in presenting evidence to the Royal Commission on Marriage and Divorce which sat in England in 1951-1955, the General Council of the Bar of England and Wales similarly

favoured an extension of the *Russell* v. *Russell* definition of matrimonial cruelty and stated that it would be undesirable to follow blindly the judicial definition of cruelty which was established more than fifty years ago in a setting of rights, duties, customs and manners which have undergone radical change.[48] The General Council of the Bar of England and Wales further observed that as a result of the *Russell* v. *Russell* definition of cruelty in England, a wife who can afford to consult and call a neurologist to give evidence may succeed in her petition for divorce whereas a wife who cannot afford such a luxury will fail.[49]

(76) It is further submitted that cruelty should be so defined as to require the court to attach paramount importance to the character and consequences of the allegedly cruel conduct rather than to the culpable intent, if any, of the allegedly cruel spouse.[50] The purpose in recognising cruelty as a ground for divorce should not be to seek out guilt and inflict punishment but to afford relief from suffering, and it should therefore not be necessary for the petitioner to prove that the respondent's conduct was wilful or intentional. For example, if a continuation of the matrimonial cohabitation has been rendered impossible as a result of the respondent's habitual drunkenness or drug addiction, the absence of any wilful or culpable intent on the part of the respondent should constitute no answer to the charge of matrimonial cruelty.[51]

Desertion As A Ground For Divorce

(77) Desertion without cause for two years and upwards is presently recognised as a ground for judicial separation and alimony in the majority of the Canadian provinces.[52] Desertion for a specified number of years is also recognised as a ground for divorce in forty-nine jurisdictions in the United States of America.[53] In England, a divorce may be granted to a petitioning spouse where the respondent has "deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition".[54] In calculating the statutory period during which the desertion must run, the courts in England are required to take "no account of any one period (not exceeding three months) during which the parties resumed cohabitation with a view to reconciliation."[55]

(78) It is submitted that desertion, if persisted in over a period of years, effectively terminates the marital consortium and that it should be introduced as a ground for divorce in Canada. As was observed in the 1966 Report of the Joint Legislative Committee on Matrimonial and Family Laws to the Legislature of the State of New York:

> "Probably no course of conduct more evidences a 'dead' marriage than the unjustified separation of one party to the marriage from the other."

This conclusion is supported by the experience of Charles F. Marden who acted as a "reconciliation master" in the State of New Jersey and who observes that "desertion cases are substantially a waste of time so far as reconciliation is concerned."[56]

(79) It is further submitted that the offence of desertion should be so defined that the spouses are not deterred from resuming cohabitation in an attempt to secure an enduring reconciliation.[57] It is accordingly recommended that desertion as a ground for divorce in Canada should be constituted by (1) an unjustified withdrawal from matrimonial cohabitation for a period of not less than three years immediately preceding the commencement of proceedings *or* (2) an unjustified withdrawal from matrimonial cohabitation for periods amounting in the aggregate to three years or more, over a period of five years immediately preceding the commencement of proceedings, provided that the respondent has persisted in the unjustified withdrawal from matrimonial

cohabitation for a continuous period of at least one year immediately preceding the commencement of proceedings.

(80) It is further submitted that where desertion constitutes a ground for matrimonial relief, the courts should be empowered to make a finding of continuing desertion notwithstanding that the respondent is or has become insane. It is accordingly recommended that the insanity of the respondent spouse should not preclude a finding of desertion if the court is satisfied that the intention to withdraw from matrimonial cohabitaion would have continued if the respondent spouse had not become insane.[58]

Adultery, Cruelty And Desertion As Grounds For Divorce: General Comment

(81) It is an over-simplification to assume that these offences, which fundamentally conflict with marital obligations, merely reflect a concept of guilt and innocence. A suit for divorce based upon these offences is not instituted merely on account of the wrongful conduct of a spouse, but rather on account of the fact that by reason of such wrongful conduct, the marital relationship has become intolerable and practically impossible to continue. Nor is it strange, that where this result is produced by the misconduct of one party, the right to treat the marital relationship as terminated should rest exclusively with the other party.

Presumed Death As A Ground For Divorce

(82) It is submitted that legislation should be enacted in Canada empowering the courts to issue a decree of divorce if reasonable grounds exist for presuming the death of the petitioner's spouse. Such legislation might conceivably be modelled on sub-sections 1 and 3 of section 14 of the Matrimonial Causes Act, (Eng.), 1965, which read as follows:

> "*14.*—(1) Any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may . . . present a petition to the court to have it presumed that the other party is dead and to have the marriage dissolved, and the court may, if satisfied that such reasonable grounds exists, make a decree of presumption of death and dissolution of marriage.
>
> (3) In any proceeding under this section the fact that for a period of seven years or more the other party to the marriage has been continually absent from the petitioner and the petitioner has no reason to believe that the other party has been living within that time shall be evidence that the other party is dead until the contrary is proved." [59]

Living Separate And Apart As A Ground For Divorce

(83) It is recommended that divorce should be available in Canada to either or both spouses where the husband and wife have lived separate and apart for a period of not less than three years immediately preceding the commencement of proceedings provided that the court is satisfied that:

(i) there is no reasonable likelihood of a resumption of matrimonial cohabitation;

(ii) the issue of a decree will not prove unduly harsh or oppressive to the respondent spouse;[60] and

(iii) satisfactory arrangements have been or will be made to provide for the maintenance of the respondent spouse and any children of the family. [61]

(84) If the right to divorce were introduced in Canada on the basis of the above recommendation, the issue of a decree should not be precluded by the traditional absolute and discretionary bars to relief [62] but should be subject only to the provisos set out in the recommendation. [63] Thus the decision of the court should and would depend not so much upon the comparative rectitude of

the conduct of the spouses but rather upon the probability of their being able to re-establish a viable marital relationship.

(85) It is submitted that legislative implementation of the above recommendation would bring the divorce laws of Canada closer to social realities and that it would relieve undue hardship and reduce the number of illicit unions and illegitimate births. It would also tend to eliminate certain undesirable characteristics which attach to a divorce law regime based exclusively upon the concept of fault.[64]

(86) It is fully realised that the above recommendation represents a radical departure from the principles underlying the present grounds for divorce in Canada since it would permit divorce proceedings to be instituted against a spouse who has been guilty of no matrimonial offense. It would further permit the institution of divorce proceedings by a spouse who is *ex facie* partly or primarily responsible for the failure of the marriage. It might be argued that in this latter case the spouse who is *ex facie* partly or primarily responsible for the separation and breakdown of the marriage ought not to be permitted to seek a divorce. Such an argument, however, would seem to ignore the following considerations:

(i) It is frequently an over-simplification of the social facts to imply that a marriage breaks down because of the fault of only one of the spouses; and

(ii) even if the petitioning spouse is primarily at fault, it is contrary to the public interest that the marriage should be regarded as continuing in law when in fact it has ceased to exist.

(87) It might further be argued that if divorce were admitted on the basis of the above recommendation, this would increase insecurity in marriage and lead to a diminution of confidence in and respect for the permanence of marriage. This argument, however, would seem to be refuted by sociological opinion and by statistical data in jurisdictions wherein the doctrine of the matrimonial offence as a criterion for divorce is supplemented by the doctrine of marriage breakdown operating through living-apart provisions.[65]

(88) The above recommendation contemplates that the court may grant a divorce to either or both spouses where they have lived separate and apart for three years or more immediately preceding the commencement of proceedings, regardless of whether the separation was voluntary and/or attributable to the fault of either spouse.[66] It might accordingly be contended that where the separation has been agreed to by the spouses, the legislative implementation of the recommendation would be equivalent to the introduction of divorce by consent. It is difficult, however, to envisage parties to a viable marriage voluntarily condemning themselves to three years' separation in order that they may terminate their marriage and re-marry third parties.[67]

Insurable Insanity As Ground For Divorce

(89) Where two parties enter into marriage, they may reasonably contemplate that their marital relationship will continue for their joint lives and it is reasonable to expect the parties to weather the customary storms that constitute the ordinary "fair wear and tear" of married life. It is unreasonable, however, to require the parties to be bound by the marriage tie in circumstances where incurable insanity supervenes and precludes the continuation of marital consortium.

(90) It is accordingly recommended that insanity should be introduced as a ground for divorce in Canada where a spouse of unsound mind has been detained as a patient in a mental institution or hospital for a continuous period of not less

than three years immediately preceding the commencement of proceedings and the court is satisfied that there is no reasonable prospect of a permanent resumption of cohabitation. Legislation introducing insanity as a ground for divorce in Canada might conceivably be modelled upon the provisions set out in sub-sections 1 and 3 of section 1 of the Matrimonial Causes Act, (Eng.), 1965, which read as follows:

> *1*.—(1) ... [A] petition for divorce may be presented ... by the husband or the wife on the ground that the respondent...is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition....
>
> (3) For the purposes of sub-section 1 [*supra*], a person of unsound mind shall be deemed to be under care and treatment while, and only while—
>
> (a) he is liable to be detained in a hospital, mental nursing home or place of safety under the Mental Health Act, 1959...
>
> (c) he is receiving treatment for mental illness in
>
> (i) a hospital or other institution provided, approved, licensed, registered or exempted from registration by any Minister or other authority in the United Kingdom...; or
>
> (ii) a hospital or other institution in any other country, being a hospital or institution in which his treatment is comparable with the treatment provided in any such hospital or institution as is mentioned in sub-paragraph (i) of this paragraph;
>
> and, in determining for the purposes of the said subsection ... whether any period of care and treatment has been continuous, any interruption of the period for twenty-eight days or less shall be disregarded."[68]

(91) It could be argued that if divorce were made available in Canada to spouses who have lived separate and apart for three years immediately preceding the commencement of proceedings,[69] it would be unnecessary to make independent provision for cases of insanity. Such an argument, however, would appear to ignore the decisions of courts in the United States, wherein statutes providing for divorce through non-fault separation provisions have been held inapplicable to cases where a spouse was insane, even though such spouse had been confined for a substantial period of time in a mental institution or hospital immediately preceding the commencement of proceedings.[70]

(92) It may be of interest to observe that incurable insanity has been made a ground for divorce not only in England but also in several European countries and in no less than twenty-nine jurisdictions in the United States.[71]

(93) One objection that might be raised against the recognition of incurable insanity as a ground for divorce is that there is an absence of fault and the termination of matrimonial rights and obligations results from circumstances beyond the control of either spouse. It is submitted, however, that if a spouse becomes incurably insane and is detained as a patient in a mental institution or hospital for a long period of time, the objects of the marriage are frustrated and there is no justification for legal insistence upon continuation of the marriage where it has in fact ceased to exist.

(94) A further objection to recognising insanity as a ground for divorce is that it introduced an invidious distinction between cases where the marital consortium is destroyed by the supervening insanity of a spouse and cases where the consortium is destroyed or impaired by a supervening incurable physical disease or incapacitating injury. The distinction between mental and physical

illness may be regarded as invalid from a medical standpoint and unfair from a humanitarian standpoint. A distinction may, however, be made between the two cases on the ground that incurable insanity, unlike other incurable diseases or physical disabilities, results in a substantial change in the personality of the disabled party.[72] Furthermore, the suggested recommendation, which requires detention of the insane spouse in a mental institution or hospital for a continuous period of three years immediately preceding commencement of the proceedings, envisages that no degree of matrimonial cohabitation is possible.[73] In cases of incurable physical illness or disability on the other hand, no similar condition necessarily ensues.

(95) It might also be argued that the recognition of insanity as a ground for divorce may inflict a severe blow to effective treatment of the mentally ill. This argument may, however, lack cogency if divorce is permitted only in circumstances where the court is satisfied that the insanity is incurable and a permanent resumption of matrimonial cohabitation is thereby precluded.

2. BARS TO MATRIMONIAL RELIEF

Collusion, Connivance and Condonation As Absolute Bars To Matrimonial Relief Collusion

(96) Collusion has not been defined by statute and the definitions formulated by the courts cannot be interpreted in an absolute sense but only by reference to the facts of the particular case to which they were applied.[74] It has been stated that collusion includes:

> "(a) Any agreement or conspiracy, to which the petitioner is a party which [as in the case of a covenant not to defend the action], tends to pervert or obstruct the course of justice;
>
> (b) Any agreement or conspiracy, to which the petitioner is a party to obtain a divorce by means of manufactured evidence.
>
> (c) Any agreement or conspiracy, to which the petitioner is a party to obtain a divorce by some fraud or deceit practised on the Court."[75]

(97) It is generally conceded that the uncertainty which attaches to the legal concept of collusion tends to discourage the spouses from mutually resolving their matrimonial problems and to deter the "innocent" spouse from making any attempt to effect a reconciliation.[76]

(98) It is submitted that the court should be empowered to grant matrimonial relief notwithstanding that there has been a collusive bargain between the spouses provided that no substantial miscarriage of justice would result. It is accordingly recommended that collusion should be a discretionary and not an absolute bar to matrimonial relief.[77]

(99) If it were decided that collusion should be retained as an absolute bar to matrimonial relief, then it is submitted that collusion should be defined by statute on the basis of the following considerations:

> (i) The spouses should be restrained from conspiring together to put forward a false case or to withhold a just defence.
>
> (ii) Matrimonial relief should not be available if one spouse has been bribed by the other spouse to take proceedings or has exacted a price from him or her for so doing.
>
> (iii) It should not amount to collusion if reasonable arrangements are arrived at between husband and wife, before the hearing of the suit, about financial provision for one spouse and the children, the division of the matrimonial home and its contents, the custody of, and access to, the children, and costs. It should be the duty of the petitioner to

disclose any such arrangements to the court at the hearing and the parties should be able to apply to the court before or after the presentation of the petition for its opinion on the reasonableness of any contemplated arrangements.[78]

Connivance

(100) "Connivance may consist of any act done with corrupt intention of a husband or wife to promote or encourage either the initiation or the continuance of adultery of his or her spouse or it may consist of passive acquiescence in such adultery."[79]

(101) It is submitted that the courts have encountered serious difficulties in applying the concept of connivance to particular fact situations and that there is no substantial reason why connivance should constitute an absolute bar to matrimonial relief in cases where a husband or wife has passively acquiesced in the commission of a matrimonial offence by his or her spouse.[80]

(102) It is accordingly recommended that connivance should be made a discretionary rather than an absolute bar to matrimonial relief. It is contemplated that in the exercise of its discretion, the court would deny relief to a petitioning spouse who has actively conspired to produce the offence complained of in the petition but that the discretion might be exercised "in favour of" a petitioning spouse who has passively acquiesced in the commission of the offence complained of.

Condonation

(103) Where a matrimonial offence has been committed by a husband or wife, his or her spouse may condone the offence and waive the right to sue for matrimonial relief by resuming matrimonial cohabitation. A condoned offence may, however, be revived and if the offending spouse is guilty of subsequent matrimonial misconduct which renders further cohabitation impossible, the "innocent" spouse may institute proceedings for matrimonial relief in respect of the condoned offence.[81]

(104) It is generally recognized that the absolute bar of condonation tends to hamper attempts at reconciliation since the innocent spouse is naturally reluctant to resume matrimonial cohabitation in an attempt to effect reconciliation because such a resumption of cohabitation constitutes condonation and therefore precludes matrimonial relief if the attempted reconciliation proves to be unsuccessful.[82]

(105) The Matrimonial Causes Act, (Eng.), 1965, section 42 provides that the matrimonial offences of "adultery and cruelty shall not be deemed to have been condoned by reason only of a resumption of cohabitation between the parties for one period not exceeding three months, or of anything done during such cohabitation, if it is proved that cohabitation was continued or resumed, as the case may be, with a view to effecting a reconciliation."

(106) It is submitted that the trial period of cohabitation which is extended under section 42, *supra*, may prove inadequate in so far as it is directed at promoting attempts at reconciliation between the spouses and that the same purpose might be better achieved by making condonation a discretionary rather than an absolute bar to matrimonial relief.[83]

(107) It is arguable that under the present Canadian law, a husband's act of sexual intercourse with his wife after knowledge of her matrimonial offence constitutes conclusive evidence of his condonation of her offence but that a wife's act of sexual intercourse with her husband after knowledge of his matrimonial offence does not constitute conclusive evidence of her condonation of his offence.[84] It is submitted that all doubt in respect of this issue should be resolved

by legislation corresponding to that set out in section 42, subsection (1) of the Matrimonial Causes Act, (Eng.), 1965, which reads as follows:

> "Any presumption of condonation which arises from the continuance or resumption of marital intercourse may be rebutted by evidence sufficient to negative the necessary intent."[85]

Restrictions on Petitions for Divorce within three years of Marriage

(108) The introduction of extended grounds for divorce under the Matrimonial Causes Act, (Eng.), 1937, has been counterbalanced by a statutory restriction which precludes the presentation of a petition for divorce during the first three years of marriage.[86] To avoid injustice rsulting from an arbitrary application of this restriction, the court may grant leave to a petitioner to present a divorce petition before the expiration of the three year period on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent.[87] Although the statutory restriction precludes the presentation of a divorce petition during the first three years of marriage, it does not preclude the prosecution of a petition based upon offences committed before the expiration of the prescribed period.[88]

(109) The purpose of the above statutory restriction is to encourage spouses to resolve their differences in the period of adjustment which necessarily takes place during the first few years of married life, and thus to reduce the number of broken marriages.[89] Many witnesses appearing before The Royal Commission on Marriage and Divorce, (Eng.), 1951-55, were critical of the restriction for the following reasons. It was suggested that the restriction ignores the fundamental precept that where there has been a wrong, the law should not withhold a remedy. It was also suggested that the restriction does nothing to encourage spouses to attempt a reconciliation and does not deter them from taking divorce proceedings; where a matrimonial offence is committed by one spouse during the three year period, the other spouse merely waits for the period to elapse before instituting proceedings. The enforced waiting period may also drive both spouses into illicit unions. Moreover, in those cases where leave is given to present a petition within the prescribed period, the cost of obtaining the divorce is greatly increased by the extra proceedings required. Some witnesses suggested that the restriction should be entirely removed and others suggested that it should be modified by reducing the waiting period or by giving the court a wider discretion to allow proceedings to be instituted during the prescribed period. The Commission concluded that the practical effect of the restriction was a matter of conjecture but considered that it should be retained since it "may go some way towards diminishing [the] problem [of the broken marriage.]"[90] The Commission further considered that the prescribed period of three years should be retained and that any relaxation of the exceptions to the general rule would seriously impair the value of the restriction.[91]

(110) It is submitted that the denial of the right to proceed for a divorce during the first three years of marriage can be justified only if it affords a real opportunity to the spouses to establish or re-establish their marriage on a sound foundation. Withholding matrimonial relief for a prescribed period will not, in itself, produce such results and accordingly any such restriction must be reinforced by the state's assumption of a more positive role in marriage guidance and the provision of more adequate counselling and conciliation services for all families in need.

3. PROTECTION OF CHILDREN IN MATRIMONIAL PROCEEDINGS

(111) It is submitted that, in their pursuit of a decree of divorce or nullity, parents may and frequently do subordinate the interests of the children to their

personal interests and a judge may not be sufficiently informed of all the material facts to avoid any resulting hardship to the children.

(112) While it is recognised that the issue of a decree of divorce or nullity does not break up the family unit but merely affords legal recognition to the social fact of the broken home, it is essential that the court should protect the interests of any children whose "parents" seek to terminate the marriage by petitioning for a judicial decree.[92]

(113) It is accordingly recommended that legislation should be introduced in Canada to protect the interests of affected children where proceedings for matrimonial relief are instituted by either spouse. Such legislation might follow the terms set out in section 33 of the Matrinonial Causes Act, (Eng.), 1965, which reads as follows:

> "*33.*—(1) Notwithstanding anything in Part I of this Act but subject to the following subsection, the court shall not make absolute a decree of divorce or nullity of marriage in any proceedings begun after 31st December 1958, or make a decree of judicial separation in any such proceedings, unless it is satisfied as respects every relevant child who is under sixteen that—
>
> (a) arrangements for his care and upbringing have been made and are satisfactory or are the best that can be devised in the circumstances; or
>
> (b) it is impracticable for the party or parties appearing before the court to make any such arrangements.
>
> (2) The court may if it thinks fit proceed without observing the requirements of the foregoing subsection if—
>
> (a) it appears that there are circumstances making it desirable that the decree should be made absolute or should be made, as the case may be, without delay; and
>
> (b) the court has obtained a satisfactory undertaking from either or both of the parties to bring the question of the arrangements for the children before the court within a specified time."[93]

(114) If such legislation is introduced in Canada to protect the children of parties who have recourse to the courts for matrimonial relief, it will be necessary for the legislation to be supplemented by additional statutory provisions empowering the court to appoint a guardian *ad litem* to represent the children in the matrimonial proceeding and/or to receive reports and advice from qualified welfare officers of social workers appointed to or by the court.[94]

(115) In England, three welfare officers are attached to the Divorce Division of the High Court in London and there is a similar officer in each divorce town. The welfare officers attached to the court provide marriage guidance and conciliation services to parties who have resort to the Divorce Court and they assume additional responsibilities in cases where there are children who would be affected by the granting of matrimonial relief to either spouse.

(116) It is recommended that welfare officers should be appointed to every court in Canada which exercises jutisdiction in matrimonial causes and that the functions of these officers should include the power to make investigations and submit reports to the court so as to assist the court in the disposition of issues which affect or relate to the care and upbringing of children.[95]

(117) It is submitted that implementation of the above recommendation should not preclude the court from exercising a statutory discretion to appoint a guardian *ad litem* to represent the interests of children who may be affected by

the disposition of inter-spousal proceedings. As Judge Hansen[96] has observed:

> "[The] emphasis upon the necessity of legal representation for children in divorce actions is not inconsistent with the role or importance of the social service investigator in securing information and evaluating such information for the benefit of the court."[97]

4. ALIMONY AND MAINTENANCE

Governing Principles

(118) The principle underlying the judicial power to grant alimony or maintenance is that the obligation of the husband to support his wife or his former wife who is without adequate means of support is more than a private matter: it is an obligation in which society has a deep concern. The right to claim alimony or maintenance is available only to a wife and it requires proof that the husband has committed a matrimonial offence.[98] Although, in the absence of a provincial statute providing otherwise, a wife guilty of adultery may be granted maintenance in an action for divorce under the Divorce and Matrimonial Causes Act (Eng.), 1857, she will not, in an absence of a statutory provision to the contrary, be granted alimony in an independent action therefor, unless her adultery has been connived at or condoned by the husband or his conduct has conduced to the adultery.[99]

(119) It is submitted that the courts should never permit fault to become the decisive factor in applications for alimony or maintenance. Two reasons may be put forward in support of this submission. First, any decision on the issue of fault tends to be somewhat arbitrary since there is usually a substantial conflict in the evidence introduced before the court and it is difficult, if not impossible, to evaluate the degree of fault attributable to either spouse. Secondly, regardless of the conduct of the spouses, society has an economic interest in alimony and maintenance proceedings since, if the wife, because of her own misconduct, is barred from receiving alimony or maintenance, public assistance may become necessary, and the economic burden is thereby shifted from the husband to the taxpayer.

(120) It is accordingly recommended that, in determining whether alimony or maintenance should be awarded, the court should place primary emphasis upon the financial resources and needs of the affected parties. The arguments which may be adduced in favour of radical revision of the procedural and substantive law relating to alimony and maintenance are well expressed by Hofstadter, J. in *Doyle* v. *Doyle*, 150 N.Y.S. 2d 909 (1957) who stated:

> "In the interest of the litigants and of the efficient administration of justice, there must be a renovation in the procedures for handling family matters in the court and, more particularly, in the principles relating to alimony and support.
>
> From the point of view of procedure, it is manifest that there is a dire need of an integrated court, properly staffed and equipped with social aids, to handle all family matters. ...so that a court dealing with the family will be able to prescribe comprehensive and final relief rather than piecemeal and temporary palliatives... Further, in an effort to reduce the numerous applications for rehearings and modifications of support allowances, consideration must be given to the use of more efficient methods employed in other jurisdictions to determine the financial capacity of the husband and the need of the wife. Standardized budgets for various income groups, court auditing offices equipped with accountants and investigators, sworn financial statements, etc. should be instituted.

However, changes in procedure alone are not sufficient; a shift in the basis of awards is requisite. The perverse system which now obtains for the fixing of alimony and support is unjust in concept and faulty in application. It is unfair to men and to women. Honest and deserving women get too little—their children likewise—and others far too much for their own good and that of society. In evolving a modern system for fixing alimony and support the elements of (1) fault, (2) financial capacity, and (3) need, must be reappraised.

Alimony should not be a reward for virtue nor a punishment for guilt. The element of fault should be de-emphasized. Fault should not be a bar to alimony except in cases of gross culpability, such as infidelity or abandonment. In most cases neither party is at fault or both are in some degree. Generally, family break-ups are not due to specific acts of either spouse, legal fictions notwithstanding. They result rather from general malaise to which both have contributed. Fault usually comes after malaise has set in; it is the symptom not the cause of domestic discord.

The factor of need, too, must be adjusted to women's new position in our society. The married woman has come a long way since the days of Blackstone when she has no legal identity apart from her husband's; she is no longer the Victorian creature, 'something better than her husband's dog, a little dearer than his horse.' She is now the equal of man, socially, politically and economically. It is time that consonant with this new approach to woman's status we develop a modern basis for fixing alimony and support which will have its roots in reality.

A practical approach in awarding alimony would be to proceed on the basis of what we may term 'net need', the wife's actual financial requisite less her current assets and earning potential in relation to her husband's capacity to pay. If a woman proves need she should have support—but when she can, she should also be required to mitigate her husband's burden either by her own financial means or earning potential or both. The want alimony seeks to solve is economic—for alimony is basically the statutory substitute for the marital obligation of a husband to support his wife.

Each case must be treated as its particular circumstances indicate for there are many variables that should be taken into account in the determination of alimony. If a woman has contributed however indirectly to her husband's career and helped to increase his substance she may rightfully be regarded as entitled to a share of his gain. A woman who has devoted the greater part of her time to caring for a home and children has had little opportunity to learn the skills necessary to earn a living in our competitive society. The court should and will take cognizance of her plight.

But the same considerations do not operate in the case of a young woman who in all but form has remained alien to her husband's interest. Why should ex-wives and separated women seek a preferred status in which they shall toil not, neither shall they spin. Alimony was originally devised by society to protect those without power of ownership of earning resources. It was never intended to assure a perpetual state of secured indolence. It should not be suffered to convert a host of physically and mentally competent women into an army of alimony drones.

Ironically, inflated alimony awards are frequently not only financially disastrous to the man but psychologically deleterious to the woman. She remains hopelessly entangled in the web of the past, never establishing a new and independent life but 'wandering between two worlds one already dead the other powerless to be born.'

> In the field of matrimonial litigation and alimony awards the husband and wife are not the sole parties. Society itself has locus standi for it is deeply affected in vital aspects. For the benefit of all concerned, we must proceed in a climate of sanity that will reflect modern reality and in a spirit of sympathetic understanding that will achieve and equity."

Equality of the Spouses

(121) The husband under common law and statute has always been required to assume the primary responsibility for maintaining his spouse and children and, with few exceptions, no corresponding obligations have been placed upon the wife.[100] It is submitted that the legal and economic emancipation of married women which has taken place during the last century justifies the imposition of reciprocal support obligations upon the hushand and wife and that legislation should be introduced to promote a greater equality of rights and obligations between the spouses and parents. Such legislation might be modelled upon the statutory provisions which have been enacted in England or in certain jurisdictions in the United States of America. Thus, the courts might be empowered to order the wife to make payments for the maintenance of any child of the family who has been committed to the custody of another person or local authority. The wife might also be required to contribute towards the maintenance of her husband where he is unable to support himself or his family by reason of disability of mind or body.[101]

5. MARRIAGE GUIDANCE AND MATRIMONIAL CONCILIATION

(122) It is submitted that the State should take positive steps to prevent marriage breakdown by providing for the development and expansion of marriage guidance and matrimonial conciliation services.

Education And Preparation For Marriage

(123) The stability and success of marriage and family life will depend in large measure upon the outlook of persons entering into marriage. Education for marriage and family life is, therefore, of fundamental importance.

(124) The Committee on Procedure in Matrimonial Causes, (Eng.), 1946-1947, has expressed the following opinion:

> "We have been much impressed by the evidence of experienced workers in this field that the basic causes of marriage failure are to be found in false ideas and unsound emotional attitudes developed before marriage, in youth and even in childhood. The right time to correct those ideas and attitudes is before marriage. There is a need for a carefully graded system of general education for marriage, parenthood and family living to be available to a'l young peple as they grow up, through the enlightened co-operation of their parents, teachers and pastors, and in addition specific preparation of engaged couples to give them instruction and guidance to ensure the success of their marriage. Valuable work is already being done on these lines and its extension is much to be desired."[102]

(125) It is submitted that difficulties encountered in married life can frequently be forestalled by education and preparation for marriage. Education for marriage and family life should, therefore, be recognized as being no less important than education for a profession or trade. Although specific programmes providing education and preparation for marriage are already sponsored by various social agencies and by churches, there is a great need to co-ordinate and expand these programmes so as to make them available to all persons throughout Canada. It might also be helpful if a handbook were provided

to all persons who contemplate marriage so that they may be better informed of the responsibilities assumed on the celebration of marriage. Such a handbook might well emphasize the importance of spouses seeking early expert advice where marital difficulties are encountered. It is, of course, essential that any programme of education or preparation for marriage should be supervised or directed by properly qualified and well-trained personnel.

Matrimonial Conciliation

(126) It is submitted that the State should seek to promote a reconciliation between spouses who encounter disharmony in their marital relationship and that to achieve this result it is essential that the exising faciliies for marriage guidance and matrimonial conciliation in Canada be expanded.

(127) It is recommend that on every petition for matrimonial relief, the court should be required to consider the possibility of a reconciliation of the spouses through counselling and, where the court is satisfied that there is a reasonably prospect of reconciliation, it should be statutorily empowered to adjourn the proceedings and designate an agency or suitable person with training and experience in marriage counselling to assist the spouses in reconsidering their position.[103] The court should also be empowered to make interim orders for the maintenance of a spouse and/or for the custody and maintenance of any child of the family where an adjournment is ordered for the purpose of affording the spouses an opportunity to become reconciled.[104]

(128) It is fully realised that the effectiveness and value of such legislation will be determined in the final analysis by the day-to-day work required to implement the legislation and it is therefore vital that adequate financial means and well-qualified and trained personnel should be available to provide the necessary counselling and conciliation services.[105]

(129) It is submitted that well-developed and co-ordinated programmes of marriage counselling cannot exist unless account is taken of the following circumstances:

1. The prospects of reconciliation are greater in the early stages of marital disharmony than in the later stages and the chances of securing matrimonial reconciliation are reduced where either spouse has instituted legal proceedings for matrimonial relief.[106] It is essential therefore that the general public should be brought to realise the importance of seeking expert marriage guidance, without delay, when tensions occur in the marital relationship and that efforts be made to remove the impression which undoubtedly exists that there is something shameful in seeking advice on marital problems. It may well be that the press and broadcasting media could be used to advantage in informing the public of the need for and the nature and extent of marriage guidance services available in the community.[107] While this writer is of the opinion that the courts should be statutorily empowered to adjourn legal proceedings and refer the spouses in suitable cases to a qualified marriage counsellor or an approved agency, it is strongly urged that conciliation services must not be made dependent upon the machinery of the courts or confined to spouses who have recourse to legal proceedings.

2. At least one of the spouses must sincerely favour an attempt at matrimonial reconciliation through counselling. The fact that a spouse seeks help indicates that he or she has not lost all willingness to co-operate and in that state of mind there is hope of reconciliation, but anything in the nature of compulsion is unlikely to yield successful results.[108]

3. Counselling and conciliation to be successful must take place in a frank and uninhibited atmosphere and each spouse must have complete assurance that nothing he or she says will be disclosed without permission or used to his or her prejudice in any subsequent matrimonial proceedings. It is therefore desirable that any communication between a spouse and a marriage counsellor or conciliator should be privileged from disclosure and that the legal privilege should extend not only to the spouses but also to the counsellor or conciliator to whom the communication is made.[109]

4. Matrimonial reconciliation through counselling demands the help of a well-trained and qualified person of wide sympathy and understanding who is able to win the confidence of those persons with whom he deals. The personal factor is so important that churches, voluntary social agencies and individuals may achieve greater success in securing reconciliations than any State institution would secure unless it were able to escape the tendency of such an institution to become impersonal.[110] It is accordingly submitted that the voluntary agencies which presently offer marriage guidance should be encouraged to expand their facilities and that if such expansion is hampered by the lack of funds, then approved agencies should receive financial aid from the State.

5. The law of condonation and collusion deters attempts at matrimonial reconciliation and should be amended so that genuine attempts at reconciliation will not preclude subsequent legal remedies if the attempts prove unsuccessful.[111] It is therefore recommended that condonation and collusion should constitute discretionary and not absolute bars to relief in matrimonial proceedings.[112]

6. THE COURT WHICH SHOULD EXERCISE JURISDICTION IN MATRIMONIAL CAUSES

(130) Jurisdiction in "matrimonial causes" is presently vested exclusively in the Superior Courts of each province. An extensive and important jurisdiction in matrimonial proceedings is nevertheless exercised throughout Canada by Juvenile and Family Courts or by Magistrate's Courts. A valuable feature of these courts of summary jurisdiction is that they have attached to them trained probation officers and counsellors who often succeed in promoting reconciliation between disputing spouses. It is submitted that, if jurisdiction in matrimonial causes continues to be vested exclusively in the Superior Courts, then adequate counselling and conciliation services should be available to persons who have recourse to these Courts for matrimonial relief.

(131) It is further submitted that an examination should be made of the feasibility of establishing throughout Canada special Family Courts to exercise an exclusive jurisdiction over all issues affecting and arising from the marital or familial relationship.

Objections To Superior Courts Retaining Exclusive Jurisdiction Over Matrimonial Causes

(132) The principal objections which may be raised against the exclusive exercise of jurisdiction over matrimonial causes[114] by the Superior Courts are as follows:

(i) The procedure in the Superior Courts is involved and expensive.

(ii) The Superior Courts are unfamiliar to most people and the procedure and atmosphere of these Courts is not conducive to a therapeutic or conciliatory approach to marital or familial problems.[115]

Advantages of Family Courts Exercising Exclusive Jurisdiction Over All Issues Affecting And Arising From The Marital Or Familial Relationship

(133) The establishment of Family Courts to exercise an exclusive jurisdiction over all matters affecting the marital or familial relationship would have the following advantages:

(i) A single court with an exclusive jurisdiction over matrimonial and familial proceedings could be better equipped at less cost with expert counselling staff and this would facilitate a therapeutic and conciliatory approach to marital and familial problems and thus place a greater emphasis upon reconciliation as an alternative to a legal decree.

(ii) A single court with an exclusive jurisdiction over matrimonial and familial proceedings would eliminate conflicts of jurisdiction where two courts in the same province are seised of the same problem and would also facilitate the more effective preparation of family case histories which would be of substantial value to the court in the disposition of proceedings for matrimonial or familial relief.[116]

Conclusions and Recommendations

(134) It is submitted that all courts which exercise jurisdiction over matrimonial and familial proceedings should be provided with an adequate counselling staff and conciliation machinery. It is accordingly recommended that a staff of counsellors and conciliators should be attached to such courts for the purposes of promoting reconciliation between spouses and aiding the court in the disposition of issues relating to children.[117] It may be argued that once a married person has instituted legal proceedings against his or her spouse, there is little prospect of securing matrimonial reconciliation through counselling.[118] This argument, however, would appear to run counter to the experience of specialised courts in the United States of America, e.g. the Toledo Family Court and the Los Angeles Conciliation Court.[119]

(135) It is further recommended that specialised Family Courts, with an adequate counselling staff, should be established in regional areas and in large towns throughout Canada to exercise an exclusive jurisdiction over all matrimonial and familial proceedings.[120] If such a radical reform is not considered practicable at the present time, then it is recommended that:

(i) The County Court should exercise an exclusive jurisdiction in undefended matrimonial causes, and in defended matrimonial causes[121] with the consent of the parties.[122]

(ii) Any party to a defended matrimonial cause should be entitled to demand a trial in the Supreme Court.[123]

(iii) There should be a right of appeal from the County Court directly to the Court of Appeal.

7. DOMICILE AS A BASIS OF JURISDICTION IN MATRIMONIAL CAUSES

(136) It is submitted that hardship and uncertainty would be avoided if the bases of jurisdiction in matrimonial causes[124] and recognition of foreign judgments were modernised and codified on logical lines. This writer proposes to confine his attention to domicile as the basis of jurisdiction in divorce proceedings but recommends that a review should be undertaken of the bases of jurisdiction in other matrimonial causes, including nullity and judicial separation.[125]

Domicile As The Basis Of Jurisdiction In Divorce Proceedings

(137) The general rule in Canada is that a court may exercise jurisdiction in divorce only if the parties are domiciled in the province wherein the proceedings are instituted.[126] A married woman automatically acquires the domicile of her husband on marriage and retains his domicile so long as the marriage subsists.[127] Since the cumulative effect of these rules would result in substantial hardship to a wife whose husband has deserted her and established a domicile in another jurisdiction, section 2 of the Divorce Jurisdiction Act, R.S.C., 1952, ch. 84 provides that a married woman who has been deserted by her husband for a period of two years and upwards may institute divorce proceedings in the courts of the province wherein the husband was domiciled immediately prior to desertion.[128]

(138) The concept of the unity of domicile between spouses derives from the former common law doctrine whereby the husband and wife were regarded as one person.[129] This doctrine has been eroded by the legal, social and economic emancipation of the married woman and it is accordingly recommended that the unity of domicile rule should be abolished. Although the hardship resulting to the married woman from this rule has been mitigated by the aforementioned legislation, it is submitted that more effective protection would be afforded if legislation were adopted in Canada empowering the married woman to establish an independent domicile for the purpose of instituting matrimonial proceedings, including proceedings for the dissolution of marriage.[130]

(139) It is further submitted that the provincial concept of domicile might well be replaced by a national concept and that either spouse who is domiciled in Canada should be entitled to institute matrimonial proceedings in any province provided that such spouse has resided in the province wherein relief is sought for not less than one year immediately preceding commencement of the proceedings.[131]

8. VOID AND VOIDABLE MARRIAGES

Capacity to Marry

(140) A marriage is void on the ground of lack of legal capacity to marry where one or both of the parties has been a party to a prior valid marriage which has not been terminated by death or by law, or where the parties are related to one another within the prohibited degrees of consanguinity or affinity, or where the consent to the marriage is vitiated by mental incapacity, intoxication, nonage, duress, fraud or mistake.[132] A marriage may also be void for lack of compliance with the formal requirements of the *lex loci celebrationis*.[133]

(141) In certain jurisdictions the grounds upon which a marriage shall be deemed to be void have been reduced to statutory form. In New Zealand, for example, section 7 of the Matrimonial Proceedings Act, (New Zealand), 1963, reads as follows:

> "7. A marriage governed by New Zealand law shall be void *ab initio*, whether or not a decree of nullity has been granted, where any of the folowing grounds exist, and in no other case:
>
> (a) In the case of a marriage that is governed by New Zealand law so far as it relates to capacity to marry—
>
> (i) That at the time of the ceremony of marriage either party to the marriage was already married:
>
> (ii) That, whether by reason of duress or mistake or insanity or otherwise, there was at the time of the marriage an absence of consent by either party to marriage to the other party:
>
> (iii) That the parties to the marriage are within the prohibited degrees of relationship set out in the ... Marriage Act, 1955, and

no order is in force under subsection (2) of section 15 of that Act dispensing with the prohibition:

(b) In the case of a marriage that is governed by New Zealand law so far as it relates to the formalities of marriage, that the parties knowingly and wilfully married without a marriage licence, or in the absence of an officiating minister or Registrar of Marriages, in contravention of the provisions of the Marriage Act, 1955." [134]

(142) It is submitted that legislative provisions corresponding to those set out in section 7(a), *supra*, which regulate legal capacity to marry, might well be enacted by the Federal Parliament in Canada and that such legislation would reduce the uncertainty which presently attaches to the common law.[135] Legislative provisions corresponding to section 7 (b), *supra*, which relate to the formal requirements of a valid marriage, would seem, however, to fall within the exclusive jurisdictional competence of the provincial legislatures.[136]

Age of Marriage

(143) There appears to be a relatively high incidence of marriage breakdown in cases where the spouses married at a very early age. It is recommended that legislation should be enacted by the Federal Parliament in Canada raising the minimum legal age for marriage to eighteen years. It is further recommended that such legislation should provide that, where a marriage has been celebrated between parties, one of whom has not attained the age of eighteen years, the marriage shall be voidable at the suit of the party who was under age at the time of the celebration of the marriage.[137] It is recognized that such legislation is not self-sufficient and that it should be supplemented by more adequate preparation of the young for marriage.[138]

Capacity to Marry Wife's Sister or Divorced Husband's Brother

(144) Under sections 2 and 3 of the Marriage and Divorce Act, R.S.C., 1952, ch. 176, a man may marry his deceased wife's sister and a woman may marry her deceased husband's brother.[139] In the light of conflicting decisions in *Re Schepull and Bekeschus and Provincial Secretary* [1954] O.R. 67 and in *Crickmay* v. *Crickmay* (1966) 57 D.L.R. (2d) 159 (B.C.),[140] it is uncertain whether the relationship of affinity is terminated by divorce so as to entitle a man to marry his divorced wife's sister and a woman to marry her divorced husband's brother. It is recommended that legislation should be enacted to resolve this uncertainly and that such legislation should take the following form:

"When a decree for divorce has been made absolute, it shall be lawful for the respective parties to marry again as if the prior marriage had been dissolved by death."

Voidable Marriages

(145) Subject to the recommendation set out in paragraph 143, *supra*, this writer does not propose to recommend the introduction of any new grounds for annulment of marriage.

(146) It may be of interest, however, to observe that section 9(1) of the Matrimonial Causes Act, (Eng.), 1965, supplements the common law ground of impotence by providing that a marriage shall be voidable on the ground:

(a) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate it; or

(b) that at the time of the marriage, either party to the marriage—

(i) was of unsound mind, or

(ii) was suffering from mental disorder so as to be unfitted for marriage and the procreation of children, or

(iii) was subject to recurrent fits of insanity or epilepsy; or

(c) that the respondent was at the time of the marriage suffering from venereal disease in a communicable form; or

(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.[141]

The Matrimonial Causes Act, (Eng.), 1965, section 9(2) further provides that the court shall not grant a decree of nullity in a case falling within paragraphs (b), (c) and (d), *supra*, unless it is satisfied that:

(a) the petitioner was at the time of the marriage ignorant of the facts alleged; and

(b) proceedings were instituted within a year from the date of the marriage;[142] and

(c) marital intercourse with the consent of the petitioner has not taken place since the petitioner discovered the existence of the grounds for a decree of annulment.[143]

It will be observed that the above conditions do not apply to a petition for annulment of marriage on the ground of the respondent's wilful refusal to consummate the marriage. With respect to this ground of annulment, it might seem more logical if it were made a ground for divorce, since a decree of nullity is ordinarily granted for some defect or incapacity existing at the time of the marriage ceremony and wilful refusal to consummate the marriage necessarily arises only after the marriage has been celebrated.[144] Since, however, wilful refusal to consummate the marriage may constitute evidence of impotence in proceedings for annulment of marriage, certain difficulties might be encountered if wilful refusal to consummate the marriage were introduced as a ground for divorce while impotence were retained as a ground for annulment.[145]

9. THE NEED FOR SOCIOLOGICAL RESEARCH

(147) It is submitted that that organised research should be undertaken with respect to the Family in Canada in order to determine crucial issues which are presently merely matters for conjecture. Such research might examine, *inter alia*, the following issues:

(i) the relative stability of religious and civil marriages;

(ii) the stability of marriages in which one or both parties come from a broken home in relation to the general stability of marriage;

(iii) the stability of marriages of divorcees in relation to the general stability of marriage;

(iv) childlessness as a factor in marriage breakdown;

(v) the causal connection between the trend to earlier marriage and the incidence of marriage breakdown; and

(vi) the facilities for marriage guidance and education for marriage and their effect on marriage stability.

(148) It is further submitted that effective research can only be undertaken if adequate statistical data is compiled through centralised agencies and that the State should aske positive steps to promote the continuing collection of statistical data relating to the Family in Canada.

Julien D. Payne.

FOOTNOTES

1. *Power on Divorce* (1964, 2nd ed.), at p. 24.
2. *Ibid.*
3. *Op cit,* at p. 26.
4. *Ibid.*
5. Report of the Royal Commission on Divorce and Matrimonial Causes, (Eng.), 1909-1912: Cmd. 6478 (1912), para. 242.
6. J. P. Lichtenberger, "Divorce Legislation" (1932) 160 Annals 116.
7. See *infra,* sub-heading "Divorce By Consent".
8. Report of the Royal Commission on Marriage and Divorce (Eng.), 1951-1955: 9678 (1956), para. 70.
9. [1906] P. 189, at pp. 207-208.
10. Cmd. 6478 (1912), paras 236-329.
11. Cmd. 6478 (1912) at pp. 171-191.
12. See *infra,* sub-heading "Living Separate And Apart As A Ground For Divorce".
13. Cmd. 9678 (1956), para. 69 (xxxiv).
14. See *infra,* sub-heading "Legislative Recognition Of Marriage Breakdown As A Ground For Divorce".
15. [1943] A.C. 517 (H.L.).
16. See *Power on Divorce* (1964, 2nd ed.), at pp. 115 and 125.
17. *Op cit,* at p. 110.
18. *Op cit,* at p. 62.
19. *Quaere* whether such provision should have provided for discretion in the light of the reasonableness of the respondent's objection to divorce rather than the unreasonableness of the petitioner's matrimonial conduct: see Kahn Freund, "Divorce Law Reform?" (1956) 19 Mod. L. R. 573 at p. 589.
20. See also Henry H. Foster, Jr., and Doris Jonas Freed, "Living Apart As A Ground For Divorce" (Monograph No. 4, Section of Family Law American Bar Association).
21. See footnote 20, *supra.*
22. See Cmd. 9678 (1956), at p. 376 *et seq.*
23. See *infra,* sub-heading "Judicial Recognition Of The Factor Of Marriage In Jurisdictions Wherein The Traditional Fault Concept Is Endorsed by the Legislature".
24. See *infra* para. 48, and sub-heading "Dangers of Fault and Non-Fault Grounds Co-existing".
25. See Freidmann, *op. cit., supra,* para. 45. See also Kahn Freund, "Divorce Law Reform?" (1956) 19 Mod. L. Rev. 573.
26. See Alabama Code tit. 34 §22 (1959); Arkansas Stat. Ann. §34-1202 (7) (Supp. 1965); Arizona Rev. Stat. Ann. §25-312 (7) (1956); Idaho Code Ann. §32-610 (1963); Kentucky Rev. Ann. §403. 020 (1) (b) (1963); Louisiana Rev. Stat. Ann. §9: 301 (1965); Texas Rev. Civ. Stat. art. 4629 (4) (1960); Virginia Code Ann. §20-91 (9) (Supp. 1964); Washington Rev. Code §26.08.020 (9) (1958) and Puerto Rico Laws Ass. tit. 31 §321 (9) (1955).
27. See H. Silving, "Divorce Without Fault" (1944) 29 Iowa L. Rev. 527:

> "The destruction of the factual marital relation gains ground as a divorce reason. This evolution takes place at the expense of the fault principle. The logical conclusion to thich the acceptance of the 'destruction

of the marital relation' as a divorce ground leads is the total exclusion of fault in divorce law: If in some cases marriage can be dissolved on the ground of 'destruction' alone, without allegation of fault, there is no real justification for permitting 'fault' problems to be raised in other cases."

28. See *supra,* sub-heading "Legislative Recognition Of Marriage Breakdown As A Ground For Divorce".

29. (1961) 1 J1 of Fam. Law 181, at p. 206.

30. "The Development Of Divorce Law In Australia" (1966) 29 Mod. L. Rev. 473, at pp. 475-476.

31. See, for example, the opinions expressed by nine members of the Royal Commission on Marriage and Divorce, (Eng), 1951-1955: Cmd. 9678 (1956), para. 69 (xxxiv-xxxv).

32. "Collusive and Consensual Divorce and The New York Anomaly" (1936) 36 Calif. L. Rev. 1121.

33. See Rutman, "Departure From Fault" (1961) 1 Journal of Family Law 181, at p. 192:

"It is unrealistic to fail to recognise that in practice numerous divorces are carried out under circumstances of mutual consent. It is one of the factors which has brought law into disrepute that it continues to regard the litigation as an adversary proceeding, and, not as it is in many cases, a mutual arrangement. The number of undefended cases is but further evidence which goes to prove this well-accepted statement."

See also Minutes of Evidence Taken Before the Royal Commission on Marriage and Divorce, 1951-1955, at p. 15 wherein Professor L.C.B. Gower, a former solicitor, expressed the following opinion.

"Although neither England nor France officially recognises divorce by consent, in fact there is never any difficulty in obtaining a divorce in either country if the parties are in agreement. The only point on which opinions may differ is as to the proportion of divorces which may be regarded as collusive or based on bogus grounds. Among the upper income groups I would say that it is well over half the total of undefended cases, although among the poorer clases, whose cases are handled under the Legal Aid Scheme, it seems to be considerably lower...But whatever the proportion, there is no doubt that many divorces are now granted where there are no true grounds, and provided that the parties are in agreement there is never the slightest difficulty in obtaining a disolution.

This state of affairs has two consequences:

(i) It enables the party who is the less anxious for a divorce to hold up to ransom the other who is eager to obtain one, and thus to extort unduly favourable financial arrangements from him.

(ii) It involves the parties often in the degrading business of actual or pretended adultery and always in deceiving the court; it forces their lawyers to be un-willing participants in the travesty of justice and it brings the whole administration of the law in disrepute."

See also Minutes of Evidence Taken Before The Royal Commission on Marriage and Divorce, 1951-1955, at p. 304, where another solicitor, Mr. W. Heyting stated:

"I feel that there is a considerable amount of collusion in one form or another, but...solicitors are not parties to it and the reason for that is this; the more intelligent people are, the more they know perfectly well what the law is on this subject and they just don't tell their solicitor the whole truth in the matter. The solicitor may have very strong suspicions and it is his duty to ask his client specifically about collusion and draw the

client's attention to the law on this matter. I am sure in the vast majority of cases he does this. But if a client denies it, there is very little more the solicitor can do whatever his suspicions may be."

34. Cmd. 9678 (1956), paras. 115-119.
35. See *infra*, sub-heading "Cruelty As A Ground For Divorce".
36. See *Power on Divorce* (1964, 2nd ed.), at pp. 417-418.
37. Cmd. 9678 (1956), para. 90.
38. Cmd. 1105 (1960), paras. 115-117.

See Payne, "Artificial Insemination Heterologous and the Matrimonial Offence of Adultery" (1961) 40 N.C.L. Rev. 111, at 114:

"It should be observed that the committee made no recommendation providing a matrimonial remedy for the wife whose husband donated semen for purposes of artificial insemination. This omission is unfortunate in so far as it re-introduces inequality between the sexes before the law. There are, of course, certain practical difficulties which impede the application of similar recommendations to the husband donor for, under present conditions, the anonymity which surrounds the donor's identity will generally preclude discovery of the offence by the wife. Although this particular difficulty might be met by statutory control or regulation of the practice of artificial insemination, other difficult legal problems would remain. For example, would the husband be penalised where his donation of semen was made before marriage but utilised subsequent thereto?"

Semble the proposed definition of cruelty hereinafter set out may afford a basis for matrimonial relief in cases where a spouse has, without the consent of his or her partner, been party to the practice of artificial insemination heterologous: see *infra*, sub-heading, "Cruelty As A ground For Divorce".

39. See *Power on Divorce* (1964, 2nd ed) at p. 24-25.
40. See paragraph 65, *supra*.
41. See Cmd. 9678 (1956), paragraph 210, wherein the Royal Commission on Marriage and Divorce recommend that either spouse should be entitled to divorce on proof that his or her partner has committed sodomy or bestiality.
42. See *Power on Divorce* (1964, 2nd ed.) at pp. 25-26 and 473-474.
43. Matrimonial Causes Act, (Eng.), 1965, section 1.
44. See 1966 Report of the Joint Legislative Committee on Matrimonial and Family Laws to the Legislature of the State of New York. See appendix to this brief for summary of the recommendations set out in the aforementioned Report.
45. See *infra*, paragraph 73.
46. See *Power on Divorce* (1964, 2nd ed.) at pp. 474-479.
46. See Domestic Relations Act, R.S.A., 1955, ch. 89, section 7(2); Queen's Bench Act, S.S., 1960, ch. 35, section 25(3). See also *Power on Divorce* (1964, 2nd ed.) at pp. 485-486.
48. Minutes of Evidence Taken Before The Royal Commission on Marriage and Divorce, 1951-1955, at p. 30.
49. *Ibid.*
50. It is accordingly submitted that the formula adopted in drafting legislation should read as follows: "the respondent has since the celebration of the marriage so conducted [himself] . . ."

It should be noted that the recent decision of the House of Lords in *Gollins* v. *Gollins* [1963] 3 W.L.R. 176 indicates that the concept of ma-

trimonial cruelty in England requires the court to examine the character of the conduct complained of and the effect it produces on a spouse of normal susceptibility. Where such conduct is of such a character that the petitioning spouse cannot reasonably be expected to endure it, matrimonial cruelty will be established and the respondent's state of mind may be deemed irrelevant. See also *Williams* v. *Williams,* footnote 51, *infra.*

51. See *Williams* v. *Williams* [1963] 3 W.L.R. 215, wherein the House of Lords held that the respondent's insanity does not necessarily constitute a defence to a charge of matrimonial cruelty in divorce proceedings.

As to insanity as a defence to divorce proceedings instituted in England on the ground of desertion, see Matrimonial Causes Act, (Eng.), 1965. This legislation implements the recommendation of the Royal Commission on Marriage and Divorce, (Eng.), 1951-1955, that desertion should not be interrupted or precluded by the insanity of the deserting spouse if it appears to the court that desertion would have occurred or continued had the respondent spouse not become insane: see Cmd. 9678 (1956), paras. 257-261.

52. See *Power on Divorce* (1964, 2nd ed.) at pp. 269 and 488-489.

53. See 1966 Report of the Joint Legislative Committee on Matrimonial and Family Laws to the Legislature of the State of New York [reprinted in the appendix to this brief].

54. Matrimonial Causes Act, (Eng.), 1965, section 1 (1) (a) (ii).

55. Matrimonial Causes Act, (Eng.), 1965, section 1 (2).

56. See Report of New Jersey Supreme Court's Committee on Reconciliation—1960, relevant section of which are reproduced in Goldstein and Katz, *The Family And The Law,* at pp. 155-159:

"An analysis of the first 1,398 cases in which the Masters held reconciliation conferences indicated that the possibilities of reconciliation vary widely depending upon the nature of the complaint. This is well illustrated by the following table:

Nature of Complaint	Number of Cases	Number of Reconciliations	Percentages of Reconciliations
1. Annulment	10	0	0
2. Desertion	715	1	0
3. Adultery	204	8	3.8
4. Separate Maintenance	137	11	8
5. Extreme Cruelty	332	29	8.7
Total of all cases	1,398	49	3.5
Total 3, 4 and 5 above	673	48	7.1

Thus the record of reconciliations in separate maintenance and extreme cruelty cases is in sharp contrast to that in annulment and desertion cases where reconciliation efforts proved almost completely fruitless. In the opinion of the Masters the lack of success in the desertion cases is not attributable to the grounds of divorce *per se,* but rather to the time factor. In desertion cases the reconciliation conferences generally come three or more years after the parties have actually separated. Almost invariably they have made their adjustments to living apart and are not the least interested in making the effort to start life together all over again. In cases brought on other grounds, the fact that the parties come before the Masters at an earlier date accounts for the better reconciliation results."

57. It is generally conceded that the offence of desertion was introduced as a ground for divorce in England under the Matrimonial Causes Act, (Eng.), 1937, militated against the possibility of reconciliation between the

spouses since it required proof of desertion for a period of three years *immediately preceding presentation of the petition for divorce.* Attempts to bring husband and wife together were accordingly frustrated by the spouses' knowledge that if the attempts at reconciliation failed a further three years' desertion would be required before a divorce could be granted. This unfortunate result of the definition of desertion adopted in the Matrimonial Causes Act, (Eng)., 1937, has now been alleviated to some extent by the provisions set out in section 1 (2) of the Matrimonial Causes Act, (Eng.), 1965: see text to footnote 55, *supra.* But see A. Irvine, "The Concept of Reconciliation And The Matrimonial Causes Act, 1963" (1966) 82 L.Q.R. 525.

58. See text to and contents of footnote 51, *supra.* See also section 1 (2) of the Matrimonial Causes Act, (Eng.), 1965, which reads as follows:

> "... [F] or the purposes of a petition for divorce, the court may treat a period of desertion as having continued at a time when the deserting party was incapable of continuing the necessary intention if the evidence before the court is such that, had that party not been so incapable, the court would have inferred that that intention continued at that time."

59. As to domicile and ordinary residence in England as the basis for the exercise of jurisdiction in respect of this ground for divorce, see Matrimonial Causes Act, (Eng.), section 14, sub-sections (2) and (5). The provisions of sections 5 (7) to 8 of the Matrimonial Causes Act, (Eng.), 1965, which relate to the issue of a decree nisi, the right of intervention by the Queen's Proctor or any other person, and the right of divorced persons to remarry, apply in respect of presumed death as a ground for divorce: see Matrimonial Causes Act. (Eng.), 1965, section 14, sub-section 4.

60. It is submitted that in determining whether the issue of a divorce decree would prove unduly harsh or oppressive to the respondent spouse, the court should not deny matrimonial relief merely because the respondent spouse objects to divorce for reasons of conscience or religious conviction. Such a spouse may give effect to his or her conscience or religious convictions notwithstanding the issue of a divorce decree by declining to exercise the right of remarriage which ensues from the fact of divorce. See *Painter* v. *Painter* (1963) 4 F.L.R. 216, at 220 and compare *Judd* v. *Judd* (1961) 3 F.L.R. 207. See generally *McDonald* v. *McDonald* (1964) 64 S.R. (N.S.W.) 435 and Selby, (J.), "The Development of Divorce Law in Australia (1966) 29 Mod. L. Rev. 473, especially pp. 477-482.

61. It might be argued that it would be more logical to enact a statutory formula which simply empowered the court to grant a decree of dissolution of marriage "if it is satisfied that the marriage has irretrievably broken down." A general clause of this nature, however, though superficially attractive, would impose an insuperable burden on the courts as presently constituted.

    As to the extent to which foreign jurisdictions have recognized marriage breakdown, through separation provisions, as a criterion for divorce, see *supra*, sub-heading "Legislative Recognition of Marriage Breakdown As A Ground For Divorce".

62. See *infra*, sub-heading "Collusion, Connivance And Condonation As Absolute Bars To Matrimonial Relief". See also *supra*, paras. 27-29.

63. But see *infra*, sub-heading Protection of Children In Matrimonial Proceedings.

64. See *supra*, sub-headings "Objections To Present Grounds For Divorce In Canada"; "Objections To Divorce Law Regime Based Exclusively On A Fault Concept"; "Divorce By Consent".

65. See *supra,* sub-headings "The Function Of The Law Of Marriage And Divorce"; "Effect Of Divorce Grounds Upon Divorce Rate"; "Marriage Breakdown Through Living Apart Statutes As Ground For Divorce: Effect On Divorce Rate".

66. See *supra,* paras. 40-41.

If this recommendation were endorsed by the Canadian Parliament without qualification, it would seem unnecessary to introduce desertion as a separate ground for divorce. Compare the recommendations and opinions set out in the Report of the Joint Legislative Committee on Matrimonial and Family Laws to the Legislature of the State of New York (reprinted in the appendix to this brief), which favour desertion and *voluntary* separation as independent grounds for divorce.

67. See *supra,* sub-heading "Distinction Between Marriage Breakdown And Divorce By Consent".

68. Compare the following recommendation submitted by the Royal Medical-Psychological Association to the Royal Commission on Marriage and Divorce, (Eng.), 1951-1955:

"A petition for divorce may be presented to the court on the ground that the respondent:

(a) is suffering from mental disorder which has been present continuously for a period of five years, and that his or her mental state is now such that recovery is extremely unlikely; or

(b) has at the time of the presentation of the petition been under care and treatment as a patient in one or more mental hospitals (or licensed houses) continuously for a period of one year."

69. See *supra,* sub-heading "Living Separate And Apart As A Ground For Divorce".

70. See *Lee* v. *Lee,* 182 N.C. 61, 108 S.E. 352 (1921); *Serio* v. *Serio,* 201 Ark. 11, 143 S.W. 2d 1097 (1940); *Messick* v. *Messick,* 177 Ky. 337, 197 S.W. 792 (1917). See generally, W. E. McCurdy, "Insanity As A Ground For Annulment Or Divorce In English And American Law" (1943) 29 Va. L. Rev. 771.

71. See Ploscowe and Freed, *Family Law: Cases and Materials* (1963) at p. 199:

"A number of states authorize divorce for incurable insanity occurring after marriage. They usually require that insanity be hopeless and incurable, that the insane person have been insane and confined to an institution for a specified period prior to action for divorce, and that the insanity be certified to by two or more physicians. They generally require that the sane person offer proof of ability or bond to support the insane spouse."

For examples of the statutory variations adopted in American jurisdictions wherein insanity constitutes a ground for divorce, see W. E. McCurdy, "Insanity As A Ground For Annulment Or Divorce In English And American Law" (1943) 29 Va. L. Rev. 771.

72. See W. E. McCurdy, (1943) 29 Va. L. Rev. 771.

73. See *supra,* paragraph 90.

74. *Power on Divorce* (1964, 2nd. ed.), p. 77.

75. Per Norris, J. in *Johnson* v. *Johnson* (1960) 23 D.L.R. (2d) 740, at 750.

76. See Final Report of the Committee on Procedure in Matrimonial Causes, (Eng.), 1946-1947: Cmd. 7024 (1947), paras. 22 and 29. See also Report of The Royal Commission on Marriage and Divorce, (Eng.), 1951-1955: Cmd. 9678 (1956), paras. 230-235.

77. See Matrimonial Causes Act, (Eng.), 1965, sections 5 and 12 which provide that collusion shall constitute a discretionary bar to relief in proceedings for divorce or judicial separation. See *Head (formerly Cox)* v. *Head* [1964] P. 228; *Ashlee* v. *Ashlee* (1963) 107 Sol. Jo. 892; *Dredge* v. *Dredge*, The Times, January 18th, 1964; *Mulhouse v. Mulhouse* [1964] 2 W.L.R. 808, [1964] 2 All E. R. 50.

78. See Report of the Royal Commission on Marriage and Divorce, (Eng.), 1951-1955: Cmd. 9678 (1956), paras. 234-235.

79. Per Laidlaw, J. A. in *Maddock* v. *Maddock* (1958) O.R. 810 (Ont. C.A.).

80. See the 1966 Report of the Joint Legislative Committee on Matrimonial and Family Laws to the Legislature of the State of New York, wherein it is recommended that the traditional bars of collusion and connivance should be replaced by the defence that the plaintiff "conspired to procure" the offence complained of: see appendix, *infra.*

81. See *Power on Divorce* (1964, 2nd ed.), pp. 50-64.

82. See Final Report of the Committee on Procedure in Matrimonial Causes, (Eng.), 1946-1947: Cmd. 7024 (1947), paras. 22 and 29. See also Report of the Royal Commission on Marriage and Divorce, (Eng.), 1951-1955: Cmd. 9678 (1956), paras. 237-246.

83. See Payne, "The Concept of Condonation in Matrimonial Causes: Its Functional Significance and Fundamental Nature" (1961) 26 Sask. Bar Rev. 4. See also J. S. Bradway, "Forgive And Forget: Condonation Today" (1962) 2 Jl. of Fam. Law 116; A. Irvine, "The Concept of 'Reconciliation' And The Matrimonial Causes Act, 1963" (1966) 82 L.S.R. 525.

84. See *Power on Divorce* (1948, 1st ed.), p. 36. Compare *Power on Divorce* (1964, 2nd ed.), pp. 56-59. See also Payne, "The Concept of Condonation in Matrimonial Causes: A Restatement of *Henderson* v. *Henderson and Crellin*" (1961) 26 Sask. Bar Rev. 53.

85. Namely, the bilateral intent to resume matrimonial cohabitation or to be reconciled: see texts and article cited in footnote 84, *supra.*

86. Matrimonial Causes Act, (Eng.), 1937, sec. 1 (1). See now Matrimonial Causes Act. (Eng.), 1965, sec. 2, which reads as follows:

> "2.—(1) Subject the next following subsection, no petition for divorce shall be presented to the court before the expiration of the period of three years from the date of the marriage (hereafter in this section referred to as 'the specified period').
>
> (2) A judge of the court may, on an application made to him, allow the presentation of a petition for divorce within the specified period on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent; but in determining the application the judge shall have regard to the interests of any relevant child and to the question whether there is reasonable probability of a reconciliation between the parties during the specified period.
>
> (3) Nothing in this section shall be deemed to prohibit the presentation of a petition based upon matters which occurred before the expiration of the specified period."

For corresponding legislation in Australia, see Matrimonial Causes Act, (Aust.), 1959, sect. 43, which reads as follows:

> *"43. Petition within three years of marriage.*—(1) Subject to this section, proceedings for a decree of dissolution of marriage shall not be instituted within three years after the date of the marriage except by leave of the court.

(2) Nothing in this section shall be taken to require the leave of the court to the institution of proceedings for a decree of dissolution of marriage on one or more of the grounds specified in paragraphs (a), (c) and (e) of section twenty-eight of this Act,* and on no other ground, or to the institution of proceedings for a decree of dissolution of marriage by way of cross-proceedings.

(3) The court shall not grant leave under this section to institute proceedings except on the ground that to refuse to grant that leave would impose exceptional hardship on the applicant or that the case is one involving exceptional depravity on the part of the other party to the marriage.

(4) In determining an application for leave to institute proceedings under this section, the court shall have regard to the interests of any children of the marriage and to the question whether there is any reasonable probability of a reconciliation between the parties before the expiration of the period of three years after the date of the marriage.

(5) Where, at the hearing of proceedings that have been instituted by leave of the court under this section, the court is satisfied that the leave was obtained by misrepresentation or concealment of material facts, the court may—

(a) adjourn the hearing for such period as the court thinks fit; or

(b) dismiss the petition on the ground that the leave was so obtained.

(6) Where, in a case to which the last preceding sub-section applies, there is a cross-petition, if the court adjourns or dismisses the petition under that sub-section, it shall also adjourn for the same period, or dismiss, as the case may be, the cross-petition, but if the court, having regard to the provisions of this section, thinks it proper to proceed to hear and determine the cross-petition, it may do so, and in that case it shall also proceed to hear and determine the petition.

(7) The dismissal of a petition or a cross-petition under sub-section (5) or (6) of this section does not prejudice any subsequent proceedings on the same, or substantially the same, facts as those constituting the ground on which the dismissed petition or cross-petition was brought.

(8) Nothing in this section prevents the institution of proceedings, after the period of three years from the date of the marriage, based upon matters which have occurred within that period.

(9) In this section, a reference to the leave of the court shall be deemed to include a reference to leave granted by a court on appeal."

[*The grounds for divorce set out in section 28, paragraphs (a), (c) and (e) are adultery, wilful and persistent refusal to consummate the marriage, and rape, sodomy or bestiality.]

87. See footnote 86, *supra.*

88. See footnote 86, *supra.*

89. Report of the Royal Commission on Marriage and Divorce, (Eng.), 1951-1955: Cmd. 9678 (1956), para. 215.

90. See Cmd. 9678 (1956), paras. 212-217.

91. *Ibid.*

92. See generally Judge R. W. Hansen, "Guardians Ad Litem in Divorce and Custody Cases: Protection of the Child's Interests" (1964) 4 Jl of Fam. Law 181; R. W. Hansen, "The Role And Rights Of Children In Divorce Actions" (1966) 6 Jl of Fam. Law 1.

See also *Kritzik* v. *Kritzik,* 21 Wis. 2d 442, 124 N.W. 2d 581 (1963), wherein Wilkie, J. stated:

"In making his determinations as to what conditions of a divorce judgment would serve the interests of the children involved, the trial

court does not function solely as an arbiter between two private parties. Rather, in his role as a family court, the trial court represents the interests of society in promoting the stability and best interests of the family. It is his task to determine what provisions and terms would best guarantee an opportunity for the children involved to grow to mature and responsible citizens, regardless of the desires of the respective parties. This power [reflects] a recognition that children involved in a divorce are always disadvantaged parties and that the law must take affirmative steps to protect their welfare."

93. For additional provisions relating to the powers of the court to make orders for the custody, maintenance and supervision of children, see Matrimonial Causes Act, (Eng.), 1965, sections 34-37.

See also Matrimonial Causes Act, R.S.O., 1960, ch. 232, sections 5 and 6 and especially section 6, sub-sections (2) and (6), which read as follows:

"6. - (2) Where the statement of claim in any action for the dissolution of marriage contains particulars as to any child of the marriage who is under sixteen years of age at the time of the commencement of the action, the Official Guardian shall cause an investigation to be made and shall report to the court upon all matters relating to the custody, maintenance and education of the child.

(6) Notwithstanding that no claim for custody or maintenance of the child is made in the action, the judge presiding at the trial may make such order as to the custody or maintenance, or both, of the child as may seem proper."

94. See R. W. Hansen, "The Role and Rights of Children in Divorce Actions" (1966) 6 Jl of Fam. Law 1, at p. 90:

"(The) emphasis upon the necessity of legal representation for children in divorce actions is not inconsistent with the role or importance of the social service investigator in securing information for the benefit of the court. As the (decision in *Wendland* v. *Wendland*, 29 Wis. 2d 145, 138 N.W. 2d 185 (1965)) points out, 'Although the court, as here, may call upon the department of domestic conciliation for an independent investigation and report, a guardian ad litem for the children, as an advocate for their interests, may well be in a position to conduct a further investigation and present evidence to the court that will help it reach its custody determination.' The twin requirements of legal representation for the children and a social service evaluation of their situation represent an inter-disciplinary approach to protecting the rights of children and to lessening the trauma of marriage dissolution upon the children. Both represent 'affirmative steps' that a court can take to determine and protect the welfare of children. That this requires additional time and requires additional expense for the divorce-seekers must be conceded. 'But . . . this extra consideration is due the children who are not to be buffeted around as mere chattels in a divorce controversy, but rather are to be treated as interested and affected parties whose welfare should be the prime concern of the court, in its custody determinations'."

95. See Final Report of the Committee on Procedure in Matrimonial Causes, (Eng.), 1946-1947: Cmd. 7024 (1947), paras. 29-34.

96. Circuit Judge, Family Court, Milwaukee, Wisconsin.

97. See contents of footnote 94, *supra.*

98. See *Power on Divorce* (1964, 2nd ed.), chs. XV and XXIII.

99. *Power on Divorce* (1964, 2nd ed.), p. 273.

100. See *Power on Divorce* (1964, 2nd ed.), chs. XV and XXIII.

101. See Matrimonial Causes Act, (Eng.), 1965, sections 15, 17, 20, 21, 33; Matrimonial Proceedings (Magistrates' Courts) Act, (Eng.), 1960, section 2. See also Vernier, *American Family Law* (1935), Vol. 3 §161.

102. Final Report of the Committee on Procedure in Matrimonial Causes: Cmd. 7024 (1947), para. 5. These conclusions are endorsed in the Report of the Royal Commission on Marriage and Divorce, (Eng.), 1951-1955: Cmd. 9678 (1956), paras. 329-330. See also the Report of the Royal Commission on Population, (Eng.), 1945-1950: Cmd. 7695, wherein it is recommended that preparation for family life should be given a more prominent place in the educational system through (i) a wide development of sex education in the schools; (ii) the adjustment of school curricula to raise the status of the practical crafts of homemaking and subjects relating to married life; and (iii) the development of special courses at colleges and centres of adult education relating to the psychological aspects of marriage as well as the ordinary domestic subjects. It should be noted that the Royal Commission on Population emphasized that the co-operation of the churches and other organisations is essential to ensure proper education and preparation for marriage.

103. See Matrimonial Proceedings Act (New Zealand), 1963, secs. 4-5:

"4.—(1) Where any proceedings for separation or restitution of conjugal rights or dissolution of a voidable marriage or divorce have been instituted,—

(a) It shall be the duty of the Court to give consideration, from time to time, to the possibility of a reconciliation of the parties to the marriage; and

(b) If at any time it appears to the Court, either from the nature of the case, the evidence in the proceedings, or the attitude of those parties, or of either of them, that there is a reasonable possibility of such a reconciliation, the Court may adjourn the proceedings to afford those parties an opportunity to become reconciled, and may nominate a suitable person with experience or training in marriage counselling, or in special circumstances some other suitable person, to endeavour to effect a reconciliation.

(2) If, not less than twenty-eight days after an adjournment under sub-section (1) of this section has taken place, either of the parties to the marriage requests that the hearing be proceeded with, the hearing shall be resumed.

5.—(1) No evidence of any information received by, or of anything said or of any admission made to a person nominated pursuant to subsection (1) of section 4 of this Act in the course of an endeavour to effect a reconciliation under that section shall be admissible in any Court or before any person acting judicially.

(2) Every person nominated pursuant to subsection (1) of section 4 of this Act who, except in so far as it is necessary for him to do so for the proper discharge of his functions under section 4 of this Act, discloses to any person any information received by him or any statement or admission made to him in the course of an endeavour to effect a reconciliation under that section commits an offence, and is liable on summary conviction to a fine not exceeding fifty pounds."

See also Matrimonial Causes Act, (Australia), 1959, secs: 14-17:

"*14. Reconciliation.*—(1) It is the duty of the court in which a matrimonial cause has been instituted to give consideration, from time to time, to the possibility of a reconciliation of the parties to the marriage (unless the proceedings are of such a nature that it would not be appropriate to do so), and if at any time it appears to the Judge constituting the

court, either from the nature of the case, the evidence in the proceedings or the attitude of those parties, or of either of them, or of counsel, that there is a reasonable possibility of such a reconciliation, the Judge may do all or any of the following:

(a) adjourn the proceedings to afford those parties an opportunity of becoming reconciled or to enable anything to be done in accordance with either of the next two succeeding paragraphs;

(b) with the consent of those parties, interview them in chambers, with or without counsel, as the Judge thinks proper, with a view to effecting a reconciliation;

(c) nominate—

(i) an approved marriage guidance organization or a person with experience or training in marriage conciliation; or

(ii) in special circumstances, some other suitable person, to endeavour, with the consent of those parties, to effect a reconciliation.

(2) If, not less than fourteen days after an adjournment under the last preceding sub-section has taken place, either of the parties to the marriage requests that the hearing be proceeded with, the Judge shall resume the hearing, or arrangements shall be made for the proceedings to be dealt with by another Judge, as the case requires, as soon as practicable.

15. Hearing when reconciliation fails.—Where a Judge has acted as conciliator under paragraph (b) of sub-section (1) of the last preceding section but the attempt to effect a reconciliation has failed, the Judge shall not, except at the request of the parties to the proceedings, continue to hear the proceedings, or determine the proceedings, and, in the absence of such a request, arrangements shall be made for the proceedings to be dealt with by another Judge.

16. Statements etc. made in course of attempt to effect reconciliation.—Evidence of anything said or of any admission made in the course of an endeavour to effect a reconciliation under this Part is not admissible in any court (whether exercising federal jurisdiction or not) or in proceedings before a person authorized by a law of the Commonwealth or of a State or Territory of the Commonwealth, or by consent of parties, to hear, receive and examine evidence.

17. *Marriage Conciliator to take oath of secrecy*—A marriage conciliator shall, before entering upon the performance of his functions as such a conciliator, make and subscribe, before a person authorized under the law of the Commonwealth or of a State or a Territory to which this Act applies to take affidavits, an oath or affirmation of secrecy in accordance with the form in the First Schedule to this Act."

104. See Matrimonial Causes Act, (Eng.), 1965, section 34 and Matrimonial Proceedings (Magistrates' Courts) Act, (Eng.), 1960, section 6.

105. Although the shortage of trained counsellors and social workers in Canada makes this a counsel of perfection at the present time, too much emphasis cannot be laid upon the importance of the best and fullest professional training for marriage counsellors conciliators.

See Matrimonial Causes Act, (Australia), 1959, sections 9-13, which read as follows:

"*9. Grants to approved marriage guidance organizations.*—The Attorney-General may, from time to time, out of moneys appropriated by the Parliament for the purposes of this Part, grant to an approved marriage guidance organization, upon such conditions as he thinks fit, such sums by way of financial assistance as he determines.

10. Approval of marriage guidance organizations.—(1) A voluntary organization may apply to the Attorney-General for approval under this Part as a marriage guidance organization.

(2) The Attorney-General may approve any such organization as a marriage guidance organization where he is satisfied that—

(a) the organization is willing and able to engage in marriage guidance; and

(b) marriage guidance constitutes or will constitute the whole or the major part of its activities.

(3) The approval of an organization under this section may be given subject to such conditions as the Attorney-General determines.

(4) Where the approval of an organization has been given subject to conditions, the Attorney-General may, from time to time, revoke or vary all or any of those conditions or add further conditions.

(5) The Attorney-General may, at any time, revoke the approval of an organization where—

(a) the organization has not complied with a condition of the approval of the organization;

(b) the organization has not furnished, in accordance with the next succeeding section, a statement or report that the organization was required by that section to furnish; or

(c) the Attorney-General is satisfied that the organization is not adequately carrying out marriage guidance.

(6) Notice of the approval of an organization under this section, and of the revocation of such an approval, shall be published in the Gazette.

11. Reports etc. by approved marriage guidance organizations.—(1) An approved marriage guidance organization shall, not later than the thirty-first day of December in each year, furnish to the Attorney-General, in respect of the year that ended on the last preceding thirtieth day of June—

(a) an audited financial statement of the receipts and expenditure of the organization, in which receipts and expenditure in respect of its marriage guidance activities are shown separately from other receipts and expenditure; and

(b) a report on its marriage guidance activities, including information as to the number of cases dealt with by the organization during the year.

(2) Where the Attorney-General is satisfied that it would be impracticable for an organization to comply with the requirements of the last preceding sub-section or that the application of those requirements to an organization would be unduly onerous, he may, by writing under his hand, exempt the organization, wholly or in part, from those requirements.

12. Admissions etc. made to marriage guidance counsellors.—(1) A marriage guidance counsellor is not competent or compellable, in any proceedings before a court (whether exercising federal jurisdiction or not) or before a person authorized by a law of the Commonwealth or of a State or Territory of the Commonwealth, or by consent of parties, to hear, receive and examine evidence, to disclose any admission or communication made to him in his capacity as a marriage guidance counsellor.

(2) A marriage guidance counsellor shall, before entering upon the performance of his functions as such a counsellor, make and subscribe, before a person authorized under the law of the Commonwealth or of a State or a Territory to which this Act applies to take affidavits, an oath or affirmation of secrecy in accordance with the form in the First Schedule to this Act.

13. Application of Part to certain branches and sections of voluntary organizations.—A reference in this Part to a voluntary organization shall be deemed to include a reference to a branch or section of such an organization, being a branch or section identified by a distinct name and in respect of which separate financial accounts are maintained."

106. See Final Report of the Committee on Procedure in Matrimonical Causes, (Eng.) 1946-1947: Cmd. 7024 (1947), para. 22. See also Report of the Royal Commission on Marriage and Divorce, (Eng.) 1951-1955: Cmd. 9678 (1956), para. 340.

107. But see Cmd. 7024 (1947), para. 29 (iii).

108. See Cmd. 7024 (1947), para. 22; Cmd. 9678 (1956), para, 340. But compare H. H. Foster, Jr. "Conciliation And Counselling In The Courts In Family Law Cases" (1966) 41 N.Y.U. Law Rev. 353 at p. 380:

"It should be understood...that if competent professional personnel are available, [a compulsory] system should reach and save more marriages than a voluntary system. Although compulsory conciliation may be useless in some cases, the results in Wisconsin demonstrate that success is possible. It has been noted that conclusions based on surface observations as to the unlikelihood of a reconciliation are not always reliable and that sometimes the parties who show the greatest hostility are the ones who later resolve their difficulties. There may also be the factor of saving face so that a party who would consider it a sign of weakness to ask for a conference may willingly submit to compulsory conciliation."

It will be observed that Professor Foster states that a compulsory scheme of conciliation requires an adequate supply of competent professional personnel. It is submitted that the immediate introduction into Canada of any compulsory conciliation scheme would be doomed to failure by reason of the lack of a sufficient number of trained counsellors and conciliators.

109. See Report of the Royal Commission on Marriage and Divorce, (Eng.), 1951-1955: Cmd. 9678 (1956), paras. 357-358:

"At present the court will treat as privileged communications made by husband or wife to a person acting as a conciliator, such as a counsellor, probation officer, doctor or clergyman. This privilege, however, is vested in the spouses and the conciliator may be obliged to disclose confidences to the court if neither spouse claims privilege. From the point of view of the individual client it may be sufficient if he is assured that he can discuss matters in complete frankness with a marriage guidance counsellor without risk of disclosure. But we think that the interests of those engaged in counselling must also be considered, and unless there is complete freedom in discussion, the whole basis of conciliation may ultimately be destroyed...[The task of counsellors] demands special qualities and therefore the number of persons suitable for this work is limited. If marriage guidance counsellors find themselves compelled to give evidence in court in matrimonial proceedings this fact may deter suitable persons from [engaging in] this work...Further, the knowledge that if he is unsuccessful in his attempt at conciliation he may be called upon to give evidence in court is not likely to assist the counsellor in his task; and if there were to be frequent appearances in court of marriage guidance counsellors the public might well lose confidence in the marriage guidance movement, and those in difficulty would become increasingly hesitant to use their services. We think that [these] considerations cannot be met by anything short of a provision that the evidence of counsellors is not to be admissible in matrimonial cases."

Compare the Final Report of the Committee on Procedure in Matrimonial Causes, (Eng.), 1946-1947: Cmd. 7024 (1947), para. 29 (x). See also

Matrimonial Proceedings Act, (New Zealand), 1963, section 5 and Matrimonial Causes Act, (Australia), 1959, sections 16-17 [reprinted *supra*, footnote 103].

110. See Final Report of the Committee on Procedure in Matrimonial Causes, (Eng.), 1946-1947: Cmd. 7024 (1947) para. 22 (vi); Report of the Departmental Committee on Grants for the Development of Marriage Guidance, (Eng.): Cmd. 7566 (1948), para. 12; Report of the Royal Commission on Marriage and Divorce, (Eng.), 1951-1955: Cmd. 9678 (1956), para. 341.

111. See *supra*, sub-heading "Collusion, Connivance And Condonation As Absolute Bars to Matrimonial Relief."

112. *Ibid.*

113 For present purposes a "matrimonial cause may be defined to include proceedings for divorce, nullity, judicial separation, restitution of conjugal rights, jactitation of marriage and independent or ancillary proceedings for alimony or maintenance. Qualification to the statement set out in the text must be admitted in so far as divorce is only permitted to persons domiciled in Quebec and Newfoundland through the legislative process. Furthermore the remedies of judicial separation and restitution of conjugal rights are not available in the province of Ontario: see *Vamvakidis* v. *Kirkoff*, 64 O.L.R. 585, [1930] 2 D.L.R. 877 (Ont. C.A.).

114. See footnote 113, *supra*.

115. But see Report of the Royal Commission on Marriage and Divorce, (Eng.), 1951-1955: Cmd. 9678 (1956), paras. 749-750:

> "The principle which has hitherto prevailed is clearly stated in the ...Report of the Gorell Commission:
>
> '...the gravity of divorce and other matrimonial cases, affecting as they do the family life, the status of the parties, the interests of their children, and the interest of the State in the moral and social well-being of its citizens, makes it desirable to provide, if possible, that, even for the poorest persons, these cases should be determined by the superior courts of the country assisted by the attendance of the Bar...'
>
> We accept that principle as sound, and as being just as applicable today as it was in 1912. We also agree with the view of the Denning Committee that the manner in which divorce is effected does influence the attitude of the community towards the status of marriage. The Committee said:
>
> 'If there is a careful and dignified proceeding such as obtains in the High Court for the undoing of a marriage, then quite unconsciously the people will have a much more respectful view of the marriage tie and of the marriage status than they would if divorce were effected informally in an inferior court.'
>
> We endorse these words:"

For criticism of the conclusion expressed, *supra*, see O. R. McGregor, *Divorce in England* (Heinemann, 1957) at pp. 170-175. See *infra*, subheading "Advantages of Family Courts Exercising Exclusive Jurisdiction Over All Issues Affecting And Arising From the Marital or Familial Relationship." See also footnote 122, *infra*.

116. See L. Neville Brown, "Matrimonial Maintenance In The United States", (1966) British Institute Of International And Comparative Law Series 13—*Parental Custody and Matrimonial Maintenance:* A *Symposium*, at pp. 179-180.

See also Sir Frederick Pollock, Letter to Daily Telegraph, November 14th, 1936:

"For some time I have thought that the cause of discontent with English jurisdiction in matrimonial causes lies deeper than controversies over the grounds for divorce or separation. When our divorce court was created its method and procedure were modelled, rather as a matter of course, on those of our civil courts in matters of ordinary litigation. The business of the court is to do justice on the claims and defences raised by the parties; it has little power of initiation or inquiry, and very little of intervention. At most it can find occasion to make suggestions for a settlement. Such is the frame of our civil procedure and quite a good one for dealing with men's disputes on matters of trade and property and their individual and collective relations as neighbours and fellow-citizens. The application of that scheme to family relations and to marriage in particular is, in my humble opinion, all wrong. A better analogy may be found in the paternal jurisdiction of the old Court of Chancery over its wards, exercised to this day by the judges of the Chancery Division, to the general satisfaction of all concerned. A court for matrimonial causes should have conciliation for its first object, should have the carriage of the case in its own hands and should be entrusted with wide discretion. It should have power to grant a final decree of divorce when, after full inquiry and consideration, reconciliation proves inpracticable, or to make a decree *nisi* with a discretionary term of anything from three to twelve months."

117. See Final Report of the Committee on Procedure in Matrimonial Causes, (Eng.), 1946-1947: Cmd. 7024 (1947), para. 29.

118. See text to and contents of footnote 106, *supra.*

119. See H. H. Foster, Jr. "Conciliation And Counselling In The Courts In Family Law Cases" (1966) 41 N.Y.U. Law Rev. 353.

120. See Scarman, J. "Family Law and Law Reform" (public lecture presented at the University of Bristol, March 18th, 1966), noted in (1966) 15 Law Gdn 7.

121. For the purposes of this recommendation, "matrimonial causes" may be defined according to the contents of footnote 113, *supra.*

122. It may be of interest to observe that the Lord Chancellor recently announced that undefended divorce cases in England will be transferred from the High Court to the County Court in the near future: see 722 H.L. Debates 1262.

See also *Re Supreme Court Act Amendment Act 1964 (B.C.), Attorney-General of British Columbia* v. *McKenzie* (1965) 51 D.L.R. (2d) 623 (S.C.C.) (wherein provincial legislation empowering County Court Judges to exercise jurisdiction over divorce and matrimonial causes was held *intra vires*).

123. Quaere whether the County Court should have the discretionary power to refer the issues to the Supreme Court where children will be affected by the disposition of the inter-spousal proceedings.

124. See footnote 113, *supra,* wherein "matrimonial cause" is defined.

125. See Report of the Royal Commission on Marriage and Divorce, (Eng.), 1951-1955: Cmd. 9678 (1956), paras. 772-919. See also Payne, "Jurisdiction in Nullity Proceedings" (1961) 26 Sask. Bar Rev. 53; Payne, "Recognition of Foreign Divorce Decrees in Canadian Courts" (1961) 10 I.C.L.Q. 846.

126. See *Power on Divorce* (1964, 2nd ed.) at p. 392.

127. See *Power on Divorce* (1964, 2nd ed.) at pp. 387-388.

128. See also section 40 of Matrimonial Causes Act, (Eng.), 1965, which reads as follows:

"*40.*—(1) Without prejudice to any jurisdiction exercisable by the court apart from this section, the court shall have jurisdiction to entertain proceedings by a wife, notwithstanding that the husband is not domiciled in England,—

(a) in the case of proceedings under this Act [other than proceedings for divorce on presumed death (which is governed by section 14) and proceedings in respect of maintenance agreements], if—

(i) the wife has been deserted by her husband, or

(ii) the husband has been deported from the United Kingdom . . . and the husband was immediately before the desertion or deportation domiciled in England;

(b) in the case of proceedings for divorce or nullity of marriage, if—

(i) the wife is resident in England and has benn ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and

(ii) the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man.

(2) In any proceedings in which the court has jurisdiction by virtue of the foregoing subsection the issues shall be determined in accordance with the law that would have been applicable thereto if both parties were domiciled in England at the time of the proceedings."

129. See *Atty.-Gen. for Alberta* v. *Cook* [1926] A.C. 444, at pp. 460-461.

130. It may be of interest to observe that the provisions of the Divorce Jurisdiction Act, R.S.C., 1952, ch. 84 (see text to footnote 128, *supra*) differ fundamentally from the clauses set out in the original bill, namely Bill No. 111, 1st Session, 16th Parliament, 17-18 Geo. V, 1926-1927. The clauses of this Bill, unlike those of the Act, specifically sought to empower the married woman to acquire an independent domicile and clauses 2 and 3 read as follows:

"2. For the purposes of this Act a married women,

(a) who is judicially separated or otherwise living separate and apart from her husband; or

(b) who either before or after the passing of this Act has been deserted by and lived separate and apart from her husband for a period of two years, and is still living apart from her husband;

may acquire a domicile for herself as though she were a *feme sole* and may commence an action for divorce praying that her marriage may be dissolved on any grounds that entitle her to such divorce in any court having jurisdiction to grant a divorce *a vinculo matrimonii.*

3. For the purposes of this Act a wife deserted by and living apart from her husband shall be deemed to retain the domicile of her husband at the time she was so deserted until she has acquired a domicile of her own choice."

See also Matrimonial Causes Act, (Australia), 1959, section 24, reproduced in footnote 131, *infra.*

131. See Matrimonial Causes Act, (Australia), 1959, sections 23 and 24, which read as follows:

"*23.*—(4) Proceedings for a decree of dissolution of marriage or for a decree of nullity of a voidable marriage shall not be instituted under this Act except by a person domiciled in Australia.

(5) Proceedings for a decree of nullity of a void marriage or for a decree of judicial separation, restitution of conjugal rights or jactitation

of marriage shall not be instituted under this Act except by a person domiciled or resident in Australia.

(7) Without prejudice to the application of sub-sections (4) and (5) of this section in relation to proceedings in the Supreme Court of a Territory to which this Act applies, jurisdiction under this Act in a matrimonial cause instituted under this Act is not conferred on the Supreme Court of such a Territory unless at least one of the parties to the proceedings—

(a) is, at the date of the institution of the proceedings ordinarily resident in the Territory; or

(b) has been resident in the Territory for a period of not less than six months immediately preceding this date.

24.—(1) For the purposes of this Act, a deserted wife who was domiciled in Australia either immediately before her marriage or immediately before the desertion shall be deemed to be domiciled in Australia.

(2) For the purposes of this Act, a wife who is resident in Australia at the date of instituting proceedings under this Act and has been so resident for the period of three years immediately preceding that date shall be deemed to be domiciled in Australia at that date."

See also Matrimonial Proceedings Act. (New Zealand), 1959, sections 6, 9, 18 and 20 which read as follows:

"*6.* A petition for a decree of nullity of a void marriage, whether the marriage is governed by New Zealand law or not, may be presented to the Court in the following cases, and in no other case:

(a) where the petitioner or the respondent is domiciled or resident in New Zealand; or

(b) where the marriage was solemnised in New Zealand.

9. A petition for separation...or for restitution of conjugal rights may be presented to the Court where the petitioner or the respondent is domiciled or resident in New Zealand at the time the petition is presented, and in no other case.

18. A petition for dissolution of a voiable marriage...may be presented to the Court by either party to the marriage where the petitioner or the respondent is domiciled in New Zealand, and in no other case.

20. A petition for divorce from the other party to the marriage may be presented to the Court by any married person where the petitioner or the respondent is at the time of the petition domiciled in New Zealand and, where the ground alleged in the petition is one of those specified in paragraphs (m), (n) and (o) of section 21 of this Act*, has been domiciled or resident in New Zealand for two years immediately preceding the filing of the petition, and in no other case."

[*See *supra,* sub-heading "Legislative Recognition Of Marriage Breakdown As A Ground For Divorce: New Zealand"]

It may be of relevance to observe that Australia, unlike New Zealand, has a federal system of government and that prior to the enactment of the Matrimonial Causes Act, (Australia), 1959, a state concept of domicile was applied as a basis for the exercise of jurisdiction in matrimonial causes. See S. J. Skelly, "A Canadian Domicile" (1966) 9 Can. Bar. Jl 493.

132. See *Power on Divorce* (1964, 2nd ed.), chs. XI and XVIII. See also D. Tolstoy, "Void And Voidable Marriages" (1964) 27 Mod. L. Rev. 385. See *infra,* footnote 135.

133. See *Power on Divorce* (1964, 2nd. ed) at pp. 375-382.

134. Compare Matrimonial Causes Act, (Australia), 1959, sections 18-20.

135. There is, for example, some difference of judicial opinion concerning the effect of duress upon a marriage. See *H.* v. *H.* [1954] P. 258 (*void*); *Silver* (*otherwise Kraft*) v. *Silver* [1955] 1 W.L.R. 728 (void); *Parojcic* (*otherwise Ivetic*) v. *Parojcic* [1958] 1 W.L.R. 1280 (voidable); *Mahadervan* v. *Mahadervan* [1963] 2 W.L.R. 271 (voidable); *Kawaluk* v. *Kawaluk* [1927] 3 D.L.R. 493 (voidable).

A marriage, within the prohibited degrees of consanguinity or affinity is, it seems, void *ab initio* in some provinces but only voidable in others: see *Power on Divorce* (1964, 2nd ed.) at pp. 195 and 342-345.

See also D. Tolstoy, "Void And Voidable Marriages" (1964) 27 Mod. L. Rev. 385 D. Vernon, "Annulment Of Marriage: A Proposed Model Act" (1963) 12 Jl of Pub. Law 143.

136. See *Hobson v. Gray* (*otherwise Hobson or French*) (1958) 25 W.W.R. (N.S.) 82 (Alta.).

137. For full discussion of this issue, see D. Mendes da Costa "Working Paper On The Ontario Marriage Act" (unpublished paper prepared for the Ontario Law Reform Commission).

138. See *supra*, sub-heading "Marriage Guidance And Matrimonial Conciliation—Education And Preparation For Marriage."

139. Sections 2 and 3 of the Marriage and Divorce Act, R.S.C., 1952, ch. 176, raad as follows:

"*2.* A marriage is not invalid merely because the woman is a sister of a deceased wife of the man, or a daughter of a sister or brother of a deceased wife of the man.

3. A marriage is not invalid merely because the man is a brother of a deceased husband of the woman, or a son of a brother or sister of a deceased husband of the woman."

140. See also *Teagle* v. *Teagle* (1952) 6 W.W.R. (N.S.) 327 (B.C.).

141. See also Matrimonial Causes Act, (Australia), 1959, section 21; Matrimonial Proceedings Act, (Mew Zealand), 1963, section 18.

142. The limitation period operates to bar relief even though the petitioner had no opportunity during the first year of marriage to discover the facts which constitute a ground for annulment. If sec. 9 of the Matrimonial Causes Act, (Eng.), 1965, were adopted as the basis for legislation in Canada, it would seem advisable to provide that the one year limitation period shall run only from the date when the petitioner discovered, or had a reasonable opportunity of discovering, the facts which constitute a ground for relief in proceedings for the annulment of the marriage. In the alternative, it is submitted that the court should have a statutory discretion to waive the one year limitation period.

143. Compare Matrimonial Causes Act, (Australia), 1959, sections 48-50; Matrimonial Proceedings Act, (New Zealand), 1963, section 18, sub-sections 3, 4 and 5.

144. See Report of the Royal Commission on Marriage and Divorce, (Eng.), 1951-1955: Cmd. 9678 (1956), paras. 88-89. See also Matrimonial Causes Act, (Australia), 1959, sections 21 and 28, whereunder impotence constitutes a ground for annulment of the marriage and wilful refusal to consummate the marriage constitutes a ground for divorce. Compare the Matrimonial Causes Act, (Eng.), 1965, section 9 (1) and Matrimonial Proceedings Act, (New Zealand), 1965, section 18, whereunder wilful refusal to consumate the marriage constitutes a ground of annulment.

The respondent's wilful refusal to consummate the marriage may be deemed to constitute cruelty within the definition proposed in paragraph 74, *supra*

145. See contents of footnote 144, *supra*.

APPENDIX

1966 REPORT OF THE JOINT LEGISLATIVE COMMITTEE ON MATRIMONIAL AND FAMILY LAWS TO THE LEGISLATURE OF THE STATE OF NEW YORK: PROPOSED CHANGES IN THE DOMESTIC RELATIONS LAW

§170. Action for divorce. An action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on any of the following grounds:

(1) The cruel and inhuman treatment of the plaintiff by defendant.

(2) The abandonment of the plaintiff by the defendant for a period of two or more years.

(3) The sentencing of the defendant to imprisonment for a minimum period of five or more years, after the marriage of plaintiff and defendant except that no divorce shall be granted on this ground unless the defendant has been imprisoned for a period of two or more years pursuant to such sentencing.

(4) The commission of an act of adultery, provided that adultery for the purposes of articles ten, eleven and eleven-A of the domestic relations law, is hereby defined as the commission of an act of sexual or deviate sexual intercourse, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant.

(5) The husband and wife voluntarily have lived apart for a continuous period of two or more years because of estrangement due to marital difficulties.

The most notorious feature of New York State's presently inadequate divorce law is its reliance upon adultery as the sole ground for dissolving a marriage by divorce. The Committee proposes that divorces be granted on four additional grounds, each of which has stood the test of time in sister states for many years: and, as far as two of these grounds are concerned, in New York as well. The time has come to recognize grounds for divorce not so much as penalties for culpable behavior of husbands and wives, but, as manifestations of dead marriages, marriage that should be terminated for the mutual protection and well being of the parties and, in most instances, of their children. It is this context that grounds for divorce should be analyzed.

1. *Cruel and Inhuman Treatment*

Since 1813, the law of New York has recognized cruel and inhuman treatment of one party to the marriage by the other as a sufficient breach of the matrimonial relationship to justify termination of most of the incidents of the marriage. *Erkenbrach* v. *Erkenbrach*, 96 N.Y. 456. For all these years, cruel and inhuman treatment has ben recognized as a ground for a judgment of separation; Domestic Relations Law §200.

The New York Courts in construing the concept of cruel and inhuman treatment have delineated between the relatively trivial acts of unpleasantness which are a feature of many marriages, and those acts which seriously violate the marriage vows. *Preason v. Preason,* 230 N. Y. 141; *Uhlmann* v. *Uhlmann,* 17 Abb. NC 236. Eating crackers in bed, extravagance, marital arguments, occasional demonstrations of anger are not, under the decisions of the New York courts, cruel and inhuman treatment.

The view of the New York courts is as follows:

"Mere austerity of temper, petulance of manners, rudeness of language, even occasional sallies of passion, if they do not threaten bodily

harm, do not amount of legal cruelty. 'These things may cause discomfort, mental anguish and suffering, but...' the answer is that courts of justice do not pretend to furnish cures for all the miseries of human life." *Kennedy* V. *Kennedy*, 73 N.Y. 369, 374.

On the other hand, the concept of "cruel and inhuman treatment" is sufficiently broad to permit our courts to adjust it to psychological reality:

"The terms 'extreme cruelty' and 'cruel and inhuman treatment' are equivalent and are broad enough to include such behavior of one party as may be reasonably said so to affect the other physically or mentally as seriously to impair health. Cruelty is not limited to bodily hazard and hardship. If it were, a husband might constantly and without cause publicly call his wife a vile and shameless bawd so long as he did not strike her or threaten to strike her, and thus might intentionally break down her health and destroy her reason..." *Pearson* v. *Pearson*, 230 N.Y. 141, 146 (See *Avdoyan* v. *Avdoyan*, 265 App. Div. 763, 40 N.Y.S. 2d 665).

Recognition of cruel and inhuman treatment of one party of the marriage by the other as a ground for divorce would conform the law to the real reason that most citizens require matrimonial dissolution, the protection of the innocent spouse's health or safety. Cruel and inhuman treatment would also be available as a ground where the offending spouse mistreats the children of the marriage. *Bihin* v. *Bihin*, 17 Abb. Pr. 19; *Taylor* v. *Taylor, 74 Hun. 639, 26 N.Y.S. 246.*

Adoption of this ground of cruel and inhuman treatment renders unnecessary separate grounds for divorce dealing with the problems caused by drug addiction or habitual intoxication. Recognizing, as the Committee does, that these two conditions are in the nature of psychological diseases, divorce should not be granted on the ground that a husband or wife has fallen prey to drunkenness or addiction unless it seriously impairs the health or safety of the non-alcoholic or non-addcit spouse. *Kissam* v. *Kissam*, 21 App. Div. 142, 47 N.Y.S. 270. To grant divorce on the specific grounds of alcoholism or narcotics addiction might also raise serious questions of definition. See *Straub* v. *Straub*, 208 App. Div. 663, 204 N.Y.S. 61.

Forty-six of New York's sister states have adopted cruelty as a standard for granting divorce and only two of these states require actual personal violence as a basis for finding such cruelty. Twenty-six of these states recognize mental cruelty as grounds for divorce on subjective evidence; and the remaining 18 require the injured party to show, by medical evidence or objective means, that mental cruelty has impaired the injured party's health or, if allowed to continue, would have such an effect before a divorce may be granted. New York, by adopting the "cruel and inhuman treatment" formula previously developed by its own legislature and its courts, would follow the pattern of those 18 states requiring objective evidence of impairment of health or the likelihood of that impairment before a divorce could be granted for cruelty other than personal violence.

2. *Abandonment for a Period of Two Years or More*

Probably no course of conduct more evidences a "dead" marriage than the unjustified separation of one party to a marriage from the other. Forty-nine of New York's sister states recognize abandonment or, as it is often described, desertion, as a ground for a divorce. New York has recognized abandonment as grounds for separation since 1813. *Erkenbaugh* v. *Erkenbaugh*, 96 N.Y. 456 and presently furnishes abandonment as a ground for separation under §200 of the *Domestic Relations Law*.

The Committee's proposal, unlike the ground for separation, is to permit divorce by reason of abandonment only where it has continued for a period of two years or more, thus, demonstrating to the state that the marriage is now a mere legal formality which condemns the innocent party to a life of either unwanted celibacy or concubinage.

Abandonment, as developed by the New York courts is well defined. Whether characterized as "abandonment" or "desertion" for purposes of discussion, it has been described as:

> "a voluntary separation of one party from the other without justification, with the intention of not returning." *Williams* v. *Williams*, 130 N.Y. 193, 197; also *Berg* v. *Berg*, 289 N.Y. 513.

Nor does the Committee propose to change the law that where an innocent party is forced to separate by reason of the wrongdoing of the other, the separation, unilateral though it may be, is not an abandonment by the innocent spouse, but is a constructive abandonment by the guilty one.

In *Uhlman* v. *Uhlmann*, the elements of "abandonment" were defined by the court:

> "It seems to me that to constitute an abandonment under the statute two elements are necessary.
>
> One is a final departure with the intention not to reurn. This intention may be shown expressly or may be implied by conduct... The next essential fact, I think is, that there should be no sufficient reason for leaving. A man might maltreat his wife to the last point of endurance by personal abuse, or ... bring a mistress into the house to annoy her, and so forth, and she might fully leave in consequence. This would not be abandonment, within the meaning of the statute, which must contemplate a wrongful or unjustifiable act of leaving." *Uhlmann* v. *Uhlmann*, 17 Abb. NC 236, 260.

The need for broadening the grounds for divorce in New York to include abandonment or desertion has been recognized for years. Failure to provide such a ground for the dissolution of marriage by divorce constitutes a penalty inflicted on the innocent but abandoned husband or wife who seeks a normal, natural life for self and, in many instance, for family.

3. *Sentencing to imprisonment for a minimum period of five years or more and imprisonment pursuant to that sentencing for two years or more.*

New York State has long recognized that incarceration of a convict for life is "civil death", and for that formalistic reason permitted a wife to regard herself as a widow.[1] The effect was to permit remarriage for those husbands or wives who were wed to "lifers".

Forty-six other states have recognized that conviction of a crime may furnish justifiable reasons for dissolution of marriage. First, the incarceration of the wrongdoer requires the innocent spouse to suffer the restrictions of marriage with none of its emotional or economic advantages, much like the abandoned husband or wife; second, the commission of certain crimes is an act which necessarily shames the innocent spouse, and, even more unfortunately, often blemishes the innocent children.

The statutes of sister states reflect these two considerations: For example, in ten states the right to a divorce is predicated on the period of imprisonment of the party to be divorced.[2] In others, divorce will be granted if the divorced party has been found guilty of certain classes of crimes.[3]

The Committee's proposal seeks to reflect both of these basic policies. By providing that the wrongdoer must be sentenced to imprisonment for a minimum of five years or more, the statute restricts its application only to those who

have been guilty of the most serious felonies.[4] On the other hand, the proposal provides that the divorced spouse must be imprisoned for at least two years prior to the divorce being granted; this serves the purpose of (1) braking the natural but sometimes too rash inclination to dissolve a marriage upon the conviction of the wrongdoing party; (2) giving the convicted party an opportunity to obtain his or her release from prison prior to dissolution of the marriage through reversal of the conviction on appeal.

4. *Adultery*

Adultery has, of course, been New York's sole ground for divorce since 1787. The Committee has seen fit to retain it although some witnesses have pointed out that a single act of adultery is perhaps the weakest of all grounds on which to predicate dissolution of a marriage.

The Committee has consistently been presented with the problem of a homosexual partner to a marriage. Under the present law homosexual acts by a husband or wife with a third person are no adultery. *Cohen* v. *Cohen*, 200 Misc. 19, 103 N.Y.S. 2d 426. It is possible that if the homosexual conduct deleteriously affects the health of the innocent spouse, it will be characterized as "cruel and inhuman treatment". *Goldsmith* v. *Goldsmith*, 151 Misc. 198, 270 N.Y. Supp. 47 (heterosexual conduct) (but see *McClinton* v. *McClinton*, 200 N.Y.S. 2d 987). It is the Committee's view that the homosexual activity is as sufficient a ground for divorce as heterosexual activity with a person other than the offender's spouse. For that reason, the provision as to adultery has been expanded to encompass homosexuality and sodomy as defined under the *Revised Penal Law* which will become effective September 1, 1967. The members of the Committee recognize the possibility that in matrimonial litigation there may be attempts to misuse this ground for divorce, but trust that safeguards such as Section 235 of the *Domestic Relations Law* and the good judgment and standards of the attorneys of the State will make such fears unwarranted. On balance then, the peculiar anomaly of granting divorce because of heterosexual adulterous activity and refusing it in cases of such activity when it is of homosexual nature, should be abolished.

5. *Voluntarily living apart for a continuous period of two or more years because of estrangement due to marital difficulties.*

All of the other proposals of the Committee for broadening the grounds for divorce in New York emphasize the concept that either one of the parties is at fault or the tensions of an unhealthy marriage cause one of the parties to engage in anti-social conduct before a divorce can be granted. Just as adultery is a "fault" ground, so too are cruel and inhuman treatment, abandonment, and imprisonment "fault" grounds for divorce.

The State's interest in the welfare of its citizens is the basis for its interest in their matrimonial arrangements. If a couple demonstrates to the state that their marriage is dead, the state should then, with appropriate safeguards for the parties and their children, recognize the need for divorce. To do otherwise is to defeat the purposes for which matrimonial law is established—stability for the individual and his family.

One of the most convincing ways in which it can be demonstrated that a marriage is "dead" is proof that a particular couple had lived separately and apart for a continuous period of years. McCurdy, "Divorce—A Suggested Approach", 9 Vanderbilt Law Review 685.

In a study co-authored by an advisor to the Committee the rationale of "living apart" as a ground for divorce is set forth:

> "The traditional concept that a divorce should be granted only to an innocent spouse for grounds based upon specific marital misconduct of

> the other has been tempered by the incorporation into the divorce laws of twenty-five American jurisdictions of an additional ground for divorce, namely, that of living apart and separate for a specified period of years. The underlying reason for this legislative action has been a realistic recognition of the fact that where a marriage is dead, as evidenced by the objective proof of a separation between husband and wife which had endured for a substantial period, no good purpose is to be served, either for the parties or the state, by a continuance in theory of a marriage bond which is meaningless in fact." Foster and Freed, "Living Apart as a Ground for Divorce", N.Y.L.J. May 17, 1965, Vol. 153, No. 94, page 1, col. 4.

Adoption of living apart as a ground for divorce would, the Committee submits, constitute legislative recognition of the needs of those of our citizens who are unwilling to indulge in the usual bitterness of a matrimonial action, but desperately require the law to recognize the actual death of their marriage.

A noted American philosopher analyzing past deprecatory criticism by others of human nature, wrote that the stratagem was "Give a dog a bad name and hang him". The living apart proposal has been treated to these same techniques of misrepresentation. "Divorce by consent" this provision has been called by some, "divorce at will" by others. Whatever the virtues or vices of divorce by consent, the living apart recommendation can hardly be so described.

The only socially justifiable reason for granting divorce, in the last analysis, can be that the continuation of the marriage bond be undesirable from the point of view of injury to the parties and the family. The true justification for "adultery", "cruel and inhuman treatment" and "abandonment" as grounds for divorce is that they reflect a sick relationship not that they are penalties of a quasi-penal nature meted out to a guilty party. Living apart is a similar demonstration of a socially useless and undesirable relationship.

The decisive factor in living apart as a ground for divorce is the period of time the parties must live apart to demonstrate conclusively the death of their marriage. It is noteworthy that the District of Columbia, after many years of providing a five year separation as ground for divorce, has only recently had that requirement reduced to one year by the Congress of the United States, D. C. Code, Section 16-904. It is true that if a couple need only live apart for a short period of time, a week or a month, such living apart would demonstrate nothing to the state and would, in practical effect, mean that divorce was for the asking. However, where, as in the Committee's proposal, a period of two years or more must elapse before divorce can be granted, the living apart demonstrates the irreconcilability of the parties.

The Committee's proposal would require three elements to be established for a divorce to be granted on the ground of living apart: (1) the parties have lived apart for a continuous period of two years or more; (2) the reason for their living apart was due to marital difficulties; and (3) either the initial separation was by agreement or at some subsequent time, two years before the divorce is granted, both parties have agreed to the continuation of the estrangement.[5]

In requiring the period of living apart to be voluntary on the part of both parties to the marriage, the Committee has rejected the view that has been accepted in a number of other states providing living apart as grounds for divorce; Foster and Freed, "Living Apart as a Ground for Divorce", N.Y.L.J. May 17, 1965, page 4, cl 3-8; McCurdy, "Divorce—A Suggtsted Approach", 9 Vanderbilt Law Review, 685, 701.

The requirement that living apart be voluntary in order to qualify for a divorce will discourage parties from unilaterally abandoning their marriages and thereafter seeking divorce. It is the intention of the Committee that living apart

be capable of ripening into divorce only where the parties *both* recognize that they are incapable of living together. *Stumpf* v. *Stumpf*, 228 Md. 350, 179 A. 2d 893; *Lewis* v. *Lewis*, 219 Md. 313, 149 A. 2d 403; *Moran* v. *Moran*, 219 Md. 339, 149 A. 2d 399; *Jakubke* v. *Jakubke*, 125 Wis. 635, 104 N.W. 704; *Pruett* v. *Pruett*, ùéô a. ûd 399; *Jakubke* v. *Jakubke*, 125 Wis. 635, 104 N.W. 704; *Pruett* v. *Pruett*, 247 N.C. 13, 100 S. E. 2d 296.

The most typical situation covered by the Committee's proposal would be the couple who commence living apart because they recognize their mutual incapacity to live together as man and wife, and after the passage of at least two years (during which time it is presumed, the social pressures of family, religious and social groups would have had an opportunity to induce reconciliation of the couple) either party cou'd obtain a divorce.

Another situation which will be considered under the proposed provision will be where separation was originally unilateral, but both parties thereafter became reconciled to the separation and now both recognize that the marriage was no longer worth attempting to save. *Richardson* v. *Richardson*, 257 N.C. 705, 127 S.E. 2d 525; *Helgott* v. *Helgott, supra*; *Jakubke* v. *Jakubke, supra.*

However, where the separation is rooted in abandonment or misconduct and the innocent party refuses to recognize the need for the separation then divorce will not be granted. *Martin* v. *Martin*, 160 F. 2d 20 (App. D. C.); *Stumpf* v. *Stumpf, supra*; *Sanders* v. *Sanders*, 135 Wis. 613, 116 N.W. 17; *Williams* v. *Williams*, 224 N.C. 91, 29 S.E. 2d 39.

§ 200. Action for separation. An action may be maintained by a husband or wife against the other party to the marriage to procure a judgment separating the parties from bed and board, forever, or for a limited time, for any of the following causes:

1. The cruel and inhuman treatment of the plaintiff by the defendant.

2. The abandonment of the plaintiff by the defendant.

3. Where the wife is plaintiff, the neglect or refusal of the defendant to provide for her.

4. The commission of an act of adultery by the defendant.

5. The sentencing of the defendant to imprisonment for a minimum period of five or more years, after the marriage of plaintiff and defendant except that no separation shall be granted on this ground unless the defendant has been imprisoned for a period of two or more years pursuant to such sentencing.

Much testimony before the Committee leveled criticism at the existence the action for judicial separation in New York. Critics claimed that the separation action was generally used as a device to extract high alimony from a spouse who wished to escape the bonds of marriage. The claim was further made that judicial separation condemned the parties to unwanted concubinage or celibacy; that it was purposeless and ineffective, that it should be abolished.

The Committee recognized that a substantial number of the citizens of this State do not, for religious or other personal reasons, recognize divorce for thmselves or their marital partners. For these people, separation from bed and board is often the only remedy by which they can obtain necessary judicial relief. Although the Committee recognizes defects in the existence of separation remedy—that after a period of living separate and apart under such a decree, the is, at the present time, ill advised for the above reasons.

Suggestions have been made by some witnesses, expert in the law of other jurisdictions, that judicial separation be treated as an intermediate temporary remedy—that after a period of living separae and apart under such a decree, the separation would ripen into a divorce.[6]

To transform the separation action into a vehicle for ultimate divorce on request of either party has the serious disadvantage of permitting, or even encouraging, a party to marriage to violate his marital vows, suffer a judicial separation because of this violation, and ultimately be rewarded with a divorce at his petition.

Two modifications of the grounds for separation have been adopted in order to bring the separation statute into conformity with the proposed grounds for divorce: (1) the definition of adultery has been expanded to include homosexuality, and (2) the Committee has proposed that separation be available in the case of an imprisonment which would constitute grounds for divorce under §170 of the proposed statute. These changes are consistent with the Committee's stated purpose of making the separation action an alternative matrimonial remedy for those citizens who do not, for reasons of conscience, believing in divorce, but do require the intermediate remedy of separation.

The grounds for separation differ from the proposed grounds for divorce in two ways. The Committee has seen no reason to limit the ground of abandonment in separation actions to a period of two years or more and the Committee has proposed the continuation of nonsupport as a ground for separation.

As to nonsupport, the Committee believed that the failure of a husband to support his wife, while a serious breach of his matrimonial duty, should not be a ground for divorce. Of course, if that nonsupport were sufficiently linked with acts that adversely affect the wife's health, it might constitute cruel and inhuman treatment, a matrimonial violation of greater significance and which would justify the granting of divorce. On the other hand, there would seem no objection to giving a wife a limited remedy where she can prove calculated nonsupport on the part of the husband. *Sengstack* v. *Sengstack,* 4 N. Y. 2d 502, 172 N.Y.S. 2d 337.

The Committee has also taken the opportunity to propose deletion of that portion of the present section 200 (2) which grants the right to separation because of conduct which "may render it unsafe and improper...to cohabit...",

The redundancy of this ground for separation with cruel and inhuman treatment was first pointed out in 1832:

> "The original statute, but more especially the Revised Statutes, have specified 'cruel and inhuman treatment,' and 'such conduct on the part of the husband towards his wife as may render it unsafe and improper for her to cohabit with him,' as, apparently distinct causes of divorce: and yet, I do not well perceive how they can be distinguished; because that which would render it 'unsafe and improper,' could not be anything less than *cruelty,* according to the definition we have received. It must be actual personal violence, menaces or threats, creating reasonable apprehension of bodily harm, which could alone render it 'unsafe' for a wife to remain with a husband; and those very acts would constitute a case of 'cruel and inhuman treatment.' They appear to me synonymous and convertible terms. Chancellor Kent has, I think, favored this construction. 'Probably,' says he, 'the word *unsafe* in our statute may mean the same thing as the reasonable apprehension of bodily hurt in the English cases:' 2 Kent's Com. 126, 2d edit., and see his opinion in *Barrere* v. *Barrere,* to which he refers." *Mason* v. *Mason,* 1 Edw. Ch. 278, 291, 292.

§212. Defenses to actions for divorce and separation. (a) The defenses of recrimination, condonation, connivance and collusion are hereby abolished. However, a plaintiff shall not be entitled to a divorce or separation on a ground therefor which plaintiff has conspired to procure or which has been willingly forgiven by plaintiff. A divorce shall not be denied by reason of the foregoing

when it is established by satisfactory proof that the parties voluntarily have lived apart for a continuous period of two or more years.

(b) Where both plaintiff and defendant have proved grounds for divorce, the court may grant a judgment of divorce to either or both parties except that no divorce shall be granted in favor of a party who did not request such relief in the pleadings.

1. *The Abolition of Defenses*

Section 212 of the Committee's proposed Statute modifies and, in some cases, abolishes the traditional defenses to a divorce action. No subject in matrimonial law has aroused so much bitter controversy among experts as the question of the defenses available in actions for divorce. The Committee's proposal is to update and make more flexible those defenses which have valid reasons for their existence. As to the others, the Committee recommends abolition.

(a) *Recrimination.*

§171(4) of the *Domestic Relations Law* currently provides that divorce is to be denied a plaintiff—

> "Where the plaintiff has also been guilty of adultery under such circumstances that defendant would have been entitled, if innocent, to a divorce."

This is recrimination. *Weiger* v. *Weiger,* 270 App. Div. 770, 59 N.Y.S. 2d 444. There is no reason to refuse a divorce to a couple who are each not respecting their marital vows unless the brutal view is taken that divorce is a reward for the innocent and punishment for the guilty. To the extent that there is reluctance to give either side a "victory" in granting judgment to one or the other, proposed §212(b), discussed below, is applicable. If we take a rational and common sense view of divorce as a legal remedy to couples whose marriage is hopelessly dead, recrimination as a defense is senseless. Recrimination in New York has also been applied as grounds for denying a separation because the suing party was guilty of "marital misconduct" *Hawkins* v. *Hawkins,* 193 N.Y., 409; *Petrella* v. *Petrella,* 23 A.D. 2d 489, 255 N.Y.S. 2d 962; *Walker* v. *Walker,* 282 App. Div. 671, 122 N.Y.S. 2d 209; aff'd 307 N.Y. 750. This, in New York, was embodied in the ancestral statute of §202 of the *Domestic Relations Law.*[8]

There would also seem to be no reason for recrimination to be a defense in an action for divorce based upon grounds other than adultery.

Is a wife promiscuous because her husband beats her regularly? Or does her husband beat her regularly because she is promiscuous? In either event, the acts of each indicate that the marriage is dangerous to the parties and should, at the request of either, be dissolved.

On the other hand, as was indicated in our discussion of abandonment and cruel and inhuman treatment above, it is an integral part of the cause of action to show that there was no justification for the wrongful act alleged as a ground for divorce (i.e. if a wife is forced to leave her husband because of his bad conduct, she has not "abandoned" him). *Silberstein* v. *Silberstein,* 218 N.Y. 525; *In re Lapenna's Estate,* 16 A.D. 2d 665, 226 N.Y. S. 2d 497. See as to "provocation" for cruel and inhuman treatment, *Barker* v. *Barker,* 168 App. Div. 212, 153 N.Y.S. 256; *Moulton* v. *Moulton,* 2 Barb. Ch. 309, *Hopper v. Hopper,* 11 Paige 46, (all of which appear to recognize a defense of provocation in New York, but, all of which were decided after the enactment in 1813 of the ancestor of Domestic Relations Law, §202).

Recrimination differs as a defense in that the misconduct alleged need not be related to the ground sued upon; thus, it goes not necessarily to an explanation of the act of cruelty or abandonment, but to the plaintiff's capacity to sue on

any ground; it is, in essence, a disqualification from suit *Doe* v. *Roe,* 23 Hun. 19; *Richardson* v. *Richardson,* 114 N.Y.S. 912; *Axelrod* v. *Axelrod,* 2 Misc. 2d 79, 150 N.Y.S. 2d 633.

If we reject the idea of "tit for tat" as a defense in matrimonial litigation, there represents perhaps one valid rationale for the doctrine of recrimination. Considerable testimony was presented to the Committee that the separation action has been transformed into a weapon used by wives to "trap" their errant husbands into a legal status that denied them the benefits of both bachelorhood and marriage. The wife then, in effect, extorts ransom from the husband in the form of a property settlement or excessive alimony before she consents to the arrangement of a migratory divorce. It has been forcefully argued that Section 202 of the *Domestic Relations Law* at least offers the husband a practical defense which would often discourage avaricious wives from undertaking such perversions of the separation action. For this reason, the Committee, with some reluctance, proposes retention of Section 202 for the present, although it proposes the immediate abolition of recrimination in divorce actions.

(b) *Condonation, Collusion and Connivance.*

The Committee recognized the need to permit a reconciling married couple to be able to "wash the slate clean" with respect to past conduct. To the extent that the defense of condonation achieves this, it is a necessary feature of the law. However, the advantage of the new formulation adopted, i.e. that the ground for divorce must have been "willingly forgiven" presents the court with a more flexible and meaningful statement. The defense is adopted from the proposed revision of Pennsylvania's Divorce Code,[9] in the commentary to which, it was noted:

> "Condonation is made less rigid. It is necessary under the proposed section that it be 'willing and voluntary'. If there is physical compulsion, or economic necessity, the court may find that despite cohabitation there was no condonation. See 21 Minn. L. Rev. 408 (1937), 6 A.L.R. 1157 (1920), 47 A.L.R. 576 (1927)"

With respect to the abolition of the defenses of connivance and collusion, the Committee has, in their stead, permitted the defense that the plaintiff "conspired to procure" the ground for divorce. As to this formulation, the Pennsylvania revisers note:

> "It is hoped that the proposed code provision will eliminate the difficulty which occurs in making a distinction between the case where the husband affords an opportunity or procures the adultery of his wife, or, on the other hand, was merely seeking to get evidence of her unfaithfulness. Under this section, he must have conspired to procure the commission of the offense."[10]

Of course, this conspiracy to procure would apply to any other ground for divorce, including cruel and inhuman treatment or abandonment.

2. *Judgment of Divorce to Both Parties*

§212 (a) in the proposed statute has abolished the defense of recrimination in divorce actions.[11] It is then probable that in many actions for divorce both plaintiffs and defendants will be able to satisfy the court of the existence of grounds for their divorce. The Committee therefore recommends that the Court in such cases be given the power to award judgments in favor of both parties where each has demanded such relief in the pleadings, thus giving the other notice of their demand for a divorce. See *Rakestraw* v. *Rakestraw,* 345 P. 2d. 888 (Okla.).

At least six other states now sanction the award of judgments to both plaintiffs and defendants in matrimonial actions by court decision: California, *Hendricks* v. *Hendricks*, 125 Cal. App. 2d 239, 270 P. 2d 80; *DeBurgh* v. *DeBurgh*, 39 Cal. 2d 858, 250 P. 2d 598; *Mueller* v. *Mueller*, 44 Cal. 2d 527, 282 P. 2d 869; Florida, *Simmons* v. *Simmons*, 122 Fla. 325, 165 So. 2d 45, Idaho, *Farmer* v. *Farmer*, 81 Idaho 251, 340 P. 2d 441; Oklahoma, *Mitchell* v. *Mitchell*, 385 P. 2d 482 (Okla.); by statutes: Oklahoma Stat. Ann., tit. 12, Sec. 1275; Minnesota, Stat. Ann. Sec. 518.06; Washington, Rev. Code Sec. 26.08.150.

Adoption of the proposed section will also be explicit recognition by this state of the reality that in many marriages the responsibility for its disruption lies with both husband and wife.

> §213. Limitations on actions for divorce and separation. No action for divorce or separation may be maintained on a ground which arose more than five years before the date of the commencement of that action for divorce or separation except where:
>
> (a) The defendant has abandoned the plaintiff and defendant has not resumed living with plaintiff.
>
> (b) The parties voluntarily have lived apart for a continuous period of two years or more because of estrangement due to marital difficulties and have not resumed living together.

The Committee proposes to retain the existing five year statute of limitations as to the bringing of divorce actions: Domestic Relations Law, §171 (3). However, the Committee has eliminated application of the statute of limitations in those cases where there has been a continuous abandonment in excess of five years, thus eliminating the trap that *Coyne* v. *Coyne*, 297 N.Y. 927 and *Berkely* v. *Berkely*, 142 N.Y.S. 2d 273 lay for the unwary. This same exception is, on the same reasoning, made applicable to those who are voluntarily living apart for a continuous period which would exceed the five year limitation of Section 213 of the proposed statute.

> §215. Conciliation court, purpose and function. A part shall be established in the supreme court in each judicial district and be known as the conciliation court. Each conciliation court shall provide marriage counseling and conciliation services to husbands and wives in actions brought under articles 10 or 11 of the domestic relations law.

The Committee has proposed the creation of a conciliation program on a state wide basis. The attachment of the conciliation apparatus to Supreme Court was made essential by the present provisions of the state constitution which limit actions concerning matrimonial status to the Supreme Court. The use of judicial districts as a unit for appointment and functioning is designed to make the personnel of the conciliation court aides to the trial courts, thus avoiding the pitfalls that befell previous conciliation programs in other states:

> §215-a. Procedure. In any action pursuant to article 10 or 11 of the domestic relations law, a justice of the supreme court, on his own motion, or on motion of either party, may direct the husband and wife to appear at a conference with the conciliation court. The conciliation court shall investigate and interview both husband and wife and shall determine whether marriage counselling or conciliation services should be provided to the parties. Those services, however, shall be provided to a party only upon his consent and are to be provided for a period of not more than one hundred twenty days. When deemed advisable by the conciliation court or the parties, such marriage counselling and conciliation services shall be provided by public, private or religious agencies who are, in the opinion of the conciliation court, qualified to render the services required.

The Committee's proposal gives the court power to compel parties to an action for divorce or separation to confer with conciliation court personnel. The purpose of this conference would be to determine whether matrimonial counseling or conciliation services should be rendered to the couple. The experts in this area of social science have testified to the Committee that in many instances, both husband and wife, though outwardly reluctant to "lose face" before the other, would inwardly feel grateful to be "compelled" to appear at such a conference. It should be noted that the Committee's proposal in no way permits "compulsory counseling", that is to say, that either or both of the parties be compelled to submit to conciliation techniques. Such a requirement would not only be a serious enough invasion of the right to privacy to raise constitutional questions; but, also would be inconsistent with the concept of reconciliation as a voluntary renewal of marital life.

The proposed provision also does not require that the parties in every divorce or separation action go before the conciliation court. The pattern of the highly successful Los Angeles Conciliation Court seems more useful for New York for a number of reasons.

There is danger that if this conciliation program begins burdened with the requirement that it examine every case, it will be over extended at the outset before adequate procedures can be established and sufficient numbers of qualified personnel appointed. Conciliation in a court setting on this scale has never been attempted in New York, and it is important that its promising beginning not be ruined by demanding too much of it.[12]

Interesting information was obtained from the two marriage counselors presently conducting a pilot program of conciliation work as an incident to matrimonial actions brought in the First Judicial Department. The two counselors found their maximum workload to be on hundred cases a year. It is obvious that subjecting all divorce or separation cases to conference would increase the workload of the counselors enormously and would sacrifice quality to quantity, reducing the performance of the conciliation court to assembly line methods. If this proposed program proves successful there will be time enough at a later date to add to its responsibilities.

The reference of cases to the conciliation court by the justices follows the practice used in the pilot program conducted in the First Department. It is hoped that the counselors will assist the courts in making the determination of which cases should be so referred to the conciliation court.

Counseling is limited to a maximum period of one hundred twenty days. In other words, any services rendered in the conciliation court will be of a short term variety, with more extensive counseling being conducted by public and private agencies. The Committee recognized the remarkable work presently being done by the public, private and religious conciliation and counseling agencies and has provided for their utilization when deemed advisable by the conciliation court. Of particular importance is that where the parties themselves prefer the utilization of another agency's services, whether that agency be religious or otherwise, they may obtain such counseling from that agency.

> §215-b. Supervision and staff. Each conciliation court shall be supervised by a justice of the supreme court in that judicial district and shall be staffed by persons qualified to render marriage counseling and conciliation services who shall be known as conciliation court counselors. Each conciliation court counselor shall be a certified social worker, registered with the department of education of the state pursuant to article one hundred fifty-four of the education law, or a certified psychologist registered with the department of education of the state pursuant to article one hundred fifty-three of the education law, or a physician

licensed to practice in this state. The conciliation court counselor shall be appointed and removed by the Presiding Justice of the appellate division of each judicial department.

The number of conciliation court counselors shall be as follows:
First district, four;
Second district, two;
Third district, one;
Fourth district, one;
Fifth district, one;
Sixth district, one;
Seventh district, one;
Eighth district, one;
Ninth district, one;
Tenth district, three;
Eleventh district, one.

It was deemed important by the Committee to have a justice of the supreme court supervising the work of each conciliation court and thus to keep the judiciary in direct charge of the staff. The question of the qualifications of the personnel is of great importance, since in the last analysis, New York's success in court oriented conciliation will depend on the quality of these counselors. The Committee thought it wise to rely upon the existing standards of certification for the trained staff.

Methods of appointment of the counselors were discussed by the Committee's staff with the office of the Adminstrative Board of the Judicial Conference and the methods provided comply with the suggestions of the Judicial Conference.

The number of counselors assigned to each district was based on the experience of the two counselors working in the First Department. It was their judgment that the increase in workload for them under the proposed statute would double and require four counselors to be employed. Having established the number of counselors needed in the First Judicial District, it was believed that the number of counselors compared to the number of justices assigned to that district would provide a proportion that could be used for every judicial district in the state. This then is the basis for the assignment. In no event did a district receive less than one counselor.

Of course, this state wide conciliation procedure is so new that it will be necessary to evaluate the experience in each district, and probably increase the number of assignments. This cannot be done until the program is undertaken and experience evaluated.

> §215-c. Powers of supervising justice. The justice supervising the conciliation court, in order to assist and aid the marriage counseling and conciliation services being provided to a husband and wife, may direct the appearance of any person before him or before a conciliation counselor. During the period marriage counseling and conciliation services are being provided, the justice supervising the conciliation court, on his own motion, or on motion of either party, may grant a stay of proceedings in the action or make any other order required by the circumstances, provided, any such stay shall remain in effect only during the period that marriage counseling and conciliation services are being provided to the parties.

Judge Pfaff of the Los Angeles Conciliation Court pointed out the usefulness of empowering the court to direct third persons to appear before it or the counselors in connection with counseling. (Judge Pfaff referred to it as the

"mother-in-law problem"). This power to compel appearance by order has been given to the supervising justice in addition to the power to stay proceedings in the action or enter other appropriate orders while the counseling is under way.

§215-d. Rights of husbands and wives. All statements made in connection with the provision of such marriage counseling and conciliation services shall be confidential and inadmissible as evidence unless the party concerned waives that privilege. Consent to or participation in marriage counseling and conciliation services shall not constitute willing forgiveness of any ground for divorce or separation.

Conciliation in court can only be successful if the individual members of the bar and their clients cooperate and are made to feel that they cannot be prejudiced by their participation. These provisions preserving the confidentiality of statements made in connection with conciliation proceedings and barring possible use of the participation as the defense of "willing forgiveness" is designed to so establish confidence.

§215-e. Salaries of conciliation court counselors. The salary of each conciliation court counselor shall be fixed by the presiding justice of the appellate division for each respective judicial department within the amount appropriated and made available therefor, and such salaries shall be payable on the audit and warrant of the state comptroller on vouchers certified or approved by the presiding justice of the appellate division for each respective judicial department in the manner provided by law.

§215-f. Rules. The justices of the appellate division in each judicial department shall promulgate rules not inconsistent with the above for the functioning of the conciliation court within each respective judicial district.

These provisions are proposed after consultation with the Judicial Conference. It is expected that the rules for each department will make appropriate adjustments for local considerations within the framework of the statute.

§216. Law Guardians. In any action commenced under articles ten or eleven of the domestic relations law, or in any proceeding for the determination of child custody or visitation rights, the court, on its own motion or on motion of a conciliation counselor, on notice to the plaintiff and defendant, at any time after commencement of the action, may appoint a law guardian to represent any minor child of the parties to protect the interests of the child in the action. The law guardian shall be designated, compensated and supervised in accordance with the provisions of article two, part four, of the family court act. The costs of such law guardians shall be included in the budget for each appellate division and shall be payable by the state of New York, within the amounts appropriated therefor.

This proposed section attempts to add to those matrimonial matters litigated in the Supreme Court, the same safeguards of the rights of children that are present in article two, part four of the Family Court Act.

It is assumed such appointments will be rare and that the law guardian appointed will concentrate on the protection of the child's interest insofar as support, visitation and custody rights are concerned.

§230. Required residence. An action to annul a marriage, or to declare the nullity of a void marriage, or for divorce, or separation may be amended only when:

1. The parties were married in the state and either party is a resident thereof when the action is commenced and has been a resident for a continuous period of one year immediately preceding, or

2. The parties have resided in this state as husband and wife and either party is a resident thereof when the action is commenced and has been a resident for a continuous period of one year immediately preceding, or

3. The cause occurred in the state and either party has been a resident thereof for a continuous period of at least one year immediately preceding the commencement of the action, or

4. Either party has been a resident of the state for a continuous period of at least two years immediately preceding the commencement of the action, or

5. The cause occurred in the state and both parties are residents thereof at the time of the commencement of the action.

New York as long as it retains the dubious distinction of being the only state in this nation which has but one ground for divorce, needs no protection against its becoming attractive to citizens from sister-states as a place where divorce can be obtained. The Committee's proposals do not add grounds for divorce which will make New York an "easy" divorce state. However, at the suggestion of the Special Committees on Matrimonial Law of the New York County Lawyers' Association and the Association of the Bar of the City of New York, the Committee has proposed the above residence requirements to ensure against the use of our courts in matrimonial proceedings by outsiders.

Each of the five alternative provisions guards against "forum shopping" by non-New Yorkers, in our courts.

§235. Information as to details of matrimonial actions or proceedings. An officer of the court with whom the proceedings in an action to annul a marriage or to declare the nullity of a void marriage or for divorce or separation or an action or proceedings for custody, visitation or maintenance of a child are filed, or before whom the testimony is taken, or his clerk, either before or after the termination of the suit, shall not permit a copy of any of the pleadings or testimony, or any examination or perusal thereof, to be taken by any other person than a party, or the attorney or counsel of a party who had appeared in the cause, except by order of the court.

If the evidence on the trial of such an action or proceeding be such that public interest requires that the examination of the witnesses should not be public, the court or referee may exclude all persons from the room except the parties to the action and their counsel and the witnesses, and in such case may order the evidence, when filed with the clerk, sealed up, to be exhibited only to the parties to the action or proceedings or some one interested, on order of the court.

The proposed expansion of §235 to include proceedings to declare the nullity of a void marriage, or for custody, visitation or maintenance of a child, is the direct result of the concern that the bar feels for publicity in these most delicate kinds of matrimonial proceedings. There does in fact seem to be no reason why the sealing provisions previously only applicable to annulments, divorces and separations should not apply to proceedings which determine the fitness of parents or other matters of similar personal nature.

§8. Marriage after divorce. Whenever a marriage has been dissolved by divorce, either party may marry again.

This proposed amendment does away with the punitive provision that a defendant who has been found guilty of adultery in a divorce action may not remarry again for three years and then only with the permission of the court.

Aside from its punitive aspects, the provision was really never more than a snare for the ignorant since anyone who married outside the state of New York in a sister state could not be reached by its provisions. *Moore* v. *Hegeman*, 92 N.Y. 521; *Fisher* v. *Fisher*, 250 N.Y. 313.

Proposed Changes in the General Obligations Law

§5-311. Certain agreements between husband and wife void. A husband and wife cannot contract to alter or dissolve the marriage or to relieve the husband from his liability to support his wife or to relieve the wife of liability to support her husband provided that she is possessed of sufficient means and he is incapable of supporting himelf and is or is likely to become a public charge.

An agreement, heretofore or hereafter made between a hushand and wife, shall not be considered a contract to alter or dissolve the marriage unless it contains an express provision requiring the dissolution of the marriage or provides for the procurement of grounds for divorce in violation of section two hundred twelve of the domestic relations law.

This proposed amendment is designed to remove any doubts as to the validity of proper separation agreements which arose by reason of the recent decision in *Viles* v. *Viles*, 14 N.Y. 2d 365, 251 N.Y.S. 2d 672.

As was pointed out by a number of witnesses, it has long been the state's public policy to encourage parties to settle their disputes over property by agreement.

> "From the earliest days in New York, separation agreements have been a standard practice. Even before the 'female emancipation statutes,' giving women the right to enter into contracts, it was quite usual for a husband and wife to contract as to support and division of property, the wife acting through a trustee, who signed the contract in her behalf. In our modern era, separation agreements in situations where a marriage no longer exists in fact, are encouraged by all reputable lawyers in order to avoid painful and necessary litigation, harmful to both the spouses and their children".[13]

In *Butler* v. *Marcus*, 264 N.Y. 519, and *Matter of Rhinelander*, 290 N.Y. 31, the New York Court of Appeals recognized the validity of such separation agreements. The *Viles* decision, as a matter of statutory construction, by a divided court, held that a separation agreement between a husband and wife was subject to attack if made in contemplation of divorce or in furtherance of the obtaining of a divorce.[14]

To remove all doubts on this question of statutory construction of §5-311, and having been greatly impressed with the usefulness and necessity for separation agreements, the Committee proposes the foregoing amendment of the statute. The Committee emphasizes that the proposal of this amendment should in no way be construed as legislative approval of the *Viles* decision.

Family Court or Supreme Court.

Considerable conflict among the witnesses' testimony before the Committee developed in connection with the question of whether jurisdiction over matrimonial actions should be in Supreme Court or the Family Court. The arguments as to this issue are many and varied. Probably they should be considered by the forthcoming constitutional convention at least insofar as the constitutional bar to the Family Court's jurisdiction over matters of matrimonial status is concerned.

The Committee strongly urges the legislature to take steps to initiate a thorough analysis of the present problems of the Family Court with a view toward solving many of the problems that face that court. That analysis might

well be conducted by this Committee in 1966 or by a temporary commission established exclusively for that purpose.

The Family Court may indeed point the way for a court in this state with integrated jurisdiction over all family problems, including actions affecting matrimonial status.[15] However, that moment is not yet at hand.[16]

There was considerable sentiment on the part of many to have all marital conciliation and counseling services provided under the auspices of the Family Court, with the Supreme Court referring cases over. This was rejected by the Committee in favor of the proposed conciliation court system because of the experience of other states to the effect that there must be close cooperation between the judges trying the matrimonial cases and the marriage counselors to make for effective conciliation programs. Of even more importance was the recognition by the members of the Committee that the individual seeking such counseling, would, in many instances, feel themselves shuttled around from court to agency and this would, in the long run, justifiably militate public opinion against the program.

Future Action.

New York's present law is hopelessly inadequate to deal with the family problems presently facing all our citizens. Adoption of the Committee's proposals are only a first step in what must be a total war against the growing instability of family life.

Broadening the grounds for divorce is essential, for it will, by inducing New Yorkers to return to their own courts to undertake divorces, enable us to identify families in trouble and also ensure the application of this state's rules to the care and protection of the children and the financial arrangements of the parties. Adoption of the Committee's proposals as to conciliation will be an important step in the rationalization of our family laws and will reflect the state's real interest in these problems.

The following aspects of our inadequate family law must be examined in the near future:

(1) The existing litigative procedures currently used in matrimonial practice;
(2) The efficacy of the state's present alimony laws;
(3) Child custody and new methods designed to solve the problems of the child in a disrupted family, and protection of his interests;
(4) In collaboration with the State Department of Education, the feasibility of establishing adequate pre-marital educational programs; with an emphasis on preventive measures to combat marital instability;
(5) The encouragement and development of a reservoir of qualified marriage counselors in the State.

Lastly, we strongly urge the legislature to renew the mandate of the Joint Legislative Committee on Matrimonial and Family Laws as presently defined as to area of inquiry.

FOOTNOTES

1. Penal Law, §511; Domestic Relations Law, §58.
2. Connecticut, Delaware, Hawaii, Massachusetts, Michigan, New Hampshire, Nebraska, Pennsylvania, Vermont, Wisconsin and District of Columbia.
3. Conviction of a "felony" or "felony or infamous crime" (Alaska, Arkansas, California, Colorado, Idaho, Illinois, Iowa, Kentucky, Missouri, North Dakota, Oregon, South Dakota (Utah); or an "infamous crime involving a violation of conjugal duty" (Connecticut), or a felony involving "moral

turpitude" (District of Columbia). Some states like Alabama and Georgia require both certain types of crimes and a specified sentence of imprisonment.

4. Under the *Penal Law* revision, effective September 1, 1967, such a sentence would mean that there could be no parole prior to that five year period, §70.00.
5. *Maloney* v. *Maloney,* 183 A. 2d 172 (Del.); *Rolph* v. *Rolph,* 1 Storey 552, 149 A. 2d 744 (Del. Super); *Helfgott v. Helfgott,* 179 F. 2d 39 (D.C. Cir.); *Parks* v. *Parks,* 116 F. 2d 556 (D. C. Cir).
6. The following states presently have such a provision: Alabama, Recompiled Code, Title 34. Sec. 22 (1); Colorado Rev. Stat. Ann. Sec. 46-1-1 (j); Connecticut Ann. Gen. Stat., Sec. 46-30; District of Columbia Code Ann., Sec. 16-904; Louisiana Stat. Ann. Art. 139; Minnesota Stat. Ann. Sec. 518.06 (8); North Dakota Century Code Ann., Sec. 14-06-05; Tennessee Code Ann. Sec. 36-802; Utah Code Ann. Sec. 30-3-1 (9); Virginia Code Ann., Sec. 20-121; Wisconsin Stat. Ann. Sec. 247.07(7).
7. *Domestic Relations Law,* Section 200 (2).
8. §202 *Defence of Justification*—The defendant in an action for separation from bed and board may set up, in justification, the misconduct of the plaintiff, and if that defense is established to the satisfaction of the court, the defendant is entitled to judgment. This section is ultimately derived from Section 13 of Chapter 102, Laws 1813. *Deisler* v. *Deisler,* 59 App. Div. 207.69. N.Y.S. 326.
9. Proposed Marriage and Divorce Codes for Pennsylvania, June 1961, p. 103; General Assembly of the Commonwealth of Pennsylvania, Joint State Government Commission.
10. *Ibid.*
11. The Committee has, as previously discussed, recommended retention of §202 of the *Domestic Relations Law,* relating to the misconduct of a plaintiff as a defense in actions for separation.
12. Over 5000 divorce and separation actions were brought in New York State in 1964, and there was undoubtedly a similar figure in 1965; Report of Administrative Board of Judicial Conference, 1965, p. 379. With grounds broadened as the Committee proposes, it is to be expected that this figure would increase substantially by at least the number of migratory divorces now undertaken by New Yorkers as well as those who are victims of abandonment.
13. Statement by Howard Hilton Spellman, Chairman of the Special Committee on Matrimonial Law of the Association of the Bar of the City of New York on November 29, 1965, before the New York State Joint Legislative Committee on Matrimonial and Family Law p. 18.
14. The problems raised by the *Viles* case are reflected in the extensive law review commentary already appearing in connection with the decision. For example, see 31 Brooklyn Rev. 404; 14 Buffalo L. Rev. 318; 51 Cornell L.Q. 135; 33 Fordham L. Rev. 519; 63 Mich. L. Rev. 735; 10 Villanova L. Rev. 171; 50 Virginia L. Rev. 1448.
15. See Alexander "Social Science: The Family Court" 21 Missouri L. Rev. 105; Gellhorn, *Children and Families in the Courts of New York City* (New York, 1954).
16. It is noteworthy that article 9 of the Family Court Act establishes a procedure by which the Family Court is to exercise its constitutional jurisdiction in matrimonial conciliation; while the Family Court in certain locales has been most successful in this work, evidence was that in many other places, the workload of the staff severely restricted the effectiveness of the court in conciliation efforts.

APPENDIX "47"

DIVORCE AND THE FAMILY IN AMERICA

by

CHRISTOPHER LASCH

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(MARRIAGE AND DIVORCE)

The statistics are confusing, but it takes no sociologist to know that the failure of marriage in America is a growing phenomenon, especially among the young, and that the Sargasso Sea of divorce, separation, and child-custody procedures more often compounds misery, encourages deceit, and burnishes guilt. In three articles and a selection from Philip Roth's new novel, the *Atlantic* here essays a study of the causes of, the attitudes toward, and some of the possible antidotes to this unhappy trend. Christopher Lasch is professor of history at Northwestern University and has taught at Williams College, Roosevelt University, and the University of Iowa. He is the author of two books ("The American Liberals and the Russian Revolution" and "The New Radicalism in America"), is married and the father of four.

All ages imagine themselves more enlightened—and at the same time, no doubt, more depraved—than their predecessors. Accordingly, we tend to exaggerate the moral distance between ourselves and the Victorians. The nineteenth century seems particularly remote to us in matters relating to sex. Since the turn of the century, the Western world is supposed to have undergone a "sexual revolution" which, for better or worse, irreversibly altered the way in which the relations between men and women were perceived. The "puritanism" of our ancestors, we suppose, gave way to sexual freedom—depravity, if you like—and the evidence for this proposition seemingly lies all about us: bikinis on the beach and skirts above the knee; obscenity on stage and screen; increasing license among adolescents; and, inevitably, in such a list, the "rising tide of divorce," as it used to be called. The fact that divorce is no longer novel or shocking merely testifies further, presumably, to the decay of the old order, the attitudes and institutions of an earlier time, which now evoke mingled nostalgia and contempt.

Divorce no longer shocks, but it is still a public issue, largely because the recent liberalization of the New York law (which previously limited grounds of divorce to adultery but which now makes a two-year separation additional grounds for divorce), together with the agitation preceding this change, focused attention once again on the absurdity of the divorce laws not only of New York but of most of the other states. But if divorce remains a political and a legal issue, it has not yet become an issue for sustained historical reflection. Studies abound, but practically all of them take for granted that the growing divorce trend is part of the "sexual revolution"; a symptom, therefore, of the decay of the family and of the whole complex of assumptions with which the old-fashioned family was bound up. It is precisely this premise, however, that needs to be re-examined if we are to understand not only divorce and marriage but a whole series of related questions, which although they are not public questions in the conventional sense have an important bearing on the collective as well as the

private lives of Americans. It is quite possible that easier divorce, far from threatening the family, has actually helped to preserve it as a dominant institution of modern society.

Only alarmists would argue that the family is literally becoming extinct. The question is whether or not it has radically changed its nature, partly as a result of the ease and frequency of divorce and partly as a result of other developments of which the frequency of divorce is a consequence. It is on this point that both scholars and laymen almost universally agree. The Victorian family, they believe, was patriarchal, based on a double standard of sexual morality according to which fidelity was demanded of the wife while the husband pursued his extramarital career of sexual escapades among prostitutes or expensive mistresses, depending on his social class. People did not marry for love so much as for the convenience of the families concerned; all marriages were in this sense "arranged." Divorce or annulment, when they rarely occurred, took place at the pleasure of the husband, the wife having no recourse in the face of her husband's indifference, infidelity, or brutality except the solace of religion and the sewing-circle society of women, fellow victims of a system which consigned them, it seemed, to perpetual subordination. Such is the picture of Victorian marriage to which the modern family is held up in striking contrast. Nowadays, even a President's daughter marries for love, a fact of which it is one of the functions of journalism ritually to remind us. The affectional basis of marriage presumably works to make the partners equals. The growing divorce trend, whether one attributes it to romantic illusions surrounding marriage or to sexual difficulties or to any number of other explanations, must therefore reflect, in one way or another, the new equality of the sexes. The fact that most divorce proceedings are now instituted by women would seem to confirm the suspicion that the relaxation of old taboos against divorce represents still another victory for women's rights.

Given these assumptions, the principal objection to the present laws is that they are an anachronism, a last refuge of Victorian predery and superstition. The authors of a recent study of American divorce complain that "while a real social revolution has been going on affecting in a thousand ways the importance and relative permanence of marriage, the divorce laws have remained the same with only few minor exceptions." The law of divorce, in short, is seen as a notable instance of "cultural lag," and the most impressive argument for reform, accordingly, is that law should not be allowed to diverge so far from practice. Most Americans apparently believe that an unhappy marriage is worse than no marriage at all and that the best way of ending an unhappy marriage is divorce by mutual consent. Yet the laws compel them to undergo the distress and humiliation of an adversary proceeding in which one party has to file charges against the other, even to fabricate them, with disastrous moral and emotional consequences for everyone concerned.

Behind all this speculation lies an understandable concern about a set of laws which degrade what they purport to dignify: the ties of marriage. But there also lies a certain amount of confusion about the history of the family, the nature of the sexual revolution, and the relation to these developments of feminism and the "ebancipation" of women. In the first place, the history of the family needs to be seen in much broader perspective than we are accustomed to see it. There are good reasons to believe that the decisive moment in the history of the Western family came not at the beginning of the twentieth century but at the end of the eighteenth, and that the Victorian family, therefore, which we imagine as the antithesis of our own, should be seen instead as the beginning of something new—the prototype, in many ways, of the modern household.

If we forget for a moment the picture of the Victorian patriarch surrounded by his submissive wife, his dutiful children, and his houseful of servants—images

that have come to be automatically associated with the subject—we can see that the nineteenth-century conception of the family departed in critical respects from earlier conceptions. Over a period of several centuries, the family had gradually come to be seen as preeminently a private place, a sanctuary from the rough world outside. If we find it difficult to appreciate the novelty of this idea, it is because we ourselves take the privacy of family life for granted. Yet as recently as the eighteenth century, before the new ideas of domesticity were widely accepted, families were more likely to be seen "not as refuges from the invasion of the world," in the words of the French historian Philippe Ariès, "but as the centers of a populous society, the focal points of a crowded social life." Ariès has shown how closely the modern family is bound up with the idea of privacy and with the idea of childhood. Before these ideas were securely established, masters, servants, and children mingled indiscriminately, without regard for distinction of age or rank.

The absence of a clearly distinguishable concept of childhood is particularly important. The family by its very nature is a means of raising children, but this fact should not blind us to the important change that occurred when child-rearing ceased to be simply one of many activities and became the central concern—one is tempted to say the central obsession—of family life. This development had to wait for the recognition of the child as a distinctive kind of person, more impressionable and hence more vulnerable than adults, to be treated in a special manner befitting his peculiar requirements. Again, we take these things for granted and find it hard to imagine anything else. Earlier, children had been clothed, fed, spoken to and educated as little adults; more specifically, as servants, the difference between childhood and servitude having been remarkably obscure throughout much of Western history (and servitude retaining, until fairly recently, an honorific character which it subsequently lost). It was only in the seventeenth century in certain classes—and in society as a whole, only in the nineteenth century—that childhood came to be seen as a special category of experience. When that happened, people recognized the enormous formative influence of family life, and the family became above all an agency for building character, for consciously and deliberately forming the child from birth to adulthood.

These changes dictated not merely a new regard for children but, what is more to the point here, a new regard for women: if children were in some sense sacred, then motherhood was nothing short of a holy office. The sentimentalization of women later became an effective means of arguing against their equality, but the first appearance of this attitude seems to have been associated with a new sense of the dignity of women; even of their equality, in a limited sense, as partners in the work of bringing up the young. The recognition of "women's rights" initially sprang not from a revulsion against domestic life but from the cult of domesticity itself; and the first "rights" won by modern women were the rights of married women to control their own property, to retain their own earnings, and, not least, to divorce their husbands.

Until the middle of the nineteenth century in England and the United States, grounds for divorce were pretty much confined to adultery and cruelty. Divorces, moreover, had to be granted by legislative enactment. These provisions, making money and political influence requisite to divorce, effectively limited divorce to members of the upper classes; and except in rare cases, to upper-class men, eager for one reason or another to get rid of their wives. The new laws, still in effect today in most places, substituted judicial for legislative divorce and broadened grounds of divorce to include desertion. Both of these provisions, particularly the second, show that women were intended to be the principal beneficiaries of the change. That was certainly the result. Ever since the liberalization of the laws in the mid-nineteenth century, divorces have been

easier and easier to obtain, and more and more of them have been granted to women.

But those who see in these statistics a general dissolution of morals and a threat to the family misunderstand the dynamics of the process. The movement for earlier divorce owed its success to the very idea which it is supposed to have undermined, the idea of the sanctity of the family. Indeed, it is somewhat misleading to see divorce-law reform as a triumph even for women's rights, for the feminists could hardly have carried the day if their attack on the arbitrary authority of husbands had not coincided with current conceptions of the family—conceptions of the family which, in the long run, tended to subvert the movement for sexual equality. It was not the image of women as equals that inspired the reform of the divorce laws, but the image of women as victims. The Victorians associated the disruption of domesticity, especially when they thought of the "lower classes," with the victimization of women and children: the wife and mother abused by her drunken husband, deserted and left with children to raise and support, or forced to submit to sexual demands which no man had a right to impose on virtuous women. These images of oppression wrung ready tears from our ancestors. The rhetoric survives, somewhat diluted, in the form of patriotic appeals to home and motherhood, and notably in the divorce courts, where it is perfectly attuned, in fact, to the adversary proceeding.

Judicial divorce, as we have seen—a civil suit brought by one partner against the other—was itself a nineteenth-century innovation, a fact which suggests that the idea of marriage as a combat made a natural counterpoint to the idea of marriage as a partnership. The combat, however, like the partnership itself, has never firmly established itself, either in legal practice or in the household itself, as an affair of equals, because the achievement of legal equality for the married woman depended on a sentimentalization of womanhood which eroded the idea of equality as easily as it promoted it. In divorce suits, sensitivity of judges to the appeal of suffering womanhood, particularly in fixing alimony payments, points to ambiguity of women's "emancipation." Sexual equality, in divorce as in other matters, does not rest on a growing sense of the irrelevance, for many purposes, of culturally defined sexual distinctions. It represents, if anything, a heightened awareness of these distinctions, an insistence that women, as the weaker sex, be given special protection in law.

From this point of view, our present divorce laws can be seen as faithfully reflecting ideas about women which, having persisted into the mid-twentieth century, have shown themselves to be not "Victorian" so much as simply modern, ideas which are dependent, in turn, on the modern obsession with the sanctity of the home, and beyond that, with the sanctity of privacy. Indeed, one can argue that easier divorce, far from threatening the home, is one of the measures—given the obsession with domesticity—that has been necessary to preserve it. Easy divorce is a form of social insurance that has to be paid by a culture which holds up domesticity as a universally desirable condition; the cost of failure in the pursuit of domestic bliss—especially for women, who are discouraged in the first place from other pursuits—must not be permitted to become too outrageously high.

We get a better perspective on modern marriage and divorce, and on the way in which these institutions have been affected by the emancipation" of women and by the "sexual revolution", if we remember that nineteenth-century feminism, as its most radical passed beyond a demand for "women's rights" to a critique of marriage itself. The most original and striking—and for most people the least acceptable—of the feminists' assertions was that marriage itself, in Western society, could be considered a higher form of prostitution, in which respectable women sold their sexual favors not for immediate financial rewards but for long-term economic security. There was "no sharp, clear, sudden-drawn

line," they insisted, between the "kept wife," living "by the exercise of her sex functions alone," in Olive Schreiner's words, and the prostitute. The difference between prostitution and respectability reduced itself to a question not of motive but of money. The virtuous woman's fee was incomparably higher, but the process itself was essentially the same; that is, the virtuous woman of the leisure class had come to be valued, like the prostitute, chiefly as a sexual object beautiful, expensive, and useless—in Veblen's phrase, a means of vicarious display. She was trained from girlhood to bring all her energies to the intricate art of pleasing men: showing off her person to best advantage, mastering the accomplishments and refinements appropriate to the drawing room, perfecting the art of discreet flirtation, all the while withholding the ultimate prize until the time should come when she might bestow it, with the impressive sanction of state and church, on the most eligible bidder of her "hand". Even then, the prize remained more promise than fact. It could be repeatedly withdrawn or withheld as the occasion arose, and became, therefore, the means by which women learned to manage their husbands. If, in the end, it drove husbands to seek satisfactions elsewhere, that merely testified to the degree to which women had come to be valued, not simply as sexual objects, but precisely in proportion to their success in withholding the sexual favors which, nevertheless, all of their activities were intended to proclaim.

The defenders of the conventional types of prostitution, meanwhile, did not fail to see the connection between prostitution and respectability; in the words of William Lecky, the historian of European morals, the prostitute was "ultimately the most efficient guardian of virtue" because she enabled virtuous women to remain virtuous. "But for her the unchallenged purity of countless happy homes would be polluted, and not a few who with the pride of their untempted chastity think of her with an indignant shudder, would have known the agony of remorse and despair." The same reasoning, as we have seen, led to the nineteenth-century reform of the divorce laws. The purity of the home demanded just such outlets as prostitution and divorce if it was to survive intact and "untempted."

The central features of this system of sexual relationships persist into the twentieth century essentially unchanged. Courtship is more than ever a "sex tease," in Albert Ellis' words, and marriage remains something to be managed—among other ways, by the simultaneous blandishment and withdrawal, on the part of the wife, of her sexual favors. Let anyone who doubts the continuing vigor of this morality consult the columns of advice which daily litter the newspapers. "Dear Abby" urges her readers, before marriage, to learn the difficult art of going for enough to meet the demands of "popularity" without "cheapening" themselves (a revealing phrase); while her advice to married women takes for granted that husbands have to be kept in their place, sexually and otherwise, by the full use of what used to be called "feminine wiles." These are prescriptions, of course, which are not invariably acted upon; and part of the "sexual revolution" of the twentieth century lies in the increased publicity which violations of the official morality receive, a condition which is then taken as evidence that they are necessarily more frequent than before. Another development, widely mistaken for a "revolution in morals," is a growing literal-mindedness about six, an inability to recognize as sexual anything other than gross display of the genitals. The sexual advances of the respectable woman, accordingly, have come to be more blatant than they used to be, a fact predictably deplored by alarmists, themselves victims of the progressive impoverishment of the sexual imagination, who erroneously confuse respectability with the concealment, rather than the withholding, of sexuality. We should not allow ourselves to be misled by the openness of sexual display in contemporary society. The

important thing is the use to which sexuality is put. For the woman, it remains, as it was in the nineteenth century, principally a means of domination; for the man, a means of vicarious display.

Current concern about divorce springs from two different kinds of considerations. On the one hand, the prevalance of divorce seems to reflect a "breakdown" of marriage. Traditionalists demand, in the face of this condition, a tightening of the divorce laws; reformers, a more "mature" approach to marriage. On the other hand, a second group of reformers is alarmed not by the breakdown of marriage but by the hypocrisy surrounding divorce. They would make marriage a completely private matter, terminable, in effect, by mutual consent—a change which might or might not accelerate the "decline of the family," but which, they argue, would better accord with our pretensions to humanity than the present laws.

The plea for more stringent legislation encounters the objection that laws governing morals tend to break down in the face of large-scale noncompliance. In New York, the old divorce law did not prevent people from getting divorces elsewhere or from obtaining annulments on the slighest suspicion of "fraud." The argument that there would be fewer divorces if there were fewer romantic illusions about marriage expresses an undoubted truth; but it is not clear, as the argument seems to assume, that there is something intrinsically undesirable about a high rate of divorce. Most reformers, when confronted with particular cases, admit that divorce is better than trying to save a bad marriage. Yet many of them shy away from the conclusion toward which these sentiments seem to point, that one way of promoting more mature marriages might be to make marriage as voluntary an arrangement, both as to its inception and as to its termination, as possible. The definition of marriage as a contract, enforceable at law, probably helps to promote the conception of marriage as a combat, a tangle of debts and obligations which figures so prominently in American folklore. Revision of the law, particularly the divorce law, would not by itself change popular ideas of marriage, but it would at least deprive them of legal sanction.

Even now, living apart is grounds for divorce in eighteen states and in Puerto Rico and the District of Columbia, the period of time varying from eighteen months in Maryland to ten years in Rhode Island. Barring a general wave of reaction, a possibility which should not by any means be discounted, other states can be expected to follow their example. In every case, reform will be accompanied by dire predictions of the disintegration of domestic values, but the family has outlived such predictions before. Far from being a survival of some earlier historical period, the idea of the family as sacred and inviolate, the cornerstone of society and the seat of virtue, is a characteristically modern idea bound up with the "privatization" of experience and with the tendency of the middle class, in Ariès's words, "to organize itself separately, in a homogeneous environment, among its families, in homes designed for privacy, in new districts kept free from all lower-class contamination." This self-segregation of the middle class may have been, in the long run, a disaster; on the other hand, it may turn out to have been, precisely because it fostered a new respect for the family, an important countervailing influence to the growth of the state. In either case, the family, desirable or deplorable, is hardly threatened by the increase in divorce.

APPENDIX "48"

AS GROUNDS FOR DIVORCE LET'S ABOLISH MATRIMONIAL OFFENCES

by

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The winds of change are beginning to blow hard upon Canada's dusty canons of divorce. Alone among the western nations of mixed religious persuasion, Canada's divorce laws have remained unchanged for decades.

In eight provinces, they are based upon a literalist interpretation of the Gospel according to St. Matthew, and divorces through the courts are granted almost exclusively on the basis of adultery.

> "And I say to you: whoever divorces his wife, except for unchastity, and marries another, commits adultery." (Matthew 19:9—RSV)

In two provinces, they are based upon a literalist interpretation of the Gospel according to St. Mark, and no divorces are granted by the courts, although a private bill of divorce may be granted by parliament at Ottawa.

> "And he said to them, Whoever divorces his wife and marries another, commits adultery against her;" (Mark 10:11—RSV)

Churchmen generally known as "liberal" who support "broader" divorce laws contend that neither quotation shows an intention by Jesus to lay down a code of divorce law; the liberals would say that His remark to His disciples, whatever may have been His exact words, was intended as a protest against the divorce law of a society in which the man could, without cause other than the desire of his own heart, divorce his wife and take another.[1]

Among secular Canadians, and I think it fair to say the term includes the majority of Canadians at least six days a week, a Biblical injunction of whatever interpretation is not the deciding factor.

Regardless of the basis of the present law which makes adultery the only important ground upon which divorce in Canada is granted, the winds of change are blowing, and it is high time we looked whither they might take us. But first let us look at some straws in the wind.

In March, 1965, a Roman Catholic Canadian of French origin spoke as a member of the Manitoba legislature in favour of a resolution to widen the grounds for divorce:

> "My own church does not recognize divorce for people of our faith. But when I'm making laws for all people it's different than when I'm making them for people of my own church."[2]

In June, 1965, the moderator of the United Church of Canada said that our divorce laws are

> "bringing all our laws, and even law itself, into disrepute."[3]

In July, 1965, the *Star Weekly* Magazine, one of the voices of secular Canada, carried an article entitled "The Respectable Canadians Who Live in Sin." The article quoted a social work agency director as saying that

> "Many common-law couples are more stable, have a higher standard of morality, are doing a better job in raising their children, and are steadier bread winners than legally married couples."

The article warns that

> "we have to change the divorce laws, or we have to accept common-law marriages."[4]

In July, 1965, the Gallup Poll reported that two-thirds of Canadians favour desertion as a grounds of divorce.[5]

In September, 1965, a radio blurb jointly produced by the Anglican and United Churches stated

> "it's time to treat divorce with the sympathy a great tragedy deserves."[6]

In September, 1965, the Anglican church overwhelmingly approved in principle the church remarriage of some divorced persons.[7] Celerity is apparently not a Christian virtue, so the matter must be resubmitted for final approval two years hence, but there seems little doubt that it will then become Anglican church law, assuming the Anglican church still then exists.

In September, 1965, the chairman of the committee on Christian unity for the Vancouver archdiocese wrote in the B.C. *Catholic*.

> "The Orthodox Church permits divorce and remarriage, relying on the authority of Matthew XIX, 9, that is, in cases of 'unchastity'.
>
> As we Roman Catholics are reminded by the Second Vatican Council of the 'special place' of Anglicanism and of the verability of the Orthodox and Eastern Churches, we do well to examine this present issue in such an ecumenical light. This will more certainly lead us to the full truth of the matter."[8]

Not agreement, but neither is it condemnation.

In January, 1966, no less than seven private bills for divorce reform were placed on the Commons Order Paper.[9]

If these straws in the wind are truly indicative and the winds of change tear out the dusty leaf of our present divorce law, what will replace it?

Let me point out two things:

First, I wish to dispel any assumption that I intend to make a plea for "easy divorce". I am opposed to "easy divorce". I believe that the institution of marriage is one of the most important to our society, and I oppose any change that will weaken it. My plea is that we *rationalize*, not *liberalize*, our divorce law. And if my proposal would reduce the number of divorces I would not for that reason be unhappy. If the number of people who *get divorced* and *shouldn't* were balanced against the number of persons who *don't get divorced but should*, it might well mean the overall divorce rate would be reduced, and the purpose of my proposal is to bring the rate closer to what it should be.

Second, there is much common ground among the various religious and non-religious points of view on this subject. It is commonly overlooked that a "divorce", as we know it, has not one but two branches. The first branch frees the parties from an existing marriage which one or both consider intolerable; the second branch permits the parties to enter into a new marriage.

Yet it is commonly forgotten that canon law (and therefore the civil law of almost all of the western world) grants "divorces" containing the first branch.[10] In Canada ths kind of divorce is called a "judicial separation".[11] In England it used to be called by the more accurate name "divorce from bed and board".[12] What is the importance of this fact? It means that no country, under any religious persuasion, denies the right of a spouse to be freed from an intolerable

marriage. It is only the second branch, the right to remarry *after* the first marriage has ended, that causes the difficulty. And if we confine our attention to this troublesome second branch, I am hopeful that the rightness of the change I will propose becomes more apparent.

Let us look then at the alternatives to the present law.

First, the present law could be restricted: two-branch divorces might be abolished. I venture you will agree with me the possibility is slight. I will go further and suggest that every country in the world either has divorce in substance if not in form, or else a form of polygamy. A Quebec lawyer tells me that the number of decrees of nullity granted and the existence of such bases as "error as to form" and "error as to person" indicate it is little more than a fiction to say Quebec has no divorce except through private bill in parliament. And is not a society which refuses a divorce to the spouse of the man with a regular mistress creating a form of polygamy?

Second, we could grant two-branch divorces by consent. The late W. Kent Power, Q.C., was one who took view that marriage is a contract like any other that should be dissoluble upon the agreement of the parties.[13]

Sir Jocelyn Simon has recently advocated such a law for couples without infant children—and no divorce where infants are involved.[14] But should a wife who, is, in words of John Dryden

> "A soil ungrateful to the tiller's care."[15]

be subject to coercion for consent to a divorce so that the tiller may lawfully farm elsewhere in search of the fleeting immortality of children? Should society side with Napoleon, or Josephine?[16]

May I state unequivocally that I believe society has a vital stake in maximizing the number of life-long happy unions among its members, and that divorce by consent seriously impedes such an objective, by its effect upon both those contemplating marriage and those already married, childless or otherwise. In the statement of his views in the 1966 *Report of the United Kingdom Royal Commission on Marriage and Divorce,* Lord Walker stated,

> "I agree with those who think that to permit divorce by consent would be to destroy the concept of marriage as a life-long union."[17]

I respectfully agree, and I would suggest that countries like the United States, where one-quarter to one-third of marriages end in divorce, have already destroyed the concept of marriage as a life-long union, and their easy divorce laws are among the culprits.

There is a tendency among those who reject a sacramental view of marriage to go to the opposite extreme and favor easy divorce. Strong reasons in terms of human welfare can be advanced for moderate reforms.

The third and by far the most commonly advocated change is the widening of the list of "grounds" for divorce. Desertion, cruelty, insanity of the spouse for a period of years are among those most commonly mentioned. But consider the following among the more than 40 grounds which have received the approbation of legislators in various United States:

1. Unnatural behaviour.
2. Violent temper or behaviour.
3. Public defamation of the other.
4. "Indignities".
5. Husband's vagrancy.
6. Wife pregnant at time of marriage. (I trust they limit that to pregnancies by other than the groom.)
7. Joining a religious sect believing cohabitation unlawful.

8. Gross marital misbehaviour.

9. Refusal by wife to move to new residence.

(This list is taken from a book with the quaint title "The Law of Marriage and Divorce—Simplified.")[18]

If divorce law in Canada is to be changed, must we open this Pandora's Box of "grounds" or "marital offences"? Must we debase this vital institution by permitting the instant dissolution of one marriage and the contracting of another by all but the most lacking in imagination? I say no, and my reason is this. Some "grounds", adultery, cruelty and desertion for example, are solid reasons for a "branch one divorce", for relief from an intolerable marriage. And they are recognized as such in almost all countries and under all religious systems. Indeed, cruelty and desertion are often stronger reasons for relief from an existing marriage than adultery. Hear the words of Lord Chancellor Birkenhead in 1920, when the House of Lords passed a Divorce Reform similar to the one that finally made its way through the House of Commons some seventeen years later:

> "I, my Lords, can only express my amazement that men of saintly lives, men of affairs, men whose opinions and experience we respect, should have concentrated upon adultery as the one circumstance which ought to afford relief from the marriage tie.
>
> Adultery is a breach of the carnal obligations of marriage. Insistence upon the duties of continence and chastity is important; it is vital to society. But I have always taken the view that that aspect of marriage was exaggerated, and somewhat crudely exaggerated, in the Marriage Service. I am concerned today to make this point, by which I will stand or fall, that the moral and spiritual sides of marriage are incomparably more important than the physical side..."[19]

Or as Sir A. P. Herbert once said,

> "Is ten minutes of adultery worse than three years of desertion or a lifetime of cruelty?"[20]

But adultery, cruelty and desertion are already recognized for "branch one divorces", judicial separations, in most provinces. And those laws need no change. Others I have mentioned are ridiculous for any purpose whatsoever. But the important point is this: none of these grounds, good or bad, has anything to do with "branch two" of a divorce, the right to remarry. The complaint of the one spouse against the other, and their mutual complaints against each other, are relevant to the terms on which the previous marriage breaks up, or whether it breaks up.

The "grounds" affect the right of alimony, the right to custody of the children, the settlement of the martrimonial property. But once the existing marriage has been dissolved, either party is free to contract a new marriage, regardless of his rights or wrongs in the first.

What then is my proposal "for two-branch divorces"? It is simply this: that adultery as "grounds" for a "two-branch divorce" be abolished; that no new "grounds" be added, and that no person should have the right to remarry until the lapse of a reasonable length of time, say three to five years, after the breakdown of the previous marriage. (In other words, at the time of the separation, a branch-one divorce would be granted if necessary and relative "fault" of each party would settle alimony, custody and property. After the lapse of three to five years, the branch-one divorce could be widened to two-branches to permit remarriage, or a separate proceedings could be taken if one previously had been necessary.)

The second-branch would simply declare that the marriage had broken down some years previously, and the parties were now free to marry again. The relevant section of the Australian *Matrimonial Causes Act, 1959* reads as follows:

> "28 (m) that the parties to the marriage have separated and thereafter have lived separately and apart for a continuous period of not less than five years immediately preceding the date of the petition, and there is no reasonable likelihood of cohabitation being resumed."

Note that the "gulity spouse" when that can be determined, would not "go free". He or she would "pay" in terms of alimony or loss of alimony, right to custody, and in the division of the matrimonial property. But the "innocent spouse", who is never completely innocent, would not be able to prevent the other's remarriage indefinitely.

Note also that "marriage breakdown" is NOT divorce by consent. It is the direct opposite of divorce by consent. Within the three to five year period, the parties could not get a divorce by consent even if adultery could be proven by the guilty party's admission or otherwise. After the three to five year period, either party could get the decree, without the consent of the other spouse. In "divorce by consent" the dissolution of the marriage is entirely in the hands of the parties and the state has no say about the matter. In "marriage breakdown" the state in effect says "no divorce until we are quite certain the marriage has permanently broken down and after the lapse of years the state permits either party to obtain the divorce, which is in reality simply a declaration that the marriage, which retrospectively can be seen to have been broken for years is now broken in law, and each party is now free to marry again. It is analogous to a nullity decree which is also declaratory and can be obtained by either spouse.

This idea that the right to remarry should be granted whenever the prior marriage had broken down for some years is not new. In addition to Australia, "Marriage Breakdown" is listed as a "grounds" for divorce in about fifteen American states, in New Zealand, and in the Scandinavian countries.[21] It is one of the bases on which church divorces are granted in some Episcopal dioceses in the United States, where it is referred to as "the spiritual death" of the marriage.[22] The 1959 Alberta Conference of the United Church of Canada advocated "marriage breakdown" as an additional *new* "grounds" for divorce.[23]

But unfortunately in all these cases "marriage breakdown" is treated as just another "grounds" for divorce. It is not. The traditional "grounds" or "matrimonial offences" as they are sometimes called, such as adultery, imply "fault" on the part of one spouse for which relief is granted to the other. "Marriage breakdown" simply recognizes things as they are, that the marriage has broken down, and some of the "fault" belongs to each side. That "marriage breakdown" is not just an additional "grounds" for divorce, but an entirely different basis on which to grant "two-branch" divorces and the right to remarry is clearly indicated in the book *Law in a Changing Society* by Wolfgang Friedmann, a professor of law at Columbia University.[24] The authors of the essay on Family Law in *Law Reform Now*,[25] edited by Lord Chancellor Gardiner, makes the distinction, and so do the writers in the *Encyclopedia Britannica*[26] and several other encyclopedias. Lord Walker makes the case very persuasively in his opinion in the Report of the United Kingdom Royal Commission mentioned earlier.[27] A total of 10 of the 19 members of the Commission advocated or gave qualified approval of "marriage breakdown" as a basis for granting divorces, although 9 of those 10 wished to retain some of the traditional grounds.[28]

What are the advantages of abolishing *all* "grounds" or "matrimonial offences" and replacing them with "marriage breakdown" as the basis for "two-branch divorces" and the right to remarry only after a lapse of some years from the time the parties separated permanently? Here are thirteen.

First the "quickie divorce" for the purpose of instant re-marriage is eliminated. No one who said, "I want out of this marriage because I have a better one to take its place," could do so, at least for a period of years longer than the matrimonial pre-planning of most people. Persons contemplating relief from an existing marriage should always be faced with the choice between "this marriage" and "no marriage" for some time. For the conduct of one's spouse, no matter how reprehensible, is reason to be relieved of that marriage, but no reason to run out and contract a new marriage the next day.

And as every marriage counsellor and divorce lawyer knows, it is the thought that one can "do better elsewhere" that is the moving force behind most divorces, not the adulterous conduct of the spouse which is the nominal complaint on which the divorce suit is based. If no other marriage could be available for some years, I believe many people could and would make their present marriage succeed.

The "quickie divorce" attracts one of the sharpest criticisms of the law and lawyers from priests, ministers, rabbis, social workers and others engaged in marriage counselling. Under our system of "instant divorce" following proof of one isolated act of adultery, the parties in an undefended action can be divorced before the counsellor has time to try to save the marriage.

Second, "divorce by consent", of which we already have a form, is eliminated. Lawyers know that the offence proven in court is seldom the real reason the plaintiff wants the divorce. It is merely the key that unlocks the door to freedom. Both parties want the divorce, so the key is turned.

In Alberta we have broadened "divorce by consent" even more. Most Alberta judges do not require corroboration of the evidence of adultery, and in most undefended cases the proof of adultery is the voluntary admission in court of the defendant husband or wife. It is the opinion of many Alberta lawyers that in the vast majority of cases, "the guilty spouse" does in fact commit adultery "for its own sake", and quite apart from any thought of a divorce action. For that reason the popular belief that most divorces are "rigged" is poppycock so far as Alberta is concerned. They don't need to be. Alberta judges deserve much credit for ameliorating an intolerable law so far as they are able to do, but the result is that on the one hand the Alberta divorce rate is more than twice the national average and divorces are often granted within a week of the filing of the statement of claim, yet on the other hand no relief is available to the hard cases, to the deserted wives, to the spouses to the alcoholic and the incurably insane. "Marriage breakdown" would grant eventual relief in all the hard cases, but the knowledge that there could be no second marriage for several years, even if both parties wanted to consent to one, would strengthen the institution by encouraging the parties to keep trying, and by deterring some of those who would otherwise take on its obligations lightly, and some of those tempted to adultery in the hope that divorce would quickly follow.

Third, eventual relief is given to those persons whose marriages have broken down but who do not engage in extra-marital relations. It is ironic that under the present law, most of the persons who break the mores of our society and commit adultery are quickly divorced, yet those who commit neither adultery nor perjury are permanently denied relief.

Fourth, the fiction of the "guilty party" is eliminated. As every marriage counsellor and divorce lawyer knows, there are no domestic situations in which the fault is all on one side. Too many plaintiffs leave divorce court under the illusion their virtue and their spouse's vice have been proven, whereas the "fault" in fact may be more or less equal.

Fifth, the right to alimony in particular and matrimonial property in general are properly litigated. If one were to sit through an average sitting of an Alberta divorce court, one would wonder at the number of women who want no alimony

from their "guilty husband", if it did not become apparent that the voluntary admission of the "guilty husband" is the only proof of adultery the woman has obtained.

Sixth, vindictive spouses are prevented from permanently preventing the remarriage of the "guilty spouse". How often does the cruelty of one spouse aid in driving the other into the arms of another man or woman? Our present law leaves to the person in some ways the least capable of judging, the permanent fate of the other

> "Vengeance is mine, I will repay, says the Lord."
> (Rom. 12:19 RSV)

So should it be.

Seventh, people are encouraged to work at making their marriage succeed. The wife who in the security of marriage "lets her cargo shift", and the husband whose career is first, his marriage a poor second, are not figments of the imagination of the cartoonist and the novelist. "Marriage breakdown" would give persons the security of knowing that a momentary lapse, adulterous or not, would not spell a sudden end, but that continuing inattention to marital duties could mean an ultimate break. Would this not be a good thing? Is not the strength of some common-law marriages mentioned by the social worker quoted earlier, the knowledge by both parties that the marriage must be kept in fact, in faith, and in attitude, since it is not in law?

Eighth, the present means test for divorce is eliminated. It is rare for the rich with resources for private investigators and property settlements to fail to obtain a divorce. For the poor, common-law is too often the solution.

Ninth, second ill-advised marriages by teen-agers are virtually eliminated.

Tenth, spouses are no longer encouraged to commit adultery to provide "grounds". As Lord Walker states,

> "It is not, I think, doubtful that people do commit adultery. . .solely in the expectation that divorce will follow . . ."[29]

Eleventh, the confusion and disorientation which can happen to the children of divorce when "Daddy" is too quickly replaced by "New Daddy" would be alleviated. If there is a substantial interval between the departure of "Daddy" and the appearance of "New Daddy", "New Daddy will to some extent fill the void left in the children's life when "Daddy" departed. "New Daddy" will replace "Daddy", not displace him, as is the case under the present system of instant divorce and instant remarriage.

Twelfth, unnecessary divorce proceedings could be eliminated. Our present law actually encourages people to ask for a divorce before they may be certain that that is what they need and want, for three reasons. Firstly, "delay" in bringing the action raises a discretionary bar which can result in the divorce being refused. Secondly, the longer the delay, the more likely that the witnesses necessary to prove the matrimonial offence will become unavailable. Thirdly, if the spouse disappears, under the present law the action cannot proceed. Under "marriage breakdown" there would in effect be no defence to the claim for dissolution, and no reason to refuse to grant the divorce in the absence of the spouse who was "long gone".

Thirteenth, the present pressures on persons with religious convictions against divorce would be relieved. It is not uncommon for a person with such convictions to eventually give in to the pressures by the spouse with no such conviction and eventually "give" a divorce. In "marriage breakdown" the spouse without such convictions, or in disregard of such convictions, would take the legal proceedings, which of course would not be recognized by the spouse who

would not remarry even though legally entitled to do so. The legal position would reflect the realities of the situation.

If these are the advantages, what are the possible disadvantages?

Would it increase the overall divorce rate? Probably, but not even time could really tell. If one examines the statistics for the divorce rate in the various states of the United States and countries of the world, some of which accept the principle of "marriage breakdown" and some of which do not, it is impossible to correlate divorce rates solely with the grounds accepted in each jurisdiction.[30] There are too many other variables such as the mobility of the society, its age and traditions, the presence and absence of stress factors such as war and depression. But the divorce rate would more accurately reflect the number of permanently broken homes. No one pretends that countries without divorce have no broken marriages, but their number is hidden behind the anonymity of common-law unions and homes which are no more than a base for extra-marital operations. Indeed, an Italian sociologist has found that one great pocket of resistance to divorce in that country comes from men with long-established mistresses.[31]

On the other hand, at a recent Calgary sitting of the divorce court, of the 45 cases tried, in 80 per cent the parties had been separated less than three years, in 58 per cent less than *one* year, in 24 per cent less than three months, and in 11 per cent of the cases, a month or less. All these cases would be delayed for time, counselling and sober second thoughts to intervene.

Would it encourage people to marry lightly, knowing they could eventually be free to marry again, whether or not their spouse wanted them "to go free"? Possibly. But this factor could be controlled by the length of time between the marriage breakdown and the right to remarry. Would many more enter marriage lightly than the number that do now, simply because they knew that three or five years after its end, a new marriage could be contracted without the consent of one's previous spouse? I doubt it.

In the sub-culture within our society in which "common-law" is the accepted way of life, it is doubtful if the divorce law has much effect one way or the other. But it might serve the useful purpose of flushing from cover the phenomenon known to the divorce lawyer, the common-law husband who moves on *so soon as* his mate is free to marry him, and who camps indefinitely with the poor woman who has an insoluble prior marriage problem.

Would the new basis for the right to remarry encourage persons "waiting out the time" to engage in adultery and enter common-law unions? If the length of time involved in the wait were excessive, it undoubtedly would. Only experience could judge the right period. Perhaps three to five years is about right.

But what of those who *could not* or *would not* wait for any length of time, the kind who under the present law leave one marriage to enter another in a matter of months? Well, is the institution of marriage well served by putting masks of respectability on unions that one United Church minister has called "serial polygamy"? Which debases the institution of marriage more, common-law unions, or the games of "musical bedrooms" played under the guise of marriage in Hollywood and other places not so distant?

An Alberta Appellate Division judge one day roundly condemned a young lawyer for calling an illicit union a "common-law marriage". Common-law marriage" as we know was once a respectable form of marriage under Scots law, not the euphemism it is today. Under "marriage breakdown" all persons could eventually remarry lawfully, and the persons who want to run from bed to bed, who now get a quickie divorce to make it look respectable, would either have to wait or openly break the positive law as well as the moral law. Then we could call a spade a spade, and a shack-up a shack-up.

Would the new basis be workable? How could you measure the three or five years, what with short-lived reconciliations and near-conciliations? The answer is that the same problems arise with respect to divorces based on "desertion", and 40% of all divorces in the United States are based on desertion.[32] The New Zealand Legislation has very sensible provisions for dealing with these mechanics which time does not permit us to discuss here.[33] They are problems which can be overcome.

If there is to be divorce reform along these lines, who should lead?

The first group that comes to mind is the Bar Association. But the Bar Association, unlike the Medical Association which is organized to achieve specific medical and political purposes, is more a collection of individuals than an organization of like-minded persons. On balance I think it is a good thing for society that the Bar has this diversity of opinion within it that prevents its collective action on most major issues, but it does mean that we must look elsewhere for leadership in this area. In any event, it is the history of the law to tinker with existing laws and seldom throw them out holus-bolus and start anew with a fresh concept. That is the reason most calls for "divorce reform" from Bar Associations and individual lawyers speak in terms of adding new grounds. The Nova Scotia Bar in December, 1965, are among the latest to do so. Their list contains seven besides adultery including "separation for three years" as just another grounds".[34] Mr. Eldon Woolliams, M.P. (Bow River) once advocated adding six grounds, [35] only one of which, "wilful refusal to consummate the marriage" corresponds exactly with the grounds put forward in Nova Scotia. (I don't suppose that one will help too many people.)

The next group that come to mind is The Press. As long ago as July 26, 1945, and again on January 28, 1953, the *Calgary Herald* editorialized approvingly concerning the idea of "marriage breakdown". A nation-wide press campaign could be a weighty factor.

Third, the other provincial legislatures could follow Manitoba's lead (which incidentally was on a non-party basis) and pass resolutions requesting the Dominion parliament to act.

Fourth, Canada needs a Parliamentary Committee or a Royal Commission to enquire into the whole of our marriage and divorce law. The basis of granting divorce is just one problem that needs attention. The lack of judicial machinery to protect the children of divorce, to make all-inclusive settlements of the property acquired during the marriage, to provide adequately for maintenance enforcement, and the need for a common Canadian domicile are among others.[36] (Since this article was written the appointment of such a Parliamentary Committee has been announced—Ed.)

But the institution most suited to give leadership is The Church, or more correctly in the context, The Churches. The winds of change are blowing, and it behooves The Churches to see that they blow good, not ill. And I submit that my proposal should be more acceptable to all churches than the present law or the other proposals to open the Pandora's Box of additional "grounds". In the "Brief to the Bishops" presented by Canadian Catholic laymen to their bishops just prior to the recent ecumenical council, a prominent Toronto Catholic lawyer, discussing the Church's attitudes to divorce, expressed the view that the Church should not impose its views on divorce on a pluralistic society.[37]

"Marriage breakdown" accepts the canon law principle that the misconduct of the spouse is never a reason for a permit to remarry but only for relief from the existing marriage. True, the right to remarry is to be given after the lapse of a signficant length of time, but surely that is more acceptable to the churches in a pluralistic society than on the one hand the present law with its provision for quicky divorce, quicky remarriage, and divorce by consent, or on the other hand the Pandora's Box proposals for listing additional grounds.

For the churches which do recognize the right to remarry under some circumstances, I sincerely suggest that "marriage breakdown" as the new basis for divorce is a means of granting eventual relief to all those whose marriages have failed, and at the same time strengthen the institution of marriage, not weaken it.

But most important of all, the Church must give positive leadership in this area. The winds of change that are blowing cannot be permitted to wear away one of our most important institutions. In the battles that lie ahead, The Church must be a field-post for reformers, not a citadel of reactionaries.

EPILOGUE

Since the foregoing was originally given as a talk to a Calgary speakers' club, I have had the benefit of comments from many persons and in particular members of the Bar and the ministry. There have been two very frequent comments. First, the three or five year fixed period is too artificial and rigid to apply in all cases. Second, three years rather than five is a sufficient time from which to create a rebuttable presumption that the marriage has permanently broken down.

Time Magazine of February 11, 1966, page 22, advocates "marriage breakdown" with proof to be given by "skilled clinicians" with no particular period of separation required, but unfortunately no such recognized species as "skilled clinician" exists.

While the matrimonial offence proven in court as the "grounds" for a divorce is seldom the chief cause of the breakdown of a marriage and should therefore by itself not be the basis for granting a divorce, nevertheless it has some probative value as tending to show that a marriage is broken down.

The following draft section is intended to enable the court to grant divorces within the three year period, and still eliminate the present abuses that arise in Canada from divorces being granted upon proof of a single isolated act of adultery, and in the United States from divorces being granted upon proof of a single isolated act of cruelty.

Draft Section for Matrimonial Causes Act

1. (1) "Extreme cruelty" means a course of conduct towards the petitioner, or the petitioner and one or more children of the petitioner or of the defendant, of such a character as to endanger life, limb or health, bodily or mental, or to create a reasonable apprehension thereof.

(2) A court having jurisdiction to grant a divorce shall, upon a petition by one of the parties to the marriage, decree dissolution whenever the marriage has permanently broken down.

(3) Permanent breakdown of the marriage shall be proven by evidence that either:

(a) the petitioner and defendant have separated and thereafter have live separately and apart for a continuous period (except for a period of cohabitation of not more than two months that has reconciliation as a prime purpose) of not less than three years immediately preceding the date of the granting of the decree, and there are no reasonable grounds for believing that there will be a reconciliation, or

(b)(i) the petitioner and the defendant have separated and thereafter have lived separately and apart for a continuous period of not less than one year immediately preceding the date of the granting of the decree, and there are no reasonable grounds for believing that there will be a reconciliation, and

(ii) the defendant has committed adultery or has, during a period of not less than one year, habitually been guilty of extreme cruelty.[38]

REFERENCES

Abolish Matrimonial Offences

1. Encyclopaedia Britannica, 1965, Vol. 7, p. 520.
2. Vancouver Sun, March 27, 1965.
3. Calgary Herald, June 4, 1965.
4. The Star Weekly, June 24, 1965.
5. Vancouver Sun, July 17, 1965.
6. CHQR, Calgary, September 12, 1965.
7. Vancouver Sun, September 2, 1965.
8. Reprinted in Vancouver Sun, September 15, 1965.
9. Albertan, January 25, 1966.
10. Encyclopaedia Britannica, 1965, Vol. 7, p. 514.
11. The Domestic Relations Act, Revised Statutes of Alberta, 1955, Section 7. Ontario and Prince Edward Island are the only provinces lacking this legislation.
12. Encyclopaedia Britannica, 1965, Vol. 7, p. 514.
13. Power on Divorce, 2 ed., pp. 24-41. The Carswell Company, Toronto, 1964. Mr. Power maintains neutrality in his text but his personal views are well known from his speeches through the years.
14. Reprinted from The Listener, in Vancouver Sun, September 17, 1965. (Sir Jocelyn Simon is the President of the Probate Divorce and Admiralty Division of the English High Court of Justice.)
15. John Dryden, Absalom and Achitophel.
16. Encyclopaedia Britannica, 1965, Vol. 13, p. 89.
17. H.M. Stationery Office, London, p. 340.
18. By Richard V. Mackay. Grosset & Dunlap, New York, 1946.
19. Life of Lord Chancellor Birkenhead, p. 349.
21. Encyclopaedia Britannica, 1965, Vol. 7, p. 519.
21. Encyclopaedia Brtannica, 1965, Vol. 7, p. 519.
22. Pike, A Time for Christian Candor, p. 143. Harper and Row, New York, 1964.
23. Proceedings of Conference, p. 20.
24. P. 175 ff. Penguin Books, Inc., Baltimore, 1964.
25. At page 140. Victor Gollancz Ltd., London, 1964.
26. Encyclopaedia Britannica, 1965, Vol. 7, p. 515.
27. At page 340.
28. At page 22.
29. At page 340.
30. Goode, World Revolution and Family Patterns, p. 82. Free Press of Glencoe, New York, 1963.
31. Parca, Gabriella, I Sultani (The Sultans). Reported in Vancouver Sun, December 17, 1965.
32. Encyclopaedia Americana, 1965, Vol. 9, p. 206.

33. Canadian Bar Review, September, 1965.

34. Vancouver Sun, December 6, 1965.

35. Calgary Herald, July 29, 1953.

36. An analysis of the United States census indicates 90% of all divorced people stay married the second time around. Perhaps divorce should be granted more easily to persons who have not been divorced before, or are we then advocating a form of trial marriage? Wattenberg & Scammon, This U.S.A. Doubleday & Co. Inc., New York, 1966. Reported in Look Magazine, February 8, 1966.

37. O'Driscoll in Brief to the Bishops. Longmans Canada Limited, Don Mills, Ontario, 1965.

38. Section 28(d) of the Australian Matrimonial Causes Act 1959 reads as follows: "28(d) that, since the marriage, the other party to the marriage has, during a period of not less than one year, habitually been guilty of cruelty to the petitioner." The expression "extreme cruelty" is used to distinguish the degree of cruelty from the wide definition of cruelty for purposes of judicial separation used in the Alberta Domestic Relations Act R.S.A. 1955, ch. 89, sec. 7, and the Saskatchewan Queen's Bench Act 1960, ch. 35, sec. 25(3). It is submitted that the one year period of cruelty is necessary to deter imaginative petitioners in uncontested actions before "liberal" judges from abusing "cruelty" as is commonly done in the United States. See also Power, supra, p. 475, for definition of cruelty.

APPENDIX "49"

THE RIGHT OF DIVORCE

by

DONALD J. CANTOR

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A desire to reform procedures that result in harmful child-custody settlements and encourage widespread perjury and deceit inspired this article by Mr. Cantor, a Hartford attorney who has contributed articles on narcotics and homosexuality to legal publications. The cases cited are composites and do not represent the experiences of actual clients.

Over 800,000 Americans have their marriages dissolved each year. For every four marriages made per year there is one broken. When one realizes that these 400,000 divorces per year involve not only the parties themselves, but witnesses, children, two sets of family, and others incidentally involved, it is clear that our divorce procedures affect to varying degrees a very large segment of our population.

Yet in few areas of American law does there exist a body of precepts less logical, less reflective of actual mores, and less respected and observed than our divorce laws. This is partially because divorce involves the broad question of human sexuality, and we have not learned how to discuss sexuality, let alone deal with it intelligently. And it also can be explained by the fact that divorce and marriage are matters of concern to religious pressure groups. The recent debate in the New York State legislature has illustrated, for example, the opposition of the Roman Catholic Church to liberalization of divorce laws, even in the state with the least liberal legislation.

To grasp the farcical nature of modern divorce, one must understand how marriage is regarded by the law. Marriage is not only a legal contract between spouses, but also the mutual adoption by both parties of a status which is defined, not by the partners, but by the state, because of the importance of marriage to society. Therefore persons may divorce only for certain prescribed reasons which the legislatures in their wisdom consider adequate. These reasons are called "grounds." Though many different grounds have been enacted in our fifty states, only one of these, adultery, is universally applicable. The others most commonly found are desertion (forty-nine states), cruelty, either physical or mental (forty-four states), conviction of crime or imprisonment (forty-three states), alcoholism (forty-three states), impotence (thirty-two states), nonsupport (twenty-eight states), and insanity (twenty-eight states). Curiously, less than one third of our states allow divorces on all of these grounds.

The grounds have one characteristic in common. They provide a basis for establishing that a spouse has transgressed against traditional marital ethics, but they bear no necessary relation to the success or failure of a marriage. Adultery, for instance, may exist without breaking a marriage apart. There is so much adultery in our society that it would be naïve to suppose spouses cannot live with it. The case of Mrs. T is illustrative in this regard. Her husband, in his early fifties, had a position with a large corporation which required him to travel

extensively. She knew he had been having affairs for at least ten years during these jaunts, but she had no thought of divorce until her husband actually began housekeeping with a paramour and lived more with her than with his family. Only after she felt she had ceased to be the primary woman in her husband's life did she seek divorce. The simple truth is that many marriages are maintained successfully with knowledge of a partner's adultery, and even with mutual knowledge of mutual adultery.

Despite our romantic propaganda about the nature of true love and marriages made in heaven, no one can really prescribe the elements of a good marriage in a formula all will accept. Some marry for money, some for position, and some to have babies and to stay out of uniform. A few choose marriage as a means of masking homosexual proclivity and are often happiest when they have very little to do with their legal spouses. To some, desertion perfects a marriage; to others, impotence is nirvana. Still others find that an afflicted spouse satisfies a need to be protective.

The point is that the assertion of grounds for divorce is simply a manifestation of incompatibility between the partners. The sources of the incompatibility that lead to adultery, cruelty, or any of the other legally sanctioned grounds are varied and numerous. It may be a loss of respect, unclean personal habits, a great intellectual gulf, sexual maladjustment, an unbridgeable gap of interest. Not infrequently the difficulty may be at least partially ascribable to financial disagreements and in-laws. Many persons marry before their essential attitudes and values are formed, and when they eventually do mature, they find their standards unshared by their spouses. (The median age for brides is 19.9; for grooms 22.9 in first marriages.) Inevitably they are then attracted by more suitable personalities.

The simple but apparently unappreciated fact that marriages succeed or fail on the question of compatability should make it clear that incompatibility is the only logical legal ground for divorce. Why should adulterous, cruel, or other types of presently required acts be proved in court in order to establish sufficient legal incompatibility? The fact that a spouse may not have committed adultery, or been cruel to his mate, does not mean that his marriage is viable and should not be dissolved. The only real judge of that is the individual, who knows whether or not he can bear living with his spouse any longer. If he says he cannot, that in itself is better proof that the marriage has outlived its usefulness than any "evidence"—genuine or manufactured—such as adultery or cruel behavior. For no list of virtues can make A love or even like B, if B, for whatever reason, irritates A. And if the law forces A to stay married to B, certainly their marriage is a marriage only by legal definition. None of the usual amenities of marriage are present.

In short, it only takes one person's dislike to break up a marriage. If one spouse wishes to divorce another, how can the marriage possibly be compatible? How can it be maintained in rebuttal that the claimant is wrong, that a person really enjoys a marriage he or she is trying to dissolve?

To state the question is to illustrate the answer. And the answer leads to the further question, why should it be necessary to prove a foregone conclusion in a court of law? The trial procedure over the question of the divorce itself is superfluous. This does not mean that all legal process can be eliminated in a divorce case. Naturally, hearings over custody, alimony, and so forth would still be necessary. But the divorce trial itself serves no purpose as a means of determining whether or not the spouse who initiates the divorce proceeding has a substantial claim, because no one can judge the substantial quality of another person's subjective reactions.

The implications of the above reasoning point quite firmly to four proposals that would overhaul our outmoded procedures and put divorce on a sensible legal basis:

1. Divorce should be made a right to be granted automatically after a fixed period of time by a court, upon the filing of a notice of intention to procure a divorce by a person who wishes to obtain one. No explanation for why the divorce is desired should be required by this notice.

2. Allied matters concerning the custody and support of children should be determined, as is now done, by a hearing, the welfare of the children being the prime consideration.

3. Questions of alimony and the division of estate should be determined, as now, by a hearing. Here acts during the marriage which were contrary to the marriage contract could be used as evidence in determining the amount of any award.

4. Allied questions such as custody and alimony should be decided after the decree of divorce has been granted.

Certain objections to this change of procedure can be immediately anticipated. First, it would be claimed that marriage should not be easily dissolved because of resulting social instability. To disagree with this point of view is not to question the proposition that marriage is a basic social institution or to deny that divorce causes instability. It is to argue, however, that forcing two antagonistic people to stay togeher, if even only in legal terms, produces more instability than to allow them freedom from each other. Few human relationships are more corrosive to the persons directly and indirectly affected than a marriage of acrimonious partners. The social order can derive no benefit from the perpetuation of such relationships.

Second, what of the rights of those partners who are divorced against their wills? Should they not be able to seek to preserve their marriage? The answer to these questions must be simply that no one should have the right to deny another person the opportunity either to marry or to divorce. The party who wishes to maintain a marriage that his partner wants to dissolve is acting either from spite, self-interest, or delusion. Even if the legal form is preserved, the spouse cannot force his or her partner to stay under the same roof. In fact, the legally successful spouse gains little more in victory than the perpetuation of his or her own unhappiness; certainly the chance to hurt oneself and another person does not qualify as a right worthy of legal protection.

But, it would be argued, such an easy method of divorce would increase the divorce rate, encourage frivolous marriage, and thus should be opposed.

This is an objection with a large degree of surface plausibility, but it cannot withstand careful scrutiny. It grossly misassesses the mood in which the great majority of people approach divorce. What is truly amazing about divorce is how much people will undergo before they will seek it. The victimized spouse often exhibits a most surprising capacity for self-delusion in trying to convince himself that things will change for the better. Mr. F did not consult me until eighteen months after his wife, he thought, tried to burn him to death; Mrs. M did not consider a divorce when her husband, during her ninth month of pregnancy, locked her in a closet and left their apartment with no one else home. Only when he deserted her did she seek to divorce him. Mr. D for years lived with the hope of saving his marriage despite constant fights and his wife's refusal to sleep with him, and did so even after finding out that she had had continuous extramarital relations during this period. Only when he discovered that these affairs had involved eight other men, including the milkman and the laundryman, did he seek divorce. These are but a few examples. I have never

seen, nor have I ever heard of, a spouse who seriously sought and eventually obtained a divorce without first enduring a lengthy period of tribulation.

This general hesitancy to seek divorce is not hard to understand. Some social stigma still attaches to it, though admittedly not much. More important, it is the disruption of one's life, both emotionally and physically. It means living alone; it means dating again with thicker waist or balding head; it means separation from children for at least one parent; it means large financial expense; it means many forms of great and small inconvenience. It is not a very attractive prospect and it is little wonder that people do not generally rush into it.

Of course, some people would, and do, take marriage frivolously. But these people are not deterred from doing so by our present laws. For now, if they have money, they simply establish residence in a state like Nevada, where it is easy to get a divorce, or go to Mexico and obtain quick divorces. If the divorce is not contested, they generally encounter little difficulty in their own states, though they will wait longer. The only people who are really inhibited at all by our present divorce laws are those who lack funds and those whose spouses will not agree to a divorce; for if agreement exists, divorce is presently always available if it can be financed. Sometimes this may require staged raids for "catching" a husband with a paramour, or a little perjury, but where the need is great the means are usually found.

Finally, frivolous marriages entered into with the thought of easy divorce can be deterred at least as well as present statutes deter them by not making divorce effective for a period of time after the decree is entered, or by not entering a decree until a fixed period has elapsed.

The primary objection to granting divorce as a right would be voiced by those concerned with the effects of divorce upon children. Undoubtedly, the worst effects of divorces are visited upon the innocent offspring, not only because they are deprived of growing up under the same roof with both natural parents, but also because too often the parents fight over and through their children. Any alteration in our divorce laws which would complicate or burden the lives of the children would properly stand condemned for that reason alone. But children have no stake worth protecting in a bad marriage. Nothing is worse for children than the atmosphere of a home without love, for such a home invariably is filled with rancor and tension.

Allowing divorce as a right would benefit the children in a number of important ways. By eliminating the need for a trial in order to get a divorce, the terrible spectacle of a child being called as a witness against a parent would be eliminated in most cases. Also, with no trail necessary, no ground for divorce would have to be revealed, and children could thus be spared in many instances the knowledge they now acquire of the misdeeds of one or both parents.

But more important, the questions of support payments, custody, and visitation rights which directly relate to children can be better dealt with if divorce is available as a right. Under our present procedures approximately 90 percent of divorce decrees are granted in uncontested cases, and these decrees usually are merely ratifications of agreements between the spouses. But these agreements are the product of bargaining, and it is the rule rather than the exception that the spouse who most wants the divorce will somewhere have to make concessions. These concessions, unfortunately, are usually made with regard to those matters which affect the children and which should be determined solely on the basis of what is best for the welfare of the children.

Sometimes, where a spouse is desperate enough, custody of the children will be surrendered to the other spouse as the price of the divorce. The case of Mrs. W illustrates this. Mrs. W was extremely intelligent and capable, not only as a wife and mother but also as a professional artist. Her earning potential and her

intellectual capacities far outstripped her husbands's. She married young, and as the years elapsed, her husband, once a hero, came into true focus as a man of limited abilities who had chosen the easy path into a family business he detested but lacked the courage to leave. The marriage deteriorated but lasted until she fell genuinely in love with an engineer who was her intellectual peer. Her husband refused to allow her to divorce him unless she agreed to give him custody of their child. She could not have divorced him if he had contested it, and consequently she surrendered custody. She did this partly because she felt the worst thing for the child would be to grow up in such an obviously unhappy atmosphere and partly because she would not pass up the chance to marry the man she loved. The morality of her behavior and decision is irrelevant here; what is relevant is that the child is being reared by a combination of an inept, neurotic father and an unloving housekeeper instead of by its clearly more competent and loving mother. Without question, the court would have granted custody to the mother had custody been heard on its merits.

These extorted concessions also arise in the context of property settlements and alimony and support payments. Mr. X, for example, agreed to give Mrs. X the following to purchase his freedom: their $30,000 house; one-half interest in their $80,000 investment properties; his $100,000 life insurance policy; a $25,000 lump sum alimony payment; his automobile; weekly support payments for each minor child of $35.00. Mr. X also agreed to remain solely responsible for paying the mortgages on the real estate he conveyed, to maintain the hospitalization and medical insurance for the benefit of his children, to pay all college expenses the children might incur, and sell without unreasonable delay his valuable stamp collection to apply toward his wife's attorney's fee. The net result was to ensure his future impoverishment and her comfort to an utterly inequitable extent. But since the parties "agreed" to these terms, they were accepted by the court and this became the judgment of the court. Making divorce a matter of right would eliminate these pressures and blackmail tactics and raise the probability that decisions concerning custody, support, and so forth would be made free of extraneous considerations.

It must be conceded, however, that the elimination of the divorce trial will not abolish all of the objectionable features which now accompany such trials. This is unfortunately true because hearings regarding child custody, support payments, division of assets, and alimony will still provide opportunities for the parties to vilify each other, punish their children, and embarrass third parties. But the elimination of the divorce trial would sharply reduce such bitter encounters since they would then occur only when hearings on these ancillary matters were held. No longer would a spouse's fault have to be established in each case to satisfy the requirements of a ground for divorce. A party's misconduct would become relevant only, for example, as it might bear on that party's capacity to be a suitable parent, and not for the purpose of establishing misconduct *per se*. In such a context, misconduct would be but one factor pertaining to the determination of the best interest of the children. In determining who should have custody of the children, a court will seldom give conclusive weight to adultery, unless it is so flagrant or censurable that incompetence may be inferred.

Since at least 90 percent of all divorces in the United States are uncontested, it seems reasonable to suppose that the withdrawal of the divorce itself from the area of contention would lead to agreement in an even larger percentage of cases.

With elimination of the divorce trial it would no longer always be necessary to expend large sums for attorney's fees, and, so often, fees for private investigators to gather evidence of spousal misconduct. No longer would persons always

be required to endure embarassment and occasionally the trauma of testifying publicly about their marriage and its failure, and, in effect their failure.

Moreover, if divorce were granted as a right, the law would be freed from the farce of uncontested divorce "trials" where the defendants don't appear, the testimony falls into patterns, the outcome is known before the show begins, and court personnel, however conscientious, have to struggle to stay awake.

The injury done to the law by this silly yet cruel charade is no less great because impossible to measure, and is all the more injurious because it corrupts not only the law but all the participants. Collusion and perjury are presumed and condoned.

Two ironic inconsistencies pervade present divorce procedure. The first is that our law attempts to regulate divorce, yet imposes almost no controls over marriage. If marriage is such a crucial concern of the state, should not a law regulate not only its dissolution but its birth? The answer, of course, is that we would not stand for such regulation. It would be an intolerable invasion of personal freedom. The second inconsistency is that while men debate whether grounds for divorce should be liberalized, whether parties should be allowed to plan their divorce ahead of time under grounds such as the two-year voluntary separation recently passed by the New York legislature, divorce has already largely become a matter of planning and collusion where uncontested. Practically every uncontested divorce is already a joint venture of the parties. So the real question is, why maintain the divorce trial procedure when it is clearly a sham not a trial, when its only real use is by spouses who fight legal dissolution of broken marriages for their own selfish purposes, and when the only other persons it affects are those too poor to gain access to easy jurisdictions?

The divorce trial is not a socially useful instrument but a repressive obstacle course inflicted as a punishment. In a political entity founded upon belief in the worth and judgment of man this is intolerable.

84 Per Cent of Poor Who Get Legal Aid in Wisconsin File Divorce Suits

Madison, Wis. Early experience with a Federal experiment in legal aid shows that poor people want divorces far more than protection from loansharks and landlords

Under Judicare, a new program that allows poor people in 26 Northern Wisconsin counties to litigate civil cases at the Government's expense, 84 per cent of the cases so far have involved divorce actions

The one-year experiment [Judicare] is financed by a $240,000 grant from the Office of Economic Opportunity, under a program initiated last year by the poverty agency to give the poor legal protection against unfair housing, welfare, credit and consumer practices.

But the first six weeks of Judicare have brought instead a rush to the divorce courts, where the poor are suing each other at a furious rate, while largely ignoring the legal issues that moved the poverty agency to enter the legal aid field.

According to statistics released today by the Judicare office here, the first 86 cases include 72 divorce matters—63 divorce suits and nine custody and support actions growing out of earlier divorces. Of the 63 suits, 58 were brought by wives with Judicare cards and involved husbands who needed representation as defendants . . .

According to Joseph F. Preluznik, the Judicare director, many people who have wanted divorces for years, but who could not afford them, are now filing suits.

He said in an interview today that in Britain, where a Judicare-type system was instituted in 1950, 80 per cent of the Government-subsidized cases in the first year were suits for divorce.

—From the New York *Times,* September 2, 1966.

APPENDIX "50"

DIVORCE REFORM IN NEW ZEALAND

by

B. D. INGLIS

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Divorce Reform in New Zealand.—One of the fields in which the New Zealand lgislature has always been conspicuously progressive is that of family law. New Zealand was the first Commonwealth country to introduce adoption legislation; it pioneered testator's family maintenance, and it has always been in the forefront of divorce reform. In these circumstances the final passing of the Matrimonial Proceedings Act by the New Zealand legislature in 1963[1] was awaited both in New Zealand and abroad with a great deal of interest, and although it is too early yet accurately to assess its impact on New Zealand practice (it came into force on January 1st 1965), it is nevertheless a useful exercise to contemplate some of the changes it has brought about.

It is first necessary to take some preliminary matters into account. On paper New Zealand has about the most liberal grounds for divorce in the world. The types of situation in which a divorce can be obtained number something in excess of twenty: there is something for everyone. But this is not as a result of the new Act. Although the previous grounds for divorce have, in some cases, been subjected to a few changes in ways which are not sufficiently important to mention, the only new ground is one which is hardly likely to be unduly popular: the artificial insemination of the wife without the husband's consent.[2]

Furthermore, in spite of the numerous grounds for divorce, in practice only four are ever frequently made use of. The first is that a separation agreement between the parties has been in full force and effect for three years. The second is that a separation order has been in full force and effect for a similar period. Third and fourth on the list are adultery, and desertion for three years. A fifth ground which is now being used with increasing frequency is that the parties have been living separate for seven years, and are unlikely to be reconciled.

These practical considerations must set the atmosphere for any discussion of New Zealand's divorce law. Other grounds, such as the respondent's habitual inebriety and cruelty for three years or more, or the respondent's conviction of murder since the solemnization of the marriage; are so rarely called into operation that, by comparison with the others mentioned, they can be classed as positively esoteric. To a certain extent, therefore, the multiplicity of grounds for divorce available in New Zealand represent what is perhaps a somewhat fashionable present trend in New Zealand legislation: a tendency to legislate for every conceivable type of hard case which the imagination can devise.

To a certain extent also what has been said about the grounds for divorce characterises the new Act as a whole. Many who were familiar with the former Act may have considered that there was much that could have been tidied up, or dropped altogether. In fact, surveying the new Act in general terms, little has been dropped, there have been few real attempts to tidy up some of the more

[1] N.Z.S., 1963, No. 71.

[2] *Ibid.*, s. 21(1)(b). This resolves the conflict between *Orford v. Orford* (1921), 49 O.L.R. 15 and *MacLennan v. MacLennan*, 1958 S.C. 105, and follows the recommendation of the Royal Commission on Marriage and Divorce on this point: Cmd. 9678, para. 90 (1956).

disgracefully confused aspects of the previous legislation—the grounds for divorce being a leading example[3]—but a number of important additions have beeen made. It is these which we must now consider.

For the first time in New Zealand provision for conciliation has been introduced into divorce proceedings.[4] In this innovation, New Zealand has followed Australia.[5] The court is expressly directed to consider, throughout a divorce hearing, the possibility of the parties' reconciliation, and for this purpose the proceedings may from time to time be adjourned and a conciliator nominated.

This is of course a most useful innovation, although a similar provision has applied to summary proceedings only for some years. As far as divorce is concerned, however, it remains to be seen how frequently the new provision will be invoked in practice. It would be a pity indeed if a valuable provision of this sort were relegated to the exceptional class of cases, but bearing in mind the popular grounds for divorce in New Zealand this is what could well happen. Nevertheless it is a step in the right direction, and at least provides a suitable climate for broadening the conciliation procedure at a later stage.

As far as jurisdiction in divorce is concerned, there has been little practical change. New Zealand legislation has always shown a good deal of concern for the wife who has been deserted, or otherwise left by her husband, in New Zealand, with a ground for divorce but obvious difficulties over the question of domicile. Provisions to meet this type of case have now been greatly simplified: it is provided that for the purposes of the new Act, first that a married woman's domicile is to be determined as if she were unmarried,[6] and secondly that a divorce petition may be founded upon the domicile of *either* the husband *or* the wife in New Zealand.[7]

Adultery has now taken on a new look: the third party, of whichever sex he or she may be, has now become a co-respondent[8] and liable for damages.[9] This represents a recognition of the equality of the sexes in perhaps a rather unexpected way.

A somewhat more important reform, however, is the introduction of a trial period of cohabitation for the purpose of reconciliation which will nt prvide a bar to a subsequent petition for divorce. The period is restricted to "one occasion for a continuous period of not more than two months".[10] This applies more dramatically to cases of desertion,[11] but similar relaxation has taken place in the rules as to condonation.[12] This is the sort of reform which is very greatly to be welcomed, although, of course, there are bound to be factual difficulties in almost every case where the issue is disputed.

The provisions as to maintenance [13] remain reasonably orthodox, apart from the introduction of maintenance for a husband. In the emotional climate of New Zealand this is a dramatic change indeed (although a husband has for some years past been able to claim maintenance in summary proceedings), but the

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[3] It is only too obvious that the list of grounds has been added to from time to time with little or no attempt at coherence or consistency. Adultery, for example, has always been a ground; cruelty (which can often amount to a far worse matrimonial offence) has never been a ground in itself, although there is the extraordinary provision that it can constitute a ground if coupled with habitual inebriety for a period of three years or more. For further discussion see Inglis, Family Law (1960), p. 118 *et seq.*, and Supplement (1964), pp. 83-84.

[4] Matrimonial Procedings Act, 1963, *supra*, footnote 1, s. 4.

[5] Matrimonial Causes Act, 1959, No. 104, of 1959, s. 14.

[6] *Supra*, footnote 1, s. 3.

[7] *Ibid.*, s. 20.

[8] *Ibid.*, s. 22.

[9] *Ibid.*, s. 36.

[10] *Ibid.*, ss. 26, 27, 29(4), (5).

[11] *Ibid.*, s. 26.

[12] *Ibid.*, s. 29(4), (5).

[13] *Ibid.*, Part VI.

number of husbands who are likely to qualify will hardly be large in view of the fact that it is a prerequisite that the husband should by his own means or labour be unable to support himself. The attractive possibility of an indigent, though healthy, husband obtaining support from his millionairess wife is therefore, in New Zealand, non-existent. One consolation is that there are not many millionairess wives in New Zealand.

As far as custody of children is concerned, the New Zealand legislature has followed England[14] and Australia[15] in requiring, as a prerequisite to the granting of a decree absolute, that the court should be satisfied that proper arrangements have been made for the custody and welfare of all "children of the marriage".[16] The last phrase has been defined extremely widely[17] to include "any child of the husband and wife...[and] any other child (whether or not a child of the husband or of the wife) who was a member of the family of the husband and the wife at the time when they ceased to live together or at the time immediately preceding the institution of proceedings, whichever first occurred; and, for the purposes of this definition, the parties to a purported marriage that is void shall be deemed to be husband and wife".

This new provision relating to children does not, however, mark a very great change in New Zealand practice. Over the last few years the courts had been showing a growing concern that proper arrangements should be made for the children of a marriage in respect of which a decree nisi had been made and had been very hesitant about granting decrees absolute in the absence of some assurance that the children's interests were being fully protected. But in any event the new provision now makes it clear that the parties cannot make any arrangements about their children simply to suit themselves, and it is quite proper that the court should now have express statutory power to delay a decree absolute while the parties sort out the question of the children's custody and welfare on a responsible basis.

A completely new feature of the Act concerns matrimonial property, and incorporates into divorce jurisdiction power to dispose of and deal with any assets the parties may have over which there is any dispute.[18] These provisions apply also to cases of nullity, and other proceedings under the Act where matrimonial relief is sought.

This particular part of the new Act follows broadly the familiar pattern of matrimonial property legislation; but in regard to the "matrimonial home" two significant departures have been made. In the first place, it is not necessary for either spouse to show that he or she has a legal or equitable interest in the property. Secondly, what is required to be taken into account is whether a "substantial contribution" has been made to the matrimonial home, "whether in the form of money payments, or services, or prudent management, or otherwise howsoever".[19]

There are two things to be said about these provisions. For one thing they enable the court, for the first time in New Zealand in the one set of proceedings, to dispose of questions of property. This is, of course, of great practical benefit. The second point is that they enable the court to deal with property questions quite apart from any question of title, and the court is no longer tied to any effort to assess proportional contributions in an exact way.[20] It needs to be

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[14] Matrimonial Proceedings (Children) Act, 1958, 6 & 7 Eliz. 2, c. 40.

[15] Matrimonial Causes Act, 1959, *supra*, footnote 5.

[16] Matrimonial Proceedings Act, 1963, *supra*, footnote 1, s. 49 *et seq.*

[17] *Ibid.*, s.2.

[18] *Ibid.*, Part VIII.

[19] *Ibid.*, ss. 58(1). 59(1). See also the Matrimonial Property Act, 1963, N.Z.S., 1963, No. 72.

[20] In this respect New Zealand has deviated somewhat from the English courts in their approach to the problem: see Inglis, *op. cit.*, footnote 3, pp. 532-551.

added that whether an order is made under this part of the Act does not depend on the success of the petition for divorce or other remedy.[21]

The earlier Act, as amended,[22] contained quite extensive provisions regulating the recognition of overseas divorce and nullity decrees. There have been some changes in the new Act,[23] and an overseas divorce decree will be recognized, apart from any common law rules, which the Act does not exclude, if:

(a) One or both of the parties were domiciled in the foreign country at the time the decree was made. (This is domicile in the New Zealand sense, and the effect of this provision is therefore to enable recognition of a divorce obtained in a country where the wife would have been domiciled had she been a feme sole.[24]).

(b) The court granting the decree has exercised jurisdiction on the basis of residence, if in fact the party concerned had been resident in that country for a continuous period of not less than two years at the time of granting the decree, or on the basis that one or both of the parties are citizens or nationals of that country, or on the basis that the wife was deserted or legally separated from her husband, and that the husband was immediately before the desertion or at the time of the separation domiciled in that country.

(c) The decree is recognized as valid in the courts of a country in which at least one of the parties to the marriage is domiciled (in the New Zealand sense).

A nullity decree will be recognized on similar grounds, with the additional alternative ground that the decree was made on any ground existing at the time of the marriage, on the basis of the celebration of the marriage in the foreign country.

In 1953 the common law as to nullity of marriage was replaced in New Zealand by statutory provisions enacted as an amendment to the earlier Act.[25] These provisions were, at least from the point of view of conflict of laws, sadly defective, the more so as they purported to exclude the common law. The provisions which now appear in the new Act[26] are a marked improvement in this respect, but there have been some additional reforms which should be noted.

First, a child of a void marriage is now regarded "for all the purposes of the law of New Zealand" as legitimate from birth, subject to the qualification that, at the time of his conception or at the time of his parents' marriage (whichever was later) his parents must not have known that the marriage was void.[27] Although this seems to lay a rather harsh disability on a child who can himself hardly be blamed for his parents' knowledge of the defects in their marriage, the provision goes further than some of the corresponding legislation elsewhere.

Jurisdiction in nullity, in relation to all cases of void marriages, has been exclusively set out. It depends upon either the domicile in New Zealand of the petitioner or respondent at the time of filing the petition, or the fact of the solemnization of the marriage in New Zealand.[28] The grounds upon which a void marriage can be nullified have been, as before, set out exhaustively; but it is made clear that these grounds apply only to "marriages governed by New Zealand law".[29] This revives the common law considerations in regard to

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[21] *Supra*, footnote 1, s. 77.
[22] Divorce and Matrimonial Causes Act, 1928, N.Z.S., 1928, No. 16, s. 12A.
[23] *Supra*, footnote 1, s. 82.
[24] *Ibid.*, s. 3.
[25] Divorce and Matrimonial Causes Act, 1928, *supra*, footnote 22, s. 10B.
[26] *Supra*, footenote 1, ss. 6-8, 18.
[27] *Ibid.*, s. 8.
[28] *Ibid.*, s 6.
[29] *Ibid.*, s. 7.

marriages which were not connected, either as to form or as to capacity, with New Zealand.

As far as voidable marriages are concerned, it was for some reason thought desirable to describe the remedy in regard to these as a "decree of dissolution of voidable marriage".[30] Jurisdiction depends solely on the domicile of the petitioner or the respondent in New Zealand, and the grounds are exhaustively set out, the common law being entirely excluded. The four grounds (with one exception) are unchanged: they are (1) incapacity to consummate or wilful refusal to consummate; (2) the mental defectiveness of one of the parties at the time of the marriage, even though that party was capable of consenting to the marriage; (3) that the respondent was, at the time of the marriage, suffering from venereal disease in a communicable form; and (4) that the respondent was, at the time of the marriage, pregnant by some man other than the petitioner. The change which has taken place is an addition to the last of these grounds: that some woman other than the petitioner was, at the time of the marriage, pregnant by the respondent. This is perhaps one of the more extravagant ways by which the equality of the sexes has been increased by the new Act, and it was inserted, apparently, for no better reason than to remove what might have been thought to be an unjust distinction between male and female petitioners. There are, of course, real grounds for the distinction, and it is hoped that no other country will be naive enough to copy this stupid provision.

A "decree of dissolution of voidable marriage" on any ground except non-consummation is available only (a) when the petitioner was at the time of the marriage ignorant of the relevant facts, and (b) if intercourse has not taken place with the petitioner's consent since the discovery of the existence of grounds for a decree.[31] There was originally a third bar to a decree: that proceedings had not been instituted within a year from the date of the marriage;[32] but this has now disappeared, to be replaced by a general provision enabling the court to refuse to grant a decree if such would be "unjust or contrary to public policy".[33]

In the space available it is not possible to give any more than an outline of the changes brought about by the new Act. One feature of it, however, is characteristic. One cannot read the Act without feeling that it is, fundamentally, legislation to relieve hard cases. It seems to start from the footing: here is a marriage which has broken up—what can be done to relieve the parties from future hardship? The next step comes after the divorce: how can the interests of children best be protected, and how can questions of matrimonial property be resolved? There is no doubt that, in the New Zealand scene, these are problems which had to be dealt with, and in regard to which the new Act goes much further than any prior legislation in finding a solution.

But this should not be the sole approach. It is axiomatic that, if liberal grounds for divorce are provided, more people will seek divorces. New Zealand has had for some years a comparatively high divorce rate. There is some doubt whether it can be said, in all good conscience, that many of those who have obtained a divorce really needed it or deserved it. New Zealand lawyers experienced in this field come across a number of cases where the parties, had they not known that divorce was reasonably easy, would have made the small effort required to make their marriage work. Liberal grounds for divorce tend to make people divorce-minded: when some difficulty arises in their marriage their first thought tends to be, not what they might do to save their marriage, but how easily they can get a divorce.

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[30] *Ibid.*, s 18.

[31] *Ibid.*, s. 18(4).

[32] Divorce and Matrimonial Causes Act, 1928, *supra*, footnote 22, s. 10B (3). *Cf. Chaplin v. Chaplin*, [1949] P. 72 (C.A.).

[33] Matrimonial Proceedings Act, 1963, *supra*, footnote 1, s. 18(3).

It is frequently said that one of the principal interests of society lies in the preservation of the family structure. If this be so, then it is certainly not in the interests of society that parties should be given too great a freedom to reorganize their marital affairs, without undue effort or inconvenience, any time the whim takes them. New Zealand is, in some ways, tending to foster such freedom. It is all very well to say that a marriage should not be continued if the parties have reached such a state of disagreement that their marriage is one only in name. This attitude recognizes the effect, but not the cause. In many such cases the parties might never have reached that stage if they had not had it impressed on them that divorce is now a comparatively trouble-free remedy.

Divorce reform always raises controversy. In the context of New Zealand's new Act is may be necessary to ask whether New Zealand has not gone too far, or whether other Commonwealth jurisdictions, with comparatively more difficult divorce procedures, do not show greater social maturity.

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APPENDIX "51"

MARRIAGE BREAKDOWN

by

R. T. OERTON AND A. R. GREEN

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An' they talks a lot o' lovin',
but wot do they understand?

THE ROAD TO MANDALAY[1]

Faced by a client who says he wants a divorce, many solicitors embark, with hardly a second thought, upon the task of obtaining one for him. Sometimes, admittedly, this is the only course to adopt. But it is our purpose here to suggest that a solicitor may often discharge his duty to his client more effectively by putting forward the suggestion that he postpone his divorce for the time being and seek instead, with professional help, to resolve the problems which led him to desire it.

Some solicitors would disagree with this contention. They might argue that it is not the function of the lawyer to question a client's decision to divorce his wife. Yet we claim to be a learned and an honourable profession, and it is to be hoped that our learning is not confined to the law, nor our honour to matters of professional etiquette. Do we substantiate this claim by parcelling out divorces across the counter like so many packets of tea?

There is a little more force in another argument, to the effect that divorce is the last resort of the parties to a marriage and is not sought unless the marriage itself has already broken down beyond hope of repair. But this is only partly true. True it certainly is that the present doctrine of the matrimonial offence,[2] coupled with the "adversary" system to which it gives rise, makes reconciliation virtually impossible once proceedings have begun, and this without doubt is a blot on our legal system (a blot which perhaps owes its continued existence to the protective cover afforded by the numerous other blots which surround it). But few solicitors with practical experience would doubt that many of the clients who come to them, ostensibly in search of divorce, are really seeking desperately a means to avoid it.

The argument has nevertheless an element of truth, and it is this which prompts us to make what is perhaps an even less orthodox suggestion. The solicitor has ample opportunity in the course of his ordinary dealings with clients in matters quite unrelated to matrimonial problems to observe the presence of marital discord and unhappiness and its devastating effect upon the children of

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[1] This article deals with a subject that is to be discussed during the Society's National Conference which is to take place in Harrogate at the end of this month. It is the outcome of a correspondence between the authors which followed the publication of Mr. Green's letter on the subject (GAZETTE, April 1963, p. 227). They wish to express their gratitude to Dr. John F. Dunn, a consultant psychiatrist, and one who is independent of all the organisations referred to below, for reading the manuscript before publication and suggesting amendments where these seemed to him appropriate.

[2] Two cases both reported in *The Times* on June 298, 1963, *Williams v. Williams* [1963] 2 All E.R. 994 and *Gollins v. Gollins* [1963] 2 All E.R. 966, represent a slight judicial movement away from this doctrine, but it remains the unassailable foundation of our statute law of divorce.

the marriage. If he can find or take an opportunity tactfully[3] to suggest professional help at this stage, then the suggestion may be better received, and may more often lead to a successful outcome, than a suggestion made after the parties have built so strong a wall between them that they can contemplate no other action than to end their marriage finally.

But why it is so important to save a marriage? It is not our purpose to rest the case for reconciliation upon religious dogma, still less to assert that divorce is in all circumstances to be condemned. Nor do we seek to imply that any useful purpose would be served by making divorce itself more difficult than it is at present. On the contrary, we feel that, in cases where a marriage has broken down completely and for a long period ceased to exist in all but name, there is a strong case for allowing divorce by consent. This, in truth, would not make divorce substantially easier, but it would certainly make it more compatible with human dignity. For the ritual of the contrived adultery, followed by an undefended suit disposed of by a judge in a couple of minutes, is probably more debasing than troublesome. We are in favour not of marriage but of happy marriages, and no one in his senses supposes that people can be made happy by law.

What we do wish to assert is that the client is frequently mistaken in his belief that divorce will solve the problem with which he is contending, and that his mistake generally arises from the fact that he does not fully understand the nature of the problem itself. Because he is unhappy in his present alliance, he often assumes too readily that he will be happier alone or with some other woman.[4] There are a number of factors which militate against the validity of this assumption. It may be that he does not intend to remarry. But man is a social creature and can extend his personality fully only in a relationship with another person.[5] Exceptional people, it is true, prefer not to enter matrimony, but the fact that the client has married once would indicate that he is not one of these. What, then, are the prospects of a happy second marriage?

The first point to make is one often overlooked. Of whatever religious persuasion the client may be, and even if he be of none at all, he is endowed with the capacity to feel guilt, remorse and a sense of failure, and these capacities may well be wakened if he brings to a summary end a relationship which was one must suppose, originally created in love and illuminated by some degree of trust and understanding. Paradoxically, he may have a better chance of future-happiness if he accepts these unpleasant emotions for what they are than if he repudiates them and thrusts them from consciousness. For in the latter case they may fester, and so lead to neurotic behaviour which may of itself go far to impair, or even destroy, a second marriage. He may, for instance, project his own guilt on to his second wife and direct at her the hatred which he cannot bear to feel for himself. When there are children of the first marriage, its dissolution will involve them in great suffering and the feeling of guilty remorse will thus be much magnified. Emotional problems precipitated in this way may also give rise in certain circumstances to one or other of the psychosomatic illnesses such as peptic ulcer.

Another point is even more important; but to appreciate its significance it is necessary to understand something of the emotional factors which underlie marital disharmony. So vast and complicated is this subject that no more than

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[3] In his letter (GAZETTE, July 1963, p. 468), Mr. Jonathan C. V. Hunt suggests that to tell a client to see a psychiatrist is to risk assault. He is, of course, quite right, and any solicitor so lacking in tact as to phrase such a suggestion in that way must expect to be assaulted. We hope that this article will deal with some of the other points made by Mr. Hunt.

[4] We shall speak of the client as male for the sake of convenience, but it goes without saying that the problems are much the same, *mutatis mutandis*, for a wife as for a husband.

[5] Those in search of convincing and well-written confirmation of this can find it, together with a simple, lucid and non-partisan exposition of analytical psychotherapy, in Dr. Anthony Storr's *The Integrity of the Personality* (Heinemann, 1960; paperback edition by Pelican 1963).

the merest sketch of some of its aspects can be here attempted. It is necessary first to dispose of a number of fallacies. Many people, judges among them, seem to think that unhappiness in marriage is usually due to the wilful refusal of one or both of the parties to behave decently and that it could be dispelled without difficulty if only he or she would make an effort at self-improvement. This fallacy both underlies and is fostered by the doctrine of matrimonial offence upon which our law or divorce is unfortunately founded. It is true, of course, that many spouses behave badly and some (but not so many) may be quite well aware that they behave badly. But not unless they are also aware of their underlying reasons for behaving badly and are fully capable of altering their behaviour can they be accused of bad behaviour for its own sake; and none, it may safely be said, will be found to have this awareness and capacity.

This brings us to a second fallacy; the supposed existence of a clear dividing line between sanity and insanity and the corollary that, provided a person is not a raving lunatic, he does not stand in need of treatment. Reliance upon this fallacy may be the defensive reaction of a husband and wife to the suggestion that they need professional help to overcome their difficulties, and were it not pathetic and touching it might seem laughable. Their lives are in ruins, their children are suffering more distress than any human being should be called upon to bear, they themselves are familiar with most of the many facets of hell. . . but it couldn't be, could it, that there is anything *wrong* with them?

There is a third fallacy, closely linked to both the others: that the sources of human action are fully conscious. This misconception, never one which would withstand detached examination, is hardly tenable now that analytical psychiatrists of various persuasions have explained the powerful influence in adult life of the forgotten events and emotions of childhood.

We suggest with diffidence (although some may perhaps agree) that legal training and the practice of the law render a lawyer particularly prone to all these fallacies. To some extent, indeed, they are enshrined within the law itself. What is to be put in their place? There is no single road by which to approach an understanding of human emotions: this is one reason why the subject seems so obscure. But it may be helpful at this stage to indicate very briefly some of the angles from which the causes of marital disharmony may be viewed.

No school will teach us how to form and sustain a relationship with another person, nor is this art to be learned from books. The only preparation we have for adult family life is the family life of our own childhood, and often without realising it we construct our adult family in that image of our childhood family which we carry unconsciously in our minds. To the extent that this image is a good, a free and a happy one, to that extent may we succeed ourselves in creating a good, free and happy family. To the extent that it is a dark, depressing or hateful image, to that extent may we fail. These statements are necessarily too simple to be absolutely true, but they contain more truth than most generalisations. It should be emphasised, however, that this early influence is largely an unconscious one, and is all the more powerful, all the more impervious to change, for being inaccessible to the clear light of conscious experience. A distorted unconscious attitude is seldom corrected by experience: on the contrary, experience itself is often distorted so as to conform with the unconscious attitude. To a man whose childhood has left him with the unconscious conviction that sexual love is wicked, aggressive or disgusting, his every experience of sexuality will necessarily seem wicked, agressive or disgusting, and so it will go to reinforce the pre-existing conviction.

A secure and happy childhood is important as a preparation for matrimony, not only because it is secure and happy, but because it is only within an atmosphere of happiness and security that a child can pass satisfactorily through all the stages of development which lie along the way to emotional maturity.

At any of these stages a distortion or an arrest of development may take place in adverse circumstances, so that the child reaches adult life with its emotions stunted or twisted by unresolved conflicts. Although it is technically correct to describe these stages as being, in the widest sense, phases of sexual development, no one should be misled by this description into supposing that their influence is confined to the sphere of overt sexuality. To be sure, overt sexual love is of immense importance in marriage, and any practitioner will confirm that obvious sexual difficulties lie at the root of many petitions for divorce (and nullity).

The desire to commit sodomy and other perversions,[6] and unduly brutal approach to sex on the one hand, and on the other (although the two have a close underlying affinity) and excessive fear of sexuality; scoptohilia, which may find expression in the desire of one spouse to spy on the other, even impotence and frigidity—all these are examples of sexual problems which arise from just such a stoppage or distortion of development as we have described. For it is natural for children at different ages to be preoccupied with their excretory functions and to develop a, basically, sexual interest in them, to fear sexuality (or, more accurately, the strength if their own sexual impulses), or to feel intense curiosity about the human body and its sexual functions such as may give rise to an impulsive desire to spy; and there is always the danger, too, that if these and other characteristics are met by rejection rather than understanding, the sexual impulse may become so fused with fear, aggression and hostility that normal sexual intercourse becomes quite impossible. (this latter event may give rise in later life to violent sexual crime, in which impulses denied a normal outlet burst forth uncontrollably.)

To pass successfully through all the succeeding stages of development is to attain emotional maturity; but few of us ever reach this goal. And here the point must be made that emotional problems which occur within marriage have very little to distinguish them from emotional problems which occur in any other setting, for it is precisely this failure of parents to accept their children with unprejudiced love, neither too dominating on the one hand nor too permissive on the other, and to treat them from the start as individuals with a dignity commensurate with their status as human beings, which is responsible for more anti-social conduct, more neurosis and more general mental suffering, as well as more marital disharmony, than any other single cause. Nor should it escape our attention that one of the main causes of a person's emotional problems (marital or otherwise) is the emotionl problems of his parents, so that to bring happiness into a marriage is vastly to improve the lives not only of the parties to the marriage itself, but of their children and perhaps even of their grandchildren and great-grand-children.

But the attainment of emotional maturity involves the possession of many capacities essential not only to marital happiness but to happiness in general: the ability to love consistently and profoundly, to accept and cope with life as it really is, to compromise, to share affection without feeling jealousy, to admit divergences amongst one's family from one's own ideas and beliefs. All these things are denied in greater or lesser degree to one whose childhood has been insecure and riven by conflict. Such a person may well reach adult life with his natural capacity for love swamped by a kind of passionate hatred—hatred which is really love gone sour, not so much love's opposite as a perversion of love itself. The hatred which he feels is for his parents or other childhood figures, the people whom he needed so desperately to love, and yet those for whom he could so often feel nothing but hostility, or (and this is only to put the same point in

[6] Perversion, however, except in so far as they reflect a more general immaturity, do not impair a marriage, unless one party objects to them. This is a point courageously made by John Osborne in *Under Plain Cover* (published with another play as *Plays for England* by Faber & Faber, 1963). Thus it has been estimated that as many as 15 per cent. of even hetero-sexual couples commit sodomy: Dr. Edward Glover, *The Roots of Crime* (Imago, 1960), p. 209.

another way) for repudiated parts of his own personality. But since the source of these feelings seems too dangerous to be admitted to consciousness, he goes through life seeking other targets at which they may be directed. Often he will meet and marry a person who is also in search of such a target, and in these circumstances the marriage will be sustained not by love but by hate[7] The advent of children provides another outlet for such feelings, and it is an open question whether some marriages are sustained more by the parties common hatred of their offspring or by their mutual hatred of one another. Basically unhappy as such people are, their marriages rarely end in divorce, for they have too great a need of one another and find too great a satisfaction in their destructive relationship.

What we have said above applies most forcibly to that phase of development which occurs at the age of between three and five, when the child begins to form a real and deeply emotional bond with the parent of the opposite sex. Upon the nature of this relationship more than upon anything else depends the child's future ability to create a satisfactory relationship in marriage. If a boy's relationship with his mother was a free and a loving one, and if they have both succeeded in progressing beyond it, his future wife will stand a good chance of obtaining a husband in whom maturity is combined with emotional harmony and the capacity for deep and lasting affection. But if the childhood relationship was tense, inhibited, depressing, frightening or unsatisfying then it will inevitably cast a shadow over the future marriage relationship.[8] Without knowing it the boy may in later life seek out a woman who is like his mother, or one whom he can force into her unsatisfactory mould. He may then blame his wife for the faults of his mother and spend his time pursing other women in a vain attempt to capture that perfect relationship of which he feels himself to have been deprived. The mature man can accept the fact that every wife has faults and that none is perfect, and he can control his urges to anger or adultery in the cause of preserving unimpaired a relationship which will provide a secure basis for the lives of his children, a rock to which he himself can cling throughout his life and a shelter from the cold of old age. Such a person as we have been describing is incapable of this.

Here, then, is another reason why divorce may not bring the happiness which a client expects, for it will not change his personality and if this has led him to fail in his first attempt to establish a stable relationship it is not unlikely that it will continue to bedevil his attempts in the future. Thus he may find himself driven to disaster again and again by his own unsolved problems, like a moth drawn into the flame of the same candle. Quite apart from moral considertions, it is bad in terms of practical policy to try to solve a problem by running away from it. It would, however, be foolish to suggest that a second marriage can never be more happy than a first, for in some cases the failure of the first marriage may have been predominantly (though never entirely) due to the other spouse. Alternatively, an admittedly immature or neurotic spouse may be more successful at the second attempt in finding a partner who will tolerate these characteristics. And if the choice were only between divorce and the continuing unhappiness of a loveless marriage then it would be hard unhesitatingly to advocate the preservation of the marriage. Divorce leaves a scar, but even a scar my be preferable to an open wound. Fortunately, however, there is now a third alternative.

[7] A detailed exposition of this, together with a particularly good explanation of the significance of the stages of infantile development, is to be found in Dr. Karin Stephen's *The Wish to Fall Ill* (paperback edition by The Cambridge University Press, 1960).

[8] Cf. Stephen, *op. cit.*, p. 188: "The ... situation is important because it is the child's first experience of love and sets the pattern for the loves of later life. According to the way in which the child succeeds in dealing with the difficulties inherent in this first love situation it learns how to love and is able to go onto healthy sexual maturity, or else its power of loving becomes impaired by entanglement with hostility, and it attempts to give up sexuality, fails to mature, and remains emotionally crippled and fixated to its early love disaster".

This is the sustained attempt of the parties with skilled help to transform their marriage relationship by gaining insight into, and thus resolving, the underlying conflicts which have jeopardised its happiness. For reasons which we shall give, we believe the help to which we have referred to be most effective when it is given in the form of analytical psychotherapy. People who have recourse to treatment of this kind are often accused of seeking an easy solution to the problems of life. In reality they seek the most difficult of all solutions—the most difficult but the most satisfying: self-knowledge. And the attempt should not be made by those lacking to any considerable degree in courage, seriousness of purpose and the will to achieve. Nor should it be concealed that this course may involve for an initial period suffering still more intense than that which the parties have already undergone. But to those who can accept its challenge, it may bring rewards which range from (at one end of the scale) the ability to bear what was previously an unbearable situation to (at the other) emotional rebirth and the attainment of such happiness as they had not known to exist.

But why is psychotherapy necessary? Surely advice and encouragement may often be enough? In attributing married unhappiness largely to the images of childhood which the parties carry at the back of their minds and to the effects of certain types of upbringing, we do not seek to belittle the harm which may be done to a marriage by outside events and present-day adversity. The need to live with the parents of the husband or wife, physical illness or disablement, inability to find work, ignorance about contraception; these things and many more may place a strain upon the most harmonious of marriages. And it is in cases such as these that more superficial help may be sufficient. Nevertheless, the ability of the marriage to survive difficulties even of this kind will ultimately depend upon what (for want of a better general phrase) we have called the emotional maturity of the parties and their insight into their own behaviour and its motives. A spouse who destroys the happiness of a marriage is seldom aware of what he is doing and (it is safe to say) never aware of his real reasons for doing it. These are always in some degree unconscious and therefore beyond voluntary control.

This is why mere advice is often useless. Suppose we were to suggest that our profession should stop treating its office staff like skivvies. Denial and rationalisations—never admissions—would come thick and fast: "But I don't...how dare you? ... why, only last week...the wages they demand...in any case, some of them ask for it..." Although no doubt the vast majority of us are considerate employers some of us are not; and yet it is precisely these who would protest the most loudly.[9] They might well realise that there was something radically wrong with the way their firms were running, but as for blaming themselves—the very idea! And so it is with marriage: you cannot, even impliedly, tell a man that he is a bad husband and should mend his ways without encountering the strongest possible resistance and running the risk of making matters worse instead of better.[10] But the bad employer might be willing to call in a business efficiency expert, if only to have the satisfaction of showing him the inefficiencies of his staff. And so it is with marriage: many a husband has gone to a therapist with the sole intent of telling him that his wife is hateful,

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[9] Cf. Dr. J. A. C. Brown, *Techniques of Persuasion* (A Pelican Original, 1963, p. 67: "... to try to alter a person's attitudes by direct instruction is to imply that he is wrong and this is interpreted, consciously or unconsciously, as an attack ..."It is an axiom that people cannot be taught who feel that they are at the same time being attacked'." But contrast Dr. Storr's description of the analytical psychotherapist's approach (Storr, *op cit.*, p 131): " ... (it) constantly demands of the patient that he should himself solve his own problems, and does not require that he should agree with the doctor or take over his ideas. The function of the analyst is to make clear what the problems are, not to provide ready-made solutions; and the avoidance of didacticism is designed to encourage the patient's independence".

[10] Brown, *op. cit.*, p. 78: "Nobody likes to have been proved wrong over some deeply-felt issue, and the result is increased aggression rather than the resolution of a social conflict".

intolerant and crazy, and many a wife has supported the venture simply in order to blacken the character of her husband. But many a husband and wife have emerged from a course of therapy which had so unpromising a beginning with the sober realisation that some of the faults (and use the word here without moral overtones) lay within themselves and not their spouses.

Analytical psychotherapy is a phrase embracing a variety of techniques which have in common the aim to improve an individual's adjustment to life and to resolve his emotional problems (whether or not they fall within a narrow definition of neurosis) by giving him insight into their origin. Treatment is by word of mouth alone, and of drugs are used at all they are employed only to assist the patient to gain insght, or to reduce the anxiety or depression which he may feel at some stages of the treatment. Psychotherapy varies in depth. At one end of the scale is classical psychoanalysis which may last for several years and extend to every aspect of the personality. At the other is superficial psychotherapy which may last only a few weeks. Which of these is employed will depend on a variety of factors, among them the seriousness of the patient's difficulty, his intelligence and his moral courage (and, it is unfortunately necessary to add, the training and even the availability of a suitable therapist, and thus the area in which he lives and his financial resources). Psychiatry and psychotherapy are by no means synonymous, although a growing number of practitioners combine both skills. Psychiatrists are traditionally doctors who treat the grosser forms of mental illness by means which are principally physical. Psychotherapists are seldom able to relieve these, though they may relieve problems which would otherwise lead to them; they do not (except as mentioned) employ physical methods, and they need not be (though they often are) medically qualified.

How can treatment of this kind be obtained? Here we have no ready answer. The client's doctor may know of a suitable agency; but he may equally well have little knowledge of the treatment or even (for general medical training has not in the past devoted much time to it) be prejudiced against its use. Similarly, the nearest psychiatrist may be the answer; but the may equally well lack either the training or the time to assist. But what of the Marriage Guidance Councils? These Councils, each in some degree autonomous but all affiliated to the National Council.[11] are established throughout the country and exist in more than a hundred towns in England and Wales. In 1959 the help of their counsellors, whose services are free, was sought in 12,000 marriages.[12] In spite of these impressive facts we confess that we approach the work of the Councils with mixed feelings. Counsellors give their services on a part-time basis, and being unpaid must inevitably spend most of their time earning their living in other ways. Their basic training, admirable though it may be, is short in the extreme and does not of itself qualify them to practise any form of psychotherapy.

This poses an initial prob'em, for although we recognise that it is not practicable in every case to trace marital problems to their childhood origins, we doubt whether any deep and lasting improvements can be brought about by counselling which does not attempt even superficially to deal with the unconscious problems involved in a marriage. The situation in London is comparatively good, because in-training of counsel ors is continued for many years so as to give them insight into unconscious motives and the capacity to deal with them.

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[11] Its address, from which information may be obtained, is 58 Queen Anne Street, London, W.1.

[12] These facts are taken from Mr. J. H. Wallis' *Someone to Turn to* (Routledge & Kegan Paul, 1961), p. 96. The book is obtainable from the address just given at 7s. 6d. + 8d. postage. The Councils were strongly supported in a letter from Mr. Louis Gabe (GAZETTE, December 1961, p. 739).

The same is true to some extent in other large cities, but in the smaller Councils the help given to clients may be supportive only, or of a limited nature.[13]

Mr. J. H. Wallis[14] records the growing dissatisfaction felt by many counsellors when faced with psychological problems with which they know themselves to be unfitted to deal. In this connection, however, mention should be made of the fact that the Councils can in some cases refer their clients to psychiatric consultants; but this advantage seems greater in theory than in practice for, to quote Mr. Wallis, "the need far outstrips the facilities"[15] and counsellors are often reduced to discussing their clients' problems with the consultant at second hand in order to make an "economical use of [his] time". [16] In truth the Councils do not seek to disguise the fact that in the best of all possible worlds their work would be carried out by highly trained paid therapists working full-time to meet need which is undoubtedly desperate. But they reasonably point out that at present such therapists exist only in the imagination and that until the government of the day sees fit to clothe them in flesh the work of the Marriage Guidance Counsellors will continue to be much better than nothing. And so, most certainly, it will.

The enquiries which we have made for the purpose of this article have revealed a very bright spot in a landscape which seems in many respects a little overcast. We have discovered one agency in particular which seems to possess all the requirements for dealing in depth with marriage problems. This is the Family Discussion Bureau, attached to the Tavistock Institute of Human Relations in London. [17] The casework staff are fully qualified to undertake the deepest forms of psychotherapy when these are indicated and regard it as part of their function to investigate the dynamic interaction of personality which takes place at an unconscious level. The Bureau appears (and indeed is recognised by the Marriage Guidance Councils) to be a model for other organisations of its kind, and we venture to think that any husband and wife fortunate enough to obtain its help would receive treatment which could hardly be bettered. Unfortunately, however, its very quality seems to be such that it cannot at present be extended or duplicated in other parts of the country.

Any solicitor who obtains help for a marriage, whether from the Family Discussion Bureau, privately, from the Marriage Guidance Councils or otherwise, has the privilege of setting the parties on a road which may eventually lead them to what is perhaps the greatest satisfaction known to mankind: a happy and stable family life. As his reward, he may obtain their lasting allegiance and, more important, their gratitude.[18]

[13] The last two sentences are copied almost verbatim from a letter written to us by Dr. Philip M. Bloom, a consultant psychiatrist attached to the London Marriage Guidance Council, to whom we are greatly indebted for his kindness in giving us most helpful information about the precise facilities provided by the Councils and by other agencies. With regard to these other agencies, he says that "apart from the Family Discussion Bureau and one or two hospital psychiatric departments which have appreciated the need ... the Family Planning Association has, here and there, set up departments where therapy can be given in sexual and marital problems. These last are in short supply ... I think you have to enquire personally of the various hospitals in your neighbourhood whether any of them take a particular interest in long term therapy of an analytical nature but most probably you will be disappointed". He concludes by suggesting that "Marriage Guidance Centres, especially in the bigger cities, have generally the most to offer".

[14] *Op. cit.*, p. 80.

[15] *Loc. cit.*

[16] Pages 77-78.

[17] The address, from which information may be obtained, is 2 Beaumont Street, London W.1. The Bureau point out in a letter that although they believe themselves to be "the only specialist agency dealing with marital problems staffed by professionally trained workers" they consider that "overt marriage problems ... are in a minority even though there are many of them", and that "the bulk of marriage problems present themselves in disguised ways, for example when the presenting symptom is a disturbed or delinquent child, physical or other symptom of ill health, it often proves ... to be a derivative of stress in the marital relationship". This serves to re-emphasise a point made earlier in this article. They add: "These disguised problems of course present themselves to many other agencies who are non-specialist from the point of view of marital work and it is for this reason that all our efforts in the training field have gone into extending the skills of professional workers in other settings". One such setting may well be that of the Probation Service.

[18] Such at least has been the personal experience of one of us.

APPENDIX "52"

DIVORCE REFORM IN CANADA

by

G. R. B. WHITEHEAD

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It is not surprising that in the course of the far-reaching social changes of this century public opinion on the subject of divorce should have moved a long way from the views which were generally accepted in the time of our grandfathers: but there are few departments of the law in which changes are more difficult to accomplish than this one, and at present it is probably true to say that the great majority of Canadians are not satisfied with the law as it stands.

The rule which in most provinces treats adultery as virtually the only ground for divorce, and requires proof of only a single act of adultery, is the principal ground of dissatisfaction. In Nova Scotia cruelty is an additional ground, and in each of the three old Maritime Provinces the distinction between nullity and divorce is less clearly drawn than it usually is elsewhere, so that impotence and consanguinity are treated in the relevant statutes on the same footing as matrimonial offences. In Ontario and the Western Provinces, where the divorce law is based on the (Imperial) Divorce and Matrimonial Causes Act of 1857, rape, sodomy and bestiality are additional grounds; but the last two fortunately are rare, and rape committed by a married man necessarily constitutes adultery, unless it is rape on his wife, which can be only if they were legally separated: see R. v. Miller L.R. 1954 2 Q.B. 282.

It is only since the (Canadian) Marriage and Divorce Act of 1925 (RSC 1952 c. 176) that a wife can claim a divorce on the ground of her husband's adultery alone. This change in the law, which followed on the enfranchisement of women, has, in practice, opened the door very wide and has led in some cases to unduly hasty divorces and in others to collusion which it is almost impossible to prove. No one will dispute that even a single act of adultery by a married man is a grave moral offence: but to regard it as fundamentally destructive of a marriage, without regard to the circumstances, is to impose a penalty which may in many cases be out of proportion to the wrong which has been done. Those of us who, in one or other of the two World Wars of this century, have served for three or four years in the Army overseas and remember the conditions which prevailed in the theatres of war at the time, are not likely to consider a comrade whom we knew to be a happily married man as deserving of losing his marriage merely on account of occasional lapses occurring when he had not seen his wife for a year or more; and nearly all of us would have viewed with great disfavour any busybody who made it his business to tell our comrade's wife about them.

The same might be said, in many cases, of the well-meaning or perhaps merely officious person who "thought the husband ought to know" about what his wife was doing during his absence. There are, of course, many degrees of gravity in sins of this kind; and even in Canada in peace time there is a great difference between the man who goes out of town on a convention and succumbs to temptation at a stag party and the man who seduces his wife's best friend in their home town. Yet each of these cases is equally a ground for divorce, and, if proved, entitles the Plaintiff to a divorce *ex debito justitiae.*

It is a truism to say that, in many of the cases where the claim for divorce is based on a single act of adultery by the husband, the adultery, even if genuine, has not been the real cause of the breakdown of the marriage. One or other of the causes discussed below may have led to the wife wanting a divorce, and the adultery is alleged merely because, under the present law, it is a ground for divorce whereas the real cause of the trouble is not a ground for divorce. Under these conditions the temptation to fake evidence of adultery is obviously strong in cases where both parties want a divorce. Of course, no lawyer should accept a case which he knows to be collusive but it is often almost impossible to distinguish between those which in reality are collusive and those where the parties have merely collaborated in finding the evidence after the adultery has been committed.

When divorce for the husband's adultery, without any other matrimonial offence, was first introduced in England after World War I, there was a flood of cases where the husband had sent his wife an hotel bill purporting to show that he had spent a night at an hotel with a woman, signing the register as Mr. and Mrs., and the wife then petitioned for divorce on the ground of his adultery. This system became so well established that the letter enclosing the bill became known in certain circles as "the usual letter", and sometimes in London on Mondays, when there were always three or four divorce courts sitting to hear undefended cases (at the rate of 30 cases per court per day) counsel might have anxious moments while waiting for his case to come on, because he knew that his witnesses were engaged in giving evidence in a similar case before another judge, and it was going to be very embarrassing if he had to ask for his case to be taken a little later in the list for that reason. Moreover, the chambermaid who was going to prove the adultery by describing how she took early morning tea in to such and such a room and found the Respondent (Defendant) and a woman who was not the Petitioner (Plaintiff) in a compromising situation would certainly have received a good tip for remembering the occasion; but often when the same chambermaid appeared as a witness in a number of such cases over a short period one began to wonder whether she really always was sure that the woman whom she had seen on one occasion only, in bed, was not the Petitioner, whom, of course, she did not know and had seen only in court that morning. Eventually Lord Merrivale, the President of the Admiralty, Probate and Divorce Division of the High Court (a judge of great experience, who commanded universal respect) determined to try to check what he could see had become an abuse; and in Aylward v. Aylward (1928) 44 TLR 456, a case in which he suspected that the Respondent (Defendant) was really committing adultery with a woman who was not the one he had taken to the hotel, he refused to make a decree. Some years later, however, in Woolf v. Woolf, L.R. 1931 P. 134, he refused a decree because the evidence established only that the husband, who was quite as desirous of obtaining a divorce as the wife was, had spent two nights at an hotel with a woman whose name he refused to give, and Lord Merrivale refused to draw the inference that adultery had been committed. The Court of Appeal would not support him in this, and granted a decree, and of course, after that, hotel divorces proceeded on the same lines as before. By this time the situation had become widely known, even outside the legal profession,

and there was strong pressure for an amendment to the law which would allow divorce on widely extended grounds. By the Matrimonial Causes Act, 1937, passed on the initiative of the well-known author and Independent M.P., Mr. A. P. Herbert, the following new grounds for divorce were created in England:—

(1) desertion for three years
(2) cruelty
(3) incurable unsoundness of mind
(4) presumption of death of the other spouse.

It is not intended to suggest that in any part of Canada hotel divorces have ever become an abuse on anything like the same scale as in England during the 1920's and 1930's (or as they are said still to be in New York): but the Court of Appeal in Nova Scotia, in the case of Durrant v. Durrant (1944) 3 DLR 30 followed the English case of Woolf v. Woolf mentioned above, and (overruling the Court of first instance) found adultery proved because a man and a woman had been found together in a hotel room at night, partly clothed, without any evidence of previous inclination to commit adultery; and this does leave a loophole which couples who want a divorce for reasons which the law in this country does not regard as sufficient can use for obtaining a divorce on the ground of adultery which never really took place. In such circumstances collusion is almost impossible to prove, and in any case it is not collusion if the wife knows nothing about the matter till the husband sends her the hotel bill.

The English Act of 1937 was a relief not only to litigants but to lawyers who had shared Lord Merrival's misgivings as to the system of hotel divorces; but it has certainly increased the difficulty of the judges' task in many cases where there may be a doubt as to whether the Respondent's (Defendant's) leaving the Petitioner (Plaintiff) was desertion or a justifiable withdrawal from an intolerable situation, and similarly where there is a doubt as to whether or not the Respondent's conduct was sufficiently inconsiderate to qualify as cruelty. Nevertheless, if there are to be changes in Canada, the English Act of 1937 may well be a suitable basis on which to start work.

Among the possible additional grounds on which divorce might be granted in Canada are:—

Desertion

This, under the present law in England, has to be for a continuous period of not less than three years immediately before the date of commencement of the divorce proceedings. There will probably be some who will feel that, even if desertion is to be allowed as a ground at all, the period ought to be longer than three years; and it is submitted that in any case the period ought not to be shorter than three years, because some desertions are due to temporary causes such as mother-in-law trouble, and if the deserted party has to wait till the cause of the trouble can be seen in perspective before anything irreparable is done, the cause may by then have disappeared or become manageable. In recent years proposals have been made in England to allow the deserting spouse to take proceedings for divorce after being in desertion for a term of years, thus taking advantage of his or her own wrong: but this idea has found no favour in the British Parliament, and it seems unlikely that it would do so in the Canadian Parliament if it were brought forward here.

If desertion were to be allowed here as a ground for divorce, the standards as to what constitutes desertion would presumably be the same as those which are now applied where desertion is pleaded by the Defendant as a defence to proceedings against him for a divorce on the ground of adultery. These are, in effect, the same as the standards now applied in England in proceedings for divorce for desertion. Probably as good a definition of desertion as can be made

is that which is found in the Report of the Royal Commission on Marriage and Divorce (Cmd. 9678, H.M.S.O., London, 1956) and runs as follows:

> "A separation of the spouses which is against the will of one spouse and which is accompanied by an intention on the part of the other spouse without just cause permanently to end the married life together."

It would be very difficult, and, (it is submitted) not advisable to attempt to lay down in statutory form a definition of desertion which would be a ground for divorce, because circumstances vary so greatly; and it would not be desirable to make too rigid a rule as to temporary resumption of cohabitation terminating a period of desertion, because that would greatly hamper attempts at reconciliation. The judges, both in Canada and in England, have had to deal with many difficult cases and have been well able to apply the general principle embodied in the Royal Commission's definition quoted above to the facts of each case as it came before them.

In cases where desertion is the ground on which divorce is being sought, it would be necessary to allow the Defendant to plead that the Plaintiff's conduct had made it impossible for him or her to remain in the matrimonial home, even though such conduct did not qualify as cruelty in the legal sense. If the Court were satisfied that such conduct on the part of the spouse who had remained in the matrimonial home was intended to drive out the other spouse, this would probably, following the rule in force in England, be treated as sufficient to enable the spouse who had left the matrimonial home to claim, after the prescribed period, a divorce against the spouse who had remained in the home on the ground of constructive desertion. Here again it would have to be left to the Court to determine in each case whether or not one spouse's shortcomings had been sufficiently serious to justify the other in leaving home. Numerous cases have been reported in England on this subject, in one of which the wife, who had remained in the matrimonial home, was found guilty of constructive desertion because she insisted (contrary to her husband's wishes) on keeping a large number of cats in the house, and told her husband that she preferred the cats to him. On this ground he was granted a divorce.

If the spouses originally parted by mutual consent, much will depend on the terms on which they parted. It would hardly be possible to treat as being in desertion a husband who had parted from his wife on the terms of a separation deed and had always punctually performed his obligations under the deed: but where the spouses parted by mutual consent but without any deed and without any express agreement as to the duration of the separation either spouse would probably have to be allowed to put an end to the agreement to separate and to treat the other as being in desertion from that time onwards, so that the three years would begin to run from the same time. This is the rule in England, and it does not present much difficulty in practical application.

If the deserting spouse repents during the three-year period and makes an offer to return which the Court regards as genuine, it should probably be treated as ending the desertion: but if he delays until the three-year period has run, and even more if he delays till divorce proceedings have been commenced against him, it might well be considered that the deserted spouse had acquired a right to a divorce, of which she was now entitled to avail herself.

Cruelty

Any extension of the grounds for divorce would presumably make cruelty a ground, as it already is in Nova Scotia. If there is to be a statutory definition of cruelty it would have to be a wide one, such as already exists in Quebec, Saskatchewan and Alberta. Article 189 of the Quebec Civil Code provides that husband and wife may respectively demand separation on the ground of outrage,

ill-usage or grievous insult committed by one towards the other, and Article 90 provides that the grievous nature and sufficiency of such outrage, ill-usage and insult are left to the discretion of the Court, which, in appreciating them, must take into consideration the rank, condition and other circumstances of the parties. In Saskatchewan and Alberta cruelty is defined as not being confined in its meaning to conduct that creates a danger to life, limb or health, but as including any course of conduct that, in the opinion of the Court, is grossly insulting or intolerable, or is of such a character that the person seeking the separation could not reasonably be expected to be willing to live with the other after he or she has been guilty of such conduct. In England and in the Canadian Provinces where English authorities are usually followed, cruelty is held to include only conduct which creates a danger to the other spouse's physical or mental health: see Russell v. Russel L.R. 1897 A.C. 395. Until recently it was considered that conduct, however inconsiderate, was not cruelty unless it was "aimed at", or intended to injure, the other spouse: see, e.g. *Kaslefsky* v. *Kaslefsky* L.R. 1951 P. 38: but in *Gollins* v. *Gollins* L.R. 1964 A.C. 644 and *Williams* v. *Williams* L.R. 1964 698 the House of Lords held that in cases of cruelty it was not necessary to show an intention to injure or inflict misery, or a guilty mind. The two essential elements were injury or apprehended injury to health and that the conduct must be grave and weighty. It is submitted that, if cruelty is to be made a ground for divorce generally in Canada, it would be preferable to judge cruelty by the standard now applied in Quebec, Saskatchewan and Alberta, and not to confine it to cases of injury or apprehended injury to the other spouse's health. The evaluation of evidence as to the injury or danger of injury to a spouse's health may be very difficult, especially if the doctor by whose evidence the danger of injury is to be proved has known the family only a short time. In some cases there may be in the Plaintiff's condition an element resembling what in suits for damages for personal injuries is known as "compensationitis", and in others there may well be a doubt as to whether the Plaintiff's nervous condition is due to the Defendant's conduct or the Defendant's conduct is due to the Plaintiff's nervous condition. In any case, a very wide discretion should be left to the Court in determining what conduct is intolerable and what is not. It may perhaps be doubted whether the large number of cases on cruelty now reported in law reports and cited in texbooks really give the Courts very much asistance, since it by no means follows that conduct which qualified as cruelty in one case ought so to qualify in another, where different personalities were involved: and, even among people of the same background the ideas of the present generation are not always the same as those of their parents, e.g. as regards the use of contraceptives.

Sentence of Life Imprisonment

In New York this involves civil death, and if the prisoner is married his or her spouse is entitled to re-marry, thus putting an end to the prisoner's marriage. In England it may enable the innocent spouse to divorce the prisoner for cruelty, if it can be shown that the shock arising from the conviction has caused a breakdown in the health of the innocent spouse. If the grounds for divorce are to be extended in Canada, many people may wish to see life imprisonment included among them, especially now that murderers, most of whom used formerly to be hanged, now nearly always have their sentences commuted. An argument to the contrary is that the divorce may make the prisoner's rehabilitation more difficult; but it cannot be asumed that his wife will be willing to live with him again if and when he gets out of prison; and, considering the scandal and misery which a husband's trial and sentence to life imprisonment must bring on his wife, it seems illogical that she should be tied to him while another woman (who may be her neighbour) has been able to divorce her husband for a single act of adultery committed in an unguarded moment.

Incurable Unsoundness of Mind

This is a ground for divorce in England under the Act of 1937, if the patient has been continuously under the care and treatment for a period of at least five years immediately preceding the presentation of the divorce petition. The period of five years is not considered to be broken if the patient is lawfully on leave of absence from the mental hospital on trial. It seems probable that a proposal to make this a ground for divorce in Canada would meet with a good deal of opposition, because, except in rare cases, the patient is in no way to blame for the disaster which has overtaken him, and if he is sufficiently lucid to understand that his wife is divorcing him, it may tend to make his mental condition worse. In addition, there are some cases where a mental patient recovers even after five years. On the other hand, the patient's detention in a mental hospital leaves his or her spouse in a most unsatisfactory position, and cases of this kind are apt to lead to the formation of irregular unions, which are deplored both by lawyers and by moralists.

Presumption of Death of the Other Spouse

This is a ground for divorce in England under the Act of 1937. The Petitioner has to prove that for a period of seven years or upwards the other party to the marriage has been continually absent from the Petitioner and that the Petitioner has no reason to believe that the other party has been living within that time. There are Rules of Court which prescribe the steps which the Petitioner must take to try to trace the missing spouse. It is for the Court to decide whether or not to draw the inference that the missing spouse is dead. If the parties are legally separated, the mere fact that the Petitioner has not heard of the missing spouse for seven years may quite probably be found insufficient.

In New York there is an "Enoch Arden Law" providing that if a husband or wife disappears for more than five years and is not known to be living despite efforts by publication to find him or her, the other spouse may sue for dissolution of the marriage.

Cases of this sort are fairly common in Canada even in peace time, and during both World Wars there were a number of cases where soldiers were reported "missing" or "missing, believed killed" and were never heard of again. In such a case the wife could, no doubt, re-marry without risking a criminal prosecution for bigamy at any time after the government had started paying her a widow's pension, because even if it was afterwards shown that the first husband was living at the time of the second marriage she could plead the receipt of the pension as evidence that she had reasonable cause to believe that he was dead: but, of course, that would not make the second marriage valid, and she might find herself divorced by her first husband for adultery and be sued by the second husband for nullity of the second marriage on the ground of bigamy. A reform on the lines either of the English or of the New York law would eliminate that possibility. Such a reform might possibly lend itself to abuse by a couple who wanted to get rid of each other; but it seems unlikely that it would, because there are easier and quicker ways of getting a collusive divorce than by disappearing for five or seven years.

Conclusion

Since under the British North America Act only the Federal Parliament can amend the divorce law, it is evident that any reform is going to need the active or passive assent of many who on principle disapprove of divorce a vinculo matrimonii altogether and believe that marriage ought to be indissoluble during the lifetime of the parties. A campaign by enthusiasts for reform who would regard an extension of the grounds for divorce as a victory over the forces

opposing them would probably be foredoomed to failure. There would be a much better chance of success if those who are interested in an extension of the grounds could make contact in advance with the other side with a view to seeing if some common ground could be found. Those of us who disapprove of all divorce a vinculo are well aware that the climate of public opinion in most parts of Canada renders restriction of the present grounds quite impossible, and probably most of us are aware that the present system of requiring evidence of adultery as an essential condition for a divorce is an incentive to collusion or to the commission of adultery which otherwise would never have been committed. Moreover, once the posibility of divorce is accepted as inevitable, some of the things discussed above may well be felt to be at least as valid grounds for Moreover, once the possibility of divorce is accepted as inevitable, some of the people on both sides of the controversy would regard as an improvement on the present position might be worked out on the basis that the grounds for divorce should be enlarged by adding some or all of the things discussed above, but that (as in England under the Act of 1937) no one should be allowed to commence proceedings for a divorce within the first three years after the marriage, unless the Petitioner obtained special leave from the court to do so, which would be granted only if the Petitioner could show exceptional hardship suffered or exceptional depravity on the part of his or her spouse. It might also be thought worthwhile to set up "conciliation courts" such as are now functioning in Los Angeles and other places in the United States, to which couples who are contemplating divorce can be referred, if they are willing. Not much seems to be known about these courts in Canada, but it is said that in quite a large proportion of cases they are successful in reconciling couples whose marriage was breaking up. Resort to these conciliation courts does not bar either party from taking divorce proceedings in the ordinary courts if no reconciliation can be arrived at. Either or both of these suggestions might help considerably in reducing the number of divorces among couples whose primary mistake was that they got married when they were too young and immature to assume the responsibility of the married state.

It would not be necessary that the grounds for divorce should be the same in all Provinces of Canada; and, indeed, they never have been. For instance, Nova Scotia has had its divorces for cruelty since before Confederation. If, for example, it became apparent that the Western Provinces wanted to introduce some ground for divorce which was not favourably regarded in Ontario or in the Maritimes, Parliament could make a distinction between the Provinces accordingly. It is assumed that in any case divorces in Quebec and Newfoundland would continue to be Parliamentary, and the Divorce Committee of the Senate would inform the Commissioner, who now hears the evidence, of the grounds on which they would probably be prepared to recommend a Parliamentary divorce if and when that ground was established by evidence before them.

None of us would expect either of the two principal political parties to commit itself to divorce reform. It would have to be done, as it was in England in 1937, by some private member or group of private members consulting with those interested, including religious leaders, social workers and members of the Bench and Bar, and then drafting a Bill which would embody the greatest common measure of agreement and would, at the same time, be capable of practical application in Court. Members of our profession in active practice and with the necessary experience who could make time to help in preparing such a reform would be performing a very real public service.

APPENDIX "53"

CRUELTY WITHOUT CULPABILITY OR DIVORCE WITHOUT FAULT

by

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On June 21, 1963, the Lords Spiritual and Temporal rejected[1] an amendment to the Matrimonial Causes and Reconciliation Bill which would have permitted a divorce after seven years' separation.[2] On June 27 the House of Lords, sitting as the ultimate appellate tribunal, delivered itself, on one and the same day, of two decisions which, as this article hopes to show, have so greatly expanded the concept of matrimonial cruelty that the basis of our divorce law has been tilted away from the traditional doctrine of the matrimonial offence and moved nearer to the principle of breakdown of marriage or "divorce without fault."

The two cases of *Gollins*[3] and *Williams*[4] must rank together as the most important judicial survey of the concept of cruelty since 1897 when the same tribunal laid down that injury to health was the essential hallmark of cruelty as a matrimonial offence.[5] The composition of the court was the same in both cases (Lord Reid, Lord Evershed, Lord Morris, Lord Hodson and Lord Pearce) and in both cases Lord Morris and Lord Hodson gave strong dissenting judgments. All of their lordships delivered separate judgments,[6] their reasoning in the one case usually being closely related to their reasoning in the other. Indeed, the two cases must be read together as a pair, and although they fill sixty-three pages of the *All England Law Reports*, their length is relieved by the sharp clash of judicial opinion which they reveal. Moreover, not only is there the exhaustive and authoritative review of the previous case-law which one would expect from the House of Lords, but one finds also (which may surprise some) a realistic appraisal of the practical social considerations involved in their conclusions.

Gollins, a case originating in a separation order made by the Ludlow magistrates, decided that an intention to injure one spouse is not an essential ingredient of cruelty. *Williams*, which was a wife's petition for divorce, decided that insanity was not necessarily a defence to a charge of cruelty. Both decisions were reached by a majority of three law lords to two; *Williams* reversed majority decision of the Court of Appeal. The dissentients, Lord Morris and Lord Hodson, like Willmer and Davies L.JJ. in the court below, take the view that a certain state of mind is required before cruelty can be made out and, as a logical corollary, that a person who did not know what he was doing cannot be guilty of

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[1] By 52 votes to 31.

[2] Subject to various safeguards. The rump of the Bill has now been enacted as the Matrimonial Causes Act, 1963, and came into effect on July 31. For useful commentaries on the Act, see p. 675 below (Miss O. M. Stone) and the two articles by Mr. Samuels in (1963) 107 S.J. 623 and 639.

[3] *Gollins* v. *Gollins* [1963] 3 W.L.R. 176; [1963] 2 All E.R. 966.

[4] *Williams* v. *Williams* [1963] 3 W.L.R. 215; [1963] 2 All E.R. 994.

[5] In *Russell* v. *Russell* [1897] A.C. 395.

[6] Busy divorce practitioners may well lament that our highest tribunal does not restrict itself to an agreed majority (and dissenting) judgment. In the United States the current fashion within the Supreme Court for the separate opinion, whether in concurrence or dissent, has aroused severe criticism (see, *e.g.*, Kauper, *Frontiers of Constitutional Liberty* (1956), p. 16).

cruelty. The majority (Lord Reid, Lord Evershed and Lord Pearce), having adopted the view in *Gollins* that an intention to injure is not a necessary element of cruelty, proceeded in *Williams* to the conclusion that insanity did not of itself constitute a defence to a suit for divorce on the ground of cruelty.

It is proposed to state the facts and to summarise, as shortly as their importance permits, the several judgments in each case in turn, and afterwards to examine the effect of the two decisions, first upon the concept of matrimonial cruelty, and secondly, upon the related ground of constructive desertion.

Gollins: The Case of the Lay-About Husband

In *Gollins* the husband, who was variously described as bone idle and a lay-about who did nothing except hang up his hat in the hall,[7] was content to let his wife run the home in Church Stretton as a guest-house in order to meet the financial burdens of the household, including staving off the husband's creditors. Although he was incorrigibly lazy, the evidence did not show any wish on his part to harm his wife nor was there any actual physical violence towards her.

In 1960 the wife warned him that she could not stand the strain of his debts any longer and that if he did not get work and clear himself of debt she would take proceedings; she also asked him to stay away from the guest-house. This warning was contained in a letter written to the husband whilst he was temporarily away from home. As her warning had no effect, she obtained from the Ludlow magistrates a maintenance order for him to pay her £3 a week, together with £1 a week for each of their two children, the ground for the order being his wilful neglect to maintain herself and them. Cruelty was not alleged on this occasion nor was any non-cohabitation clause inserted in the order, but the husband began to occupy a separate bedroom and had little contact with his wife. The maintenance order was made in January 1961, but the husband never paid more than a fraction of the amounts ordered. In October of that year the wife applied to the magistrates for a variation of the orginal order by the insertion of a non-cohabitation clause on the ground of his persistent cruelty. No doubt she was advised that without proof of cruelty or the like such a clause was not normally inserted.[8] In asking for the clause her whole object was to get the husband out of the house. She relied on her doctor's evidence that she was suffering from a moderately severe anxiety state, which he attributed to her financial and marital difficulties.

The magistrates found persistent cruelty proved[9] and inserted the desired clause. The husband had meanwhile taken out a cross-summons to revoke the order on the ground that the wife was in desertion or, alternatively, that he was no longer guilty of wilful neglect to maintain because he was not and never had been in a position to pay the amount ordered. On this cross-summons the justices deleted the maintenance for the children and reduced the wife's maintenance to £1 a week; they also remitted the accrued arrears under the original order. Not content with this but smarting under the finding of cruelty, the husband appealed to the Divisional Court. The court found in his favour,[10] but on the wife's appeal to the Court of Appeal, Wilmer and Davies L.JJ. (Harman L.J. dissenting) restored the justice's order.[11]

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[7] Harman L.J.'s telling phrase (at [1962] 3 All E.R. 903, letter I).

[8] See *Jolliffe* v. *Jolliffe* (1963) 107 S.J. 78; *Vaughan* v. *Vaughan* [1963] 2 All E.R. 742 (noted (1963) 26 M.L.R. 581 *supra*). These cases cast doubt upon certain observations of Willmer and Davies L.JJ. in *Gollins* in the Court of Appeal.

[9] In their reasons the justices nowhere expressly mention cruelty, but a finding of persistent cruelty is clearly implied from their tenor; see, to this effect, Lord Hodson at [1963] 2 All E.R. 983, letter C.

[10] [1962] 2 All E.R. 366.

[11] [1962] 3 All E.R. 897.

In the view of the Divisional Court (Sir Jocelyn Simon P. and Cairns J.) the final question which the court should ask itself is "whether the conduct in issue plainly satisfied the meaning of the word 'cruelty' in its ordinary acceptation," and by this test the husband's conduct, however reprehensible, could not properly be stigmatised by the word "cruelty". With this straightforward approach Harman L.J. agreed in his dissenting judgment in the Court of Appeal: to him this seemed to be the beginning and the end of the matter. Davies L.J., however, found "dangerous" the test of asking whether the conduct amounted to cruelty in the ordinary sense of the word[12] and expressed entire agreement with Willmer L.J. who, in a carefully reasoned judgment, emphasised that the question of cruelty resolved itself into one of fact. Hence the answer could not be found by looking at law reports and seeing how other cases in other circumstances had been decided, because the question (to quote Mr. Justice Pearce) was "whether *this* conduct by *this* man to *this* woman or vice-versa is cruelty."[13] Hence too, as was pointed out by the House of Lords in *Jamieson*,[14] the undesirability of creating, by judicial pronouncement, certain categories of acts or conduct having the nature or quality of cruelty, or of attempting a comprehensive definition of cruelty. Nevertheless, he believed that there did exist principles of law to serve as a guide in answering this question of fact. These "propositions of law" he summarised under four heads: (1) there was the basic requirement laid down by the House of Lords in *Russell*[15] that the conduct must cause danger to health; (2) the conduct of the offending spouse must be in some sense aimed at or directed against the complaining spouse, this requirement being laid down by the Court of Appeal in *Kaslefsky*,[16] which decision, "so far as I am aware, has never been overruled and is therefore binding on us"; (3) in the absence of elements (1) and (2) the charge of cruelty must as a matter of law be dismissed; (4) given that requirements (1) and (2) were satisfied, it was a question of fact and degree whether or not the conduct complained of amounted to cruelty. In approaching this last question, Willmer L.J. thought the relevant considerations to be: first, that a spouse should not lightly be held guilty of the serious charge of cruelty, but rather to constitute cruelty the conduct must be of a grave and weighty character or at least it must not come within what Asquith L.J. described as "the ordinary wear and tear of married life"[17]; and secondly, one must always consider the personalities of the two spouses and especially the susceptibilities of the innocent spouse.

Intention Not Essential in Cruelty

Pausing here, it will be seen that his lordship stipulates the conjunction of three elements to constitute cruelty: injury to health, a certain mental element on the part of the offending spouse, and conduct which is grave and weighty.

All five members of the House of Lords endorsed the general comments of Willmer L.J. about cruelty being a question of fact and degree and the undesirability of attempting a comprehensive definition. But the majority held, and this is now the law immutable save by statute, that the second element, a certain mental state on the part of the offender, is not an essential ingredient, although a desire to hurt may be a relevant factor in assessing whether the conduct is sufficiently grave and weighty to amount to cruelty. Or, to put it another way,

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[12] Likewise Lord Herschell in *Russell* [1897] A.C. 395: "it is beyond controversy that it is not every act of cruelty in the ordinary and popular sense of the word which amounted to *saevitia*, entitling the party aggrieved to a divorce." Hence, of course, the constant use of a qualifying epithet by judges and legal writers, *e.g.*, "legal cruelty," "matrimonial cruelty," etc.

[13] *Lauder* v. *Lauder* [1949] 1 All E.R. 76 at p. 90.

[14] [1952] A.C. 525.

[15] [1897] A.C. 395.

[16] [1951] P 38.

[17] *Buchler* v. *Buchler* [1947] P. 25 at p. 45.

the attitude of mind of the offender goes to the gravity and weight of his conduct but no particular attitude is essential. As Lord Reid said: "Often the conduct must take it colour from the state of mind which lay behind it."[18] The new view is put succinctly by him at the end of his judgment: "If the conduct complained of and its consequences are so bad that the petitioner must have a remedy, then it does not matter what was the state of the respondent's mind."[19] Such a case, he felt, was *Williams*. He goes on: "In other cases, the state of his mind is material and may be crucial." Into this second category he groups, on the one hand, cases of a deliberate intention to cause suffering, such as *Jamieson*,[20] and on the other, a case like *Gollins* where the respondent knew that he was injuring his wife's health, although he had no desire nor intent to injure her. He points out that the present is not one of those complicated and difficult cases where the petitioner is partly at fault (such as *King*[21]) or where from illness or temperament the petitioner is unduly demanding or unusually sensitive or where the respondent suffers from some mental abnormality (such as *Williams*). Rather,

> "I am dealing with a spouse normal in mind and health who has been reduced to ill-health by inexcusable conduct of the other spouse persisted in although he knew the damage which he was doing."[22]

As these facts had been clearly proved and went well beyond the ordinary wear and tear of married life, persistent cruelty was established so as to permit the wife to live apart pursuant to the justices' order.

Earlier in his judgment Lord Reid had abjured the attempt to define cruelty comprehensively[23]:

> "Much must depend on the knowledge and intention of the respondent, on the nature of his (or her) character, and on the character and physical or mental weaknesses of the spouses, and probably no general statement is equally applicable in all cases except the requirement that the party seeking relief must show actual or probable injury to life, limb or health."

Nevertheless, he recognised that the matter could not be left simply at large for the trial judge,[24] as this would lead to a multitude of appeals. But his lordship would reduce tests, rules and presumptions to a minimum. "In matrimonial cases we are not concerned with the reasonable man, as we are in cases of negligence. We are dealing with this man and this woman and the fewer *a priori* assumptions we make about them the better."[25]

His lordship proceeded to examine the test of conduct "aimed at" the petitioner as propounded by Denning L.J. in *Kaslefsky*, the case by which Willmer and Davies L.JJ. had felt themselves bound. He thought the phrase "more picturesque than of easy practical application." If the "aimed at" test had been limited to cases of an actual deliberate intention to injure no difficulty would have arisen through it. But cruelty had been extended to situations where no actual intention was proved; instead, an intention to injure had been assumed by resort to the presumption that a man intends the natural and probable consequences of his acts. His lordship illustrates from his own national game that

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[18] [1963] 2 All E.R. 966 at p. 969, letter I.

[19] *Ibid.* at p. 974, letter B.

[20] [1952] A.C. 525.

[21] [1953] A. C. 124; in this case the husband's health was affected by his wife's nagging and accusations, but his petition alleging cruelty failed because his own adulterous conduct had provoked her behaviour.

[22] [1963] 2 All E.R. 966 at p. 974, letter D.

[23] *Ibid.* at p. 969, letter C.

[24] As the Divisional Court was prepared to do, with its reliance on the "ordinary acceptation" of the word cruelty.

[25] [1963] 2 All E.R. 966 at p. 970, letter B.

such a presumed intention is really no intention at all[26]:

> "If I say that I intend to reach the green, people will believe me although we all know that the odds are ten to one against my succeeding; and no one but a lawyer would say that I must be presumed to have intended to put my ball in the bunker, because that was the natural and probable result of my shot."[27]

His lordship considered that such an irrebuttable presumption, laying down, as it must, an objective standard of behaviour, had no place in a matrimonial offence where one is dealing with *this* man and *this* woman. On the other hand, if the presumption is rebuttable, then the onus of proof is transferred, so that the respondent must prove that he did not intend the natural and probable consequences that in fact resulted from his conduct.

Perhaps a more cogent objection to such presumptions[28] is to be found in the judgment of Lord Pearce where he points out that not infrequently acts which any reasonable person would regard as cruel, or which any reasonable person would have known to be injuring the health of the victim, are done by a respondent "who is so bigoted, or obtuse, or insensitive, or self-centred that he or she did not realise that these acts were cruel or injurious or intend that they should be."[29] Now, to avoid giving a free hand to, say, bigots to be as cruel as seems reasonable to their bigotry, "a court may, as a piece of prima facie reasoning, presume that a person intends the probable consequences of his acts. But if that presumption is rebuttable and the court insists on proof of intention, then in many cases of cruelty it cannot honestly give relief against the bigot, the obtuse, the insensitive, the self-centred."[30] To avoid this absurdity, the tendency has been, as both Lord Reid and Lord Pearce observe, for the courts to pay lip service to its insistence on intention but to regard the presumption in question as irrebuttable, or, in other words, to adopt an objective test of intention. By way of example Lord Reid points to the judgment of Willmer L.J. in the present case.

Not being bound by the authority of *Kaslefsky* Lord Reid was of opinion that the time had come to reject intention as a necessary element in cruely. In cases like *Gollins,* "If he knew, or the evidence shows that he must have known, the effect of his conduct, . . . why does intention matter?[31] He finds support for this proposition in *Lang,* where the husband deliberately ill-treated his wife, knowing that this was likely to cause her to leave him but desiring, or hoping, that she would not leave. Lord Reid's ana'ysis of the Privy Council's agreed single judgment (a type of judgment which he acknowledges to be "not infrequently obscure"[32]) deserves citation:

> "He (the husband) did not act with the intention of driving her out, but he acted with the knowledge that that was what would probably happen. There are references to what a reasonable man would have known; but it is said that this man must have known, which I take to mean that it was proper to hold on the evidence that he did know. So in the result his desire to keep his wife or lack of intention to drive her out was irrelevant. The Act[33] said nothing about intention: it used the word

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[26] *Ibid.* at p. 972, letter L.

[27] As Dr. Goodhart has well shown in his magistral article "Cruelty, Desertion and Insanity in the Matrimonial Law" ((1963) 79 L.Q.R. 98), the presumed or "constructive intention" is really not a true intention at all but would be more accurately described as foresight. Thus, if Lord Reid's imaginary golf-ball injured a child whom he knew to be playing in the bunker, he might well be liable in negligence.

[28] Dubbed "disingenuous" by Lord Pearce [1963] 2 All E.R. 966 at p. 990, letter D.

[29] [1963] 2 All E.R. 966 at p. 990, letter C.

[30] *Ibid.* letter D.

[31] [1963] 2 All E.R. 966 at p. 971, letters F, G.

[32] Is this a reference to *D.P.P.* v. *Smith* [1961] A.C. 290?

[33] This refers to the Marriage Act, 1928 (No. 3726), of the State of Victoria, s. 75 (*a*), whereby wilful desertion (but not cruelty) is made a ground for divorce; hence, the reliance in *Lang* on the former, and not the latter, ground.

'wilfully'. So the decision was that if without just cause or excuse you persist in doing things which you know your wife will probably not tolerate, and which no ordinary woman would tolerate, and then she leaves, you have wilfully deserted her, whatever your desire or intention may have been. That seems to be in line with what I am now submitting to your lordships is the law in cases of cruelty."[34]

Professor Goodhart, writing after *Gollins* and *Williams* had been decided by the Court of Appeal,[35] suggested that, in the absence of an actual intention to be cruel, cruelty should be tested by the same objective standard as negligence in the law of tort, namely, the "probable foresight of the reasonable man" in relation to the consequences of the act in question, the only subjective requirement being that the act itself must have been done intentionally.[36] Dr. Biggs, in his scholarly but ill-timed monograph on the concept of matrimonial cruelty,[37] likewise concluded that in order to establish cruelty it must be shown that the respondent foresaw the consequences of his conduct and where such foresight could not be proved it might be presumed by resort to the presumption that a person intends the natural and probable consequences of his acts.[38] Moreover, he argued (very persuasively) that his conclusion was supported by authority, especially the case of *Lang*.[39] For him, however, the presumption is irrebuttable only in the sense that it is invoked in the last resort where there is no adequate evidence to prove either the existence or the absence of foresight in the respondent.[40]

Significantly, both Willmer and Davies L.JJ. in the Court of Appeal spoke in terms of foresight,[41] and the former had even more explicitly adopted this test in *Windeatt*.[42] Lord Reid, however, categorically rejects such a test:

> "Irrebuttable presumptions have had a useful place in the law of tort in facilitating the change from a subjective to an objective standard. In matrimonial affairs we are not dealing with objective standards, and it is not a matrimonial offence to fall below the standard of the reasonable man (or the reasonable woman). We are dealing with this man and *this* woman."[43]

For his lordship then it is not the foresight of the reasonable man, but the intention or at least the knowledge of the actual respondent that has to be considered, and this only in those cases where the state of his mind is in any way material. For "if the conduct complained of and its consequences are so bad that the petitioner must have a remedy, then it does not matter what was the state of the respondent's mind."[44]

Lord Evershed agreed with Lord Reid's opinion and considered that this husband's conduct could be described by the words of Sir William Scott in

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[34] [1963] 2 All E.R. 966 at p. 973, letter I *et seq.*

[35] "Cruelty, Desertion and Insanity in Matrimonial Law" (1963) 79 L.Q.R. 98.

[36] *Ibid.* at p. 125.

[37] John M. Biggs, *The Concept of Matrimonial Cruelty* (1962 and so pre-*Gollins*).

[38] See especially Chap. V, "Foreseen Consequences" and his conclusion at p. 98.

[39] [1955] A.C. 402. A similar conclusion to that of Dr. Biggs about the effect of this case was reached by Sir Carleton Allen in his valuable article "Matrimonial Cruelty" (1957) 73 L.Q.R. 317 and 512.

[40] Biggs, *op. cit.* at p. 96.

[41] Thus, in *Gollins* [1962] 3 All E.R. 897, Willmer L.J. said: "But such an intention (to injure) may in a proper case be inferred where, for instance, the conduct complained of is persisted in (a) after warning that it is having an adverse effect on the other spouse, or (b) *in circumstances in which any reasonable person would appreciate that it was likely to injure the other spouse*" (at p. 901, letter E: italics supplied).

[42] [1962] 1 All E.R. 776, at p. 786, letter C. That his lordship is adopting in these cases an objective test of forsight is plain: see to his decision at first instance in *Usmar* v. *Usmar* [1949] P. 1, where he found the wife in that case cruel although "blissfully unconscious of the disastrous extent to which her conduct was undermining the marriage."

[43] [1963] 2 All E.R. 966 at p. 972, letter E *et seq.*

[44] *Ibid.* at p. 974, letter B.

Evans[45] as being "such as to show an absolute impossibility that the duties of the married life can be discharged."[46] As Dr. Biggs has pointed out, the minority of the House of Lords in *Russell* favoured this very test of impossibility as the criterion of cruelty in preference to that of injury to health, the test which the majority of their lordships adopted. It is interesting that Lord Evershed should apparently accumulate both criteria: he emphasises at the outset of his judgment that the essential requirement of injury to health has been expressly proved in the present case. Perhaps he introduces the test of "impossibility" to compensate for the discarding of the element of intention. In his view the test of "aimed at" emerged from the premise that cruelty involved a quality of malignity in the respondent, and in rejecting both premise and test he declared roundly:

> "the presence of intention to injure on the part of the spouse charged or (which is, as I think, the same thing) proof that the conduct of the party charged was 'aimed at' the other spouse is not an essential requisite for cruelty."[47]

Lord Pearce's Test of Unendurable Conduct

Lord Pearce was also in favour of dismissing the appeal. He begins his long judgment by pointing out that two safeguards have been established against cruelty being founded on mere trivialities and incompatibility. There is the need for the conduct to be grave and weighty, as laid down from the days of Lord Stowell, and *Russell* stipulated that there must also be danger to health. Intention to injure has been rejected as a necessary ingredient of cruelty in cases such as *Kelly, Hadden, Squire* and *Jamieson*,[48] although it may be a deciding factor in some doubtful cases. His lordship traced the germ of the doctrine of "aimed at" from *Horton*[49] in 1940 to its full expression in *Kaslesky*[50] which adopted and elaborated Denning L.P.'s earlier dictum in *Westall*.[51] His lordship had some sympathy with the court's desire in *Kaslesky* "to supply some mesh that would separate the grain from the chaff." Unfortunately, the doctrine had created confusion and difficulty. In his view the test was not a happy one from a practical standpoint and it could only be made to work if it was "patched by presumptions." Under the "aimed at" doctrine the court is at once faced with the difficulty that much cruelty is purely selfish and is not aimed at the victim nor prompted by any intention or desire to injure:

> "A court may, as a piece of prima facie reasoning, presume that a person intends the probable consequences of his acts. But if that presumption is rebuttable and the court insists on proof of intention, then in many cases of cruelty it cannot honestly give relief against the bigot, the obtuse, the insensitive, the self-centred."[52]

He goes on to say that to treat the presumption as irrebuttable in order to avoid the absurdities indicated by him is to arrive back at the same objective test as Dr. Lushington had applied over a hundred years ago[53] when he claimed that he

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[45] (1790) 1 Hag. Con. 35: Sir William Scott later became Lord Stowell.

[46] But, as Sir Carleton Allen has well shown (*op. cit.*, p. 324), Lord Stowell's judgment in *Evans*, read as a whole, implies that marriage only becomes impossible where the wife is in physical danger. It was the dissenting minority in *Russell* who tried to erect impossibility into a test independent of injury to health. This, in the view of the majority (and of Sir Carleton Allen), would be to face the courts with an insoluble problem.

[47] [1963] 2 All E.R. 966 at p. 976, letter E.

[48] *Kelly* v. *Kelly* (1870) L.R. 2 P. & D. 59; *Hadden* v. *Hadden, The Times*, December 5, 1919; *Squire* v. *Squire* [1948] 2 All 51; *Jamieson* v. *Jamieson* [1952] A.C. 525.

[49] *Horton* v. *Horton* [1940] 3 All E.R. 380.

[50] *Kaslefsky* v. *Kaslefsky* [1950] 2 All E.R. 398;]1951[P. 38.

[51] *Westall* v. *Westall* (1949) 65 T.L.R. 337.

[52] [1963] 2 All E.R. 966 at p. 990, letter D.

[53] *Dysart v. Dysart* (1844) 1 Rob.Eccl. 106 at p. 116.

must consider "the conduct *itself* and its probable consequences" rather than motives or intentions.

Having thus rejected intention, whether actual or presumed, as an essential ingredient of cruelty, Lord Pearce propounds his own criteria as follows:

> "It is impossible to give a comprehensive definition of cruelty, but when reprehensible conduct or departure from the normal standards of conjugal kindness causes injury to health or an apprehension of it, it is, I think, cruelty if a reasonable person, after taking due account of the temperament and all the other particular circumstances, would consider that the conduct complained of is such that this spouse should not be called on to endure it." [54]

He indicated that a similar test was propounded for constructive deserion by the Court of Appeal in *Hall*,[55] save that in constructive desertion there need be no injury to health.

The Dissenting Opinions

In their dissenting judgments both Lord Morris and Lord Hodson agree with Willmer and Davies L.JJ. in the court below that, in addition to grave and weighty conduct and injury to health, cruelty requires, as a third ingredient, an intention to injure, or at least persistence in conduct with knowledge of its effect. Lord Morris would allow the intention or knowledge to be presumed where any reasonable man must have known the consequence of his conduct; and he anticipates Lord Pearce's criticisms of "disingenuous presumptions" by observing that "the process of drawing an inference does not involve imputing an intention that did not in fact exist, but involves deducing from proper material that an intention did exist." [56] Lord Hodson does not advert to this point but remarks [57] that the converse of the decision in *Russell*, namely, that once injury to health could be attributed to matrimonial discord then cruelty was proved, has never been advanced in English law until the present case. And both the learned law lords felt that on the ultimate question of fact, the conduct of the husband could not properly be stigmatised by the word "cruelty" in its ordinary acceptation, agreeing in this respect with the conclusion of Sir Jocelyn Simon P. and Cairns J. in the Divisional Court and Harman L.J. in the Court of Appeal. Although findings of justices should not be disturbed where there is evidence to support them, they agreed that the finding in the present case was wholly wrong and ought not to be allowed to stand.

Williams: The Case of the Insane Husband

The same five members of the House of Lords proceeded directly to give judgment in *Williams*. Again Lord Morris and Lord Hodson formed a dissenting minority.

The case began as a petition for divorce before Mr. Commissioner Gallop, Q.C., on assize.[58] The wife's petition alleged cruelty on the part of her husband. There was a history of insanity in his family, and after ten years of uneventful married life he began to hear voices and spent some time in hospital. Eventually he was certified insane, but in 1958 he was regarded as a voluntary patient and

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[54] [1963] 2 All E.R. 966 at p. 992 A *et seq.*

[56] [1962] 3 All E.R. 518. This case will be returned to later.

[56] At p. 978, letter F. So too Sir Carleton Allen: "while inferences of intention from actual consequences may be faulty, they are less faulty than attempts to see, as in a crystal, the workings of human minds" (*loc. cit.* at p. 524).

[57] [1963] 2 All E.R. 966 at p. 984, letter F.

[58] Unreported; but the facts of the case and the judgment are fully recited by Willmer L.J. in the Court of Appeal: [1962] 3 All E.R. 441.

in March 1959 discharged himself from hospital and returned home. His medical condition however was unchanged, and the voices were now telling him that his wife was behaving as a prostitute and that there were men in the loft of the house. He persistently accused her of adultery and sometimes climbed up into the loft to find the men. Not surprisingly, during the nine months he was at home in this state his wife's health was damaged.

The learned Commissioner had no difficulty in holding that she had made out her case of cruelty, unless the second limb of the M'Naghten Rules applied. He found as a fact that the respondent knew what he was doing in making the accusations but that he did not know that they were wrong in any sense of the that the M'Naghten Rules applied and in particular to hold that the second limb of these Rules applied as well as the first.

The Court of Appeal (Willmer and Davies L.JJ., Donovan L. J. dissenting) held that they were bound by the court's previous decision in *Palmer*[59] to hold that the M'Nagethen Rules applied and in particular to hold that the second limb of these Rules appied as well as the first.

In the House of Lords Lord Reid swept aside the argument that the language of the 1937 Act had altered the law of cruelty by its use of the expression "treated" with cruelty.[60] Accordingly, he turned back to the old law to see the effect of insanity upon allegations of cruelty. In 1884 Lord Penzance stated that an insane man was likely enough to be dangerous to his wife's personal safety, but that the remedy lay "in the restraint of the husband, not the release of the wife."[61] The same conclusion was reached in the Scottish case of *Steuart* in 1870.[62] But modern methods of treatment for mental illness, with compulsory detention only as a last resort, mean that adequate protection may not be available to a spouse under the mental health legislation. In *Hanbury* (1892) the jury found, as directed by Sir C. Butt, that the husband was capable of understanding "the nature and consequences" of his acts, and the wife obtained her decree on the ground of adultery coupled with cruelty.[63] On appeal[64] Lord Esher took this finding to mean that the husband knew what he was doing and that he was doing wrong, but he reserved his opinion on the question whether the petitioner would be entitled to divorce if the respondent did not know the nature of what he was doing or that he was doing wrong.

Under the Matrimonial Causes Act, 1937, the first relevant case was *Astle*,[65] in which Henn Collins J. decided that, as the respondent did not know the nature and quality of his acts, those acts could not amount to cruelty, his reason for adopting the M'Naghten Rules being that they were the test applied in all other courts. *Astle* was criticised *obiter* in *Squire*,[66] in the course of rejecting the need for cruelty to be malignant or intentional. The next year the question came again before the Court of Appeal in *White*,[67] but in that case the respondent's type of insanity did not come within the M'Naghten Rules and was therefore disregarded, the Court of Appeal taking the view that the mere fact of insanity was no defence to a charge of cruelty. Denning L. J. further observed that the M'Naghten Rules did not apply to the law of divorce, insanity being no defence in divorce proceedings. This view was adopted by Pearce J. in *Lissack*[68] where

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[59] [1954] 3 All E.R. 494.

[60] See now Matrimonial Causes Act, 1950, s. 1 (1) (c): "on the ground that the respondent ... has ... treated the petitioner with cruelty." *Cf.* Matrimonial Proceedings (Magistrates' Courts) Act, 1960, s. 1 (1) (c): that the defendant .. has been guilty of persistent cruelty to the complainant."

[61] *Hall* v. *Hall* (1864) 3 Sw. & Tr. 347 at p. 349.

[62] *Steuart* v. *Steuart* (1870) 8 Macph. (Ct. of Sess.) 821.

[63] *Hanbury* v. *Hanbury* [1892] P. 222.

[64] (1892) 8 T.L.R. 559.

[65] *Astle* v. *Astle* [1939] 3 All E.R. 967.

[66] [1948] 2 All E.R. 51.

[67] *White* v. *White* [1949] 2 All E.R. 233.

[68] *Lissack* v. *Lissack* [1950] 2 All E.R. 233.

he held that on the earlier authorities insanity was no defence to a charge of cruelty.

Finally the matter came back before the Court of Appeal in *Swan* and *Palmer*.[69] In the former case *Lissack* was disapproved, all members of the court holding that insanity was a defence if the first limb of the M'Naghten Rules was satisfied; Somervell L. J. went further in thinking that the second limb by itself would not constitute a defence, that is, if the respondent knew the nature and quality of his acts but did not know that they were wrong. The facts of *Palmer* much resembled those in *Williams*, the husband being insane with the delusion that his wife was unfaithful and assaulting her on several occasions. It was held that he knew what he was doing and knew it was wrong, both limbs of the Rules being applied; in the result the wife succeeded in establishing cruelty.

Lord Reid also referred briefly to the Scottish authorities, which, after some judicial veering, settled in *Breen* upon the view that insanity *is* a defence.[70] Although the M'Naghten Rules are no part of the law of Scotland, the Scottish cases are valuable on the general question of insanity as a defence in cases of matrimonial cruelty.

The Choice Before the House

Lord Reid concluded his review of the authorities with a summary of the four solutions, "none wholly satisfactory," between which the House must then choose. These were:

(1) that the M'Naghten Rules must be applied (the solution of the majority in the Court of Appeal);

(2) that only the first limb of the Rules should be applied (the solution of the dissentient in the Court of Appeal, Donovan L.J.);

(3) that insanity was no defence;

(4) that insanity was a defence if it had given rise to the cruel acts.

His lordship found three main difficulties in adopting solution (1). First, in criminal cases a jury may interpret the rules liberally to give the accused the benefit of the doubt and so mitigate their inherent defects; but in a divorce case "it would be impossible to give the benefit of the doubt to an insane aggressor against the injured spouse."[71] Secondly, there was the difficulty of attributing a meaning to "wrong" appropriate to a divorce case: the meaning adopted for criminal cases, "contrary to law," obviously could not apply.[72] Thirdly, the M'Naghten Rules would introduce into divorce law their capricious distinction between different types of insanity.

The half-way house of solution (2) was not favoured by his lordship, although it would supply a straightforward enough test. It was subject to the objection that "it discriminates between people who on evidence are proved to be equally irresponsible by reason of disease of the mind."[73] Of the two clear-cut alternatives that remained he recognised that there were two schools of thought, even among judges, between those who believed that there could not be cruelty without some kind of *mens rea* and those who thought that there could. In his view "the law cannot just take cruelty in its ordinary or popular meaning because that is too vague: we must decide what, if any, mental state is a

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[69] *Swan* v. *Swan* [1953] 2 All E.R. 854; *Palmer* v. *Palmer* [1954] 3 All E.R. 494.

[70] *Breen* v. *Breen*, 1961 S.C. 158.

[71] [1963] 2 All E.R. 994 at p. 1002, letter G.

[72] See *Sofaer* v. *Sofaer* [1960] 3 All E.R. 468, where Collingwood J. suggested "culpable."

[73] [1963] 2 All E.R. 994 at p. 1003, letter C. His lordship had earlier observed that there were types of insanity outside the M'Naghten Rules which no less deprived the insane man of responsibility.

necessary ingredient." At this point he referred briefly to his opinion in *Gollins* and observed that the law had long abandoned the original and stricter requisite of malignity or intention to hurt and accepted a second and lesser degree of *mens rea* or "blameworthiness," such as knowledge that one is injuring the health of one's spouse and persistence in that injurious conduct. *Gollins* was itself such a case. A third possibility was that it sufficed if the acts were intentional, even if not blameworthy because there was neither malignity nor foresight of the consequences; but this solution, which would permit the first limb of the M'Naghten Rules to provide a defence, Lord Reid had already rejected. Reverting then to the second kind of *mens rea*, he proceeds to show that this test of "blameworthiness" is unsatisfactory.

Insanity no Defence to Cruelty

In this key passage of his argument he observes that there are many spouses who are not insane but are either sick in mind or body or so stupid, selfish or spoilt that they plainly do not appreciate or foresee the harm which they are doing to the other spouse, and "perhaps they are now so self-centred that nothing would ever get the truth into their heads."[74] Lord Reid supposes that no one would now maintain that cruelty cannot be proved against such a person, "If his acts are sufficiently grave and really imperil the other spouse." And it is difficult in some of these cases to attribute "more than a speck or scintilla of blame" to the respondent in the sense that he, not the reasonable man, ought to have realised the consequences of what he was doing and could have done otherwise if he had tried. He goes on:

> "If we are to make culpability an essential element in cruelty, we can really only bring in these people by deeming them to have qualities and abilities which the evidence shows that they do not possess. Surely it is much more satisfactory to accept the fact that the test of culpability has broken down and not to treat entirely differently two people one of whom is just short of and the other just over the invisible line which separates abnormality from insanity."[75]

He concludes that a decree should be pronounced against such an abnormal person not because his conduct was aimed at his wife, nor because a reasonable man would have realised the position, nor because he must be deemed to have foreseen or intended the harm he did, but simply because the facts are such that, after making all allowances for his disabilities and for the temperaments of both parties.[76]. It must be held by the objective observer that the character and gravity of his acts are such as to amount to cruelty. And his lordship sees no good reason why what is right for an abnormal person should not apply to an insane person. Hence he would allow the appeal and grant the wife the decree sought.

Both Lord Evershed and Lord Pearce agree with Lord Reid's conclusion. Lord Evershed is firmly of the opinion that the second limb of the M'Naghten Rules has no application, which disposes of the present appeal. But in view of the even division of his brethren he feels obliged to express an opinion on the general question of insanity as a defence to cruelty. He would reject the M'Naghten Rules altogether as inapplicable to divorce cases: "cruelty is not a crime."[77] Furthermore he maintains, though "with some hesitation," that the test of cruelty is "wholly objective."[78] This expression he explains by the

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[74] At p. 1004, letter B *et seq.*

[75] *Ibid.* letter D.

[76] Thereby, of course, introducing a subjective element: *cf.* his lordship's statement in *Gollins* at p. 970: "We are dealing with this man and this woman."

[77] At p. 1006, letter B.

[78] At p. 1009, letter C.

example of a man who is seen beating his wife, his child or his dog: according to the objective test "the question would be, whether, according to the judgment of a reasonable man who saw the performance, the actor could fairly be said to be treating his wife, his child or his dog with cruelty?" [79] It follows therefore that proof of insanity such that the spouse did not know the nature and quality of his act is "not necessarily" an answer to cruelty.

Lord Evershed reaches this conclusion with obvious reluctance. Thus, he says:

> "If the decision in this matter rested with me alone I am disposed to think that I should take the view that, on the ordinary sense of language, a man could not and would not be said to be treating another with cruelty if he was shown, by reason of mental disease or infirmity, not to be at all aware of what he was doing—if, to take an extreme case, a man who was observed to be beating physically his wife with the utmost severity were proved to be quite unaware that he was doing other than beating his drawing-room rug." [80]

And, as we have seen, he introduces "not necessarily" as words of qualification when rejecting insanity as a defence. By this qualification he wished to signify that the mental derangement of the person charged cannot be wholly disregarded—certainly where the victim of the cruelty is aware of the disorder. "But the test will still be objective—in all the circumstances of the case should it fairly be said that the spouse charged has treated the other with cruelty?" [81]

Lord Evershed concludes that generally speaking the conduct of the party charged will not fail to be properly described as cruel merely because he is unaware of the nature and quality of his conduct, and he is led to this conclusion by Lord Reid's argument that, to hold otherwise, would be to draw an unfair and illogical distinction between one kind of insanity and another—to the serious detriment of the victim of the cruelty.

The Balance of Hardship

Lord Pearce again adds his voice to that of the majority. He demonstrates that in tort and contract the common law affords no clear or uniform solution of the problem whether the defendant's insanity affords him immunity. In the matter of divorce the common law is of no more help than the criminal law. Divorce is not punitive, rather "the frailties of humanity produce various situations which demand practical relief and the divorce Acts owe their origin to a merciful appreciation of that demand." [82] The Act of 1937, in first allowing divorce for cruelty, was enacted, "in order to alleviate the hardship to respondents and petitioners alike of being tied for life to a marriage that had broken down." [83] The omission of "guilty" in section 2 of the 1937 Act was deliberate: the new section was breaking away from the old idea of insistence on a matrimonial offence in that it was adding incurable insanity as a ground for divorce.

His lordship reviews the previous authorities and shows how they culminate in the decision of the Court of Appeal in the present case where it was held for the first time that the second limb of the M'Naghten Rules applied. It was also the first reported case in the whole history of English matrimonial law in which a respondent had ever succeeded on a defence of insanity. In the result, "the shackles of the M'Naghten Rules, which have caused so much difficulty in

[79] At p. 1008, letter E.
[80] At p. 1009, letter A.
[81] *Ibid.* letter D.
[82] At p. 1022, letter H.
[83] At p. 1023, letter D.

criminal cases, have been fastened on to divorce suits at a time when the criminal courts are emerging from their confinement." [84]

The practical considerations of allowing the defence are then considered by his lordship. He discusses the plight of a wife who seeks relief against an insane husband whether on the ground of the cruelty arising from his mental illness or on the ground of his acts of constructive desertion. If the husband is sufficiently insane he may be given immunity for both his cruelty and his acts of constructive desertion; but he may not be so continuously insane as to be detained permanently in which case, as the law now stands, it is doubtful if she has any "reasonable cause" for not living with him, so that if she leaves the husband, she will probably be in desertion herself and without home or maintenance. The principle of "separation by necessity" founded upon *Lilley* [85] presents difficulties and depends upon her paying lip service at least to a willingness to return whenever it is safe to do so, whereas the truth may well be that after her ordeal she is not prepared to do so in any event. After five years she may possibly obtain her release on the ground of incurable insanity, but this is by no means certain.

In Lord Pearce's words "the frequent hardship to the petitioner so greatly exceeds the more infrequent hardship to a respondent that the practical social considerations speak strongly against insanity as a defence to cruelty."[86] He cites in aid the recommendation to like effect of the Morton Commission.[87] He would not impose on the words "treated with cruelty" in the Act either the gloss "intending to be cruel or knowing that it was cruel" or even the gloss "intending to do the act which was in fact cruel." He sees no justification for applying either the second or the first limb of the M'Naghten Rules. He admits the attractive simplicity of applying the first limb. But to do so would create a dividing line which in practice would not be easy to apply, which would at times make the courts powerless to help when need was most needed, and which would cause more hardship than it alleviated. Moreover it is not the dividing line which has been drawn in criminal cases nor that drawn in cases of contract, but it is that which has, after much doubt, been drawn in cases of tort.[88] "Why" he asks "if a decree on the ground of cruelty can be granted against a man who is driven by the impulses of a diseased brain, should there be a line, shared only by the law of tort, which puts those who do not know their acts into a different class from those who cannot avoid their acts?"[89] In his view, the distinction is one of sentiment rather than logic and one that the House of Lords should not impose in the absence of any uniform legal principle that compels such a distinction; insanity should, like temperament and other circumstances, be one of the factors that may be taken into account in deciding whether a wife is entitled to relief. Thus, where the conduct in question could not amount to cruelty in the absence of an actual intention to hurt, an insane spouse would not be held to be cruel. But where the conduct would be held to be cruelty regardless of motive or intention, insanity should not bar relief.

The Dissenting Opinions

In his dissenting judgment Lord Morris thought that the mental health of the parties should be a relevant and integral part of the inquiry whether one spouse has treated the other with cruelty. Insanity was a fact which must be taken into account rather than a "defense": as was said by the House of Lords in *King*,[90]

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[84] At p. 1026, letter F.
[85] *Lilley v. Lilley* [1959] 3 All E.R. 283 (discussed in (1960) 23 M.L.R. 1).
[86] [1963] 2 All E.R. 994 at p. 1027, letter I.
[87] Report of Royal Commission on Marriage and Divorce (1956, Cmd. 9678). para. 256.
[88] *Morriss v. Marsden* [1952] 1 All E.R. 925.
[89] [1963] 2 All E.R. 994 at p. 1029, letter C.
[90] *King v. King* [1953] A.C. 124.

whether one spouse has treated the other with cruelty is a *single* question. For his lordship cruelty is a matrimonial "offence" and a "grave accusation" involving "opprobrium." It follows that there must at least be an intentional act before one can find cruelty. Here he quotes with approval the much-cited phrase of Shearman J. in *Hadden*:

> "I do not question that he had no intention of being cruel, but his intentional acts amounted to cruelty."[91]

Accordingly, he would prefer to follow the older English cases in not classing as cruelty conduct which preceded from "madness, dementia, or positive disease of the mind"[92] an approach also adopted by modern Scottish authorities. for

> "the consideration of the mental state of the spouse whose conduct is complained of may be a deciding factor in reaching a conclusion that that spouse has not treated the other with cruelty."[93]

This conclusion leads his lordship to ask whether there is any test or formula by which to measure the extent of the relevancy of the mental state of the respondent. His answer is that it is undesirable to seek to use any set form of words or any formula by which to measure whether someone who is mentally afflicted has treated another with cruelty. The M'Naghten Rules may often be helpful as guides, for which purpose he could see no justification for picking on one of them to the exclusion of others. "But there is no magic in the mouthing of some phrase or formula." Rather, cruelty should be regarded as an issue of fact uncomplicated as far as possible by questions of law and released from anchorage to any phrase or formula. On the facts of the present case he agreed with the finding of the trial judge; for, in his lordship's judgment,

> "if certain conduct can properly and fairly be said to be the definite result of mental illness..., it would be contrary to the fitness of things to stigmatise it as cruelty."[94]

Lord Hodson, who also dissented, differs from Lord Morris in preferring the orthodox approach of discussing insanity as a "defense" to a charge of cruelty. On his view of the authorities the phrase cruelty or persistent cruelty in the modern statutes was meant to bear the same meaning as it had previously borne in the ecclesiastical courts, and nothing in the older cases suggested that a madman would have been regarded as cruel. In his opinion "cruelty" involves an implication of blameworthiness. If cruelty then is to be excused by insanity (as he believes it is), that is because intention is relevant and the effect of insanity is to negative intention. Lord Hodson agreed with Asquith L. J.[95] that, if insanity were immaterial, it would follow that the intention of the aggressor is irrelevant, for the act must be looked at from the point of view of the victim and one looks no further than that.

As to what degree of insanity will furnish a defence, Lord Hodson thinks that the M'Naghten Rules have at least the merit of simplicity. Like Lord Morris, however, he would not wish to be bound by any form of words. The first limb of the rules, as applied to cruelty, has received a wider measure of acceptance than the second and goes some way towards recognising the subjective element in cruelty. But in his lordship's view it does not go far enough and the second limb "or its equivalent" is needed to cover the case of one who is conscious of what he is doing but through disease of the mind does not know that is it wrong. He agreed with Davies L.J. that the word "wrong" could not bear the meaning

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[91] *The Times*, December 5, 1919.
[92] The phrase of Sir J. P. Wilde in *Hall* v. *Hall* (1844) 1 Rob.Eccl. 106 at p. 116.
[93] [1963] 2 All E.R. 994 at p. 1015, letter D.
[94] *Ibid.* at p. 1016, letter F.
[95] *White* v. *White* [1949] 2 All E.R. 339 at p. 347.

"contrary to the law" which it bore in a criminal context but that it meant simply "wrong" (presumably, morally wrong). He is fortified in his conclusion by the decision of the Court of Session in *Breen* where it was held (*per* Lord Patrick) that:

> "In principle no blame can be attached to a man who at the time of the acts in question was by reason of alienation of mind disabled from coming to a rational decision in regard to the acts."[96]

Nor did he think that the wife would be left wholly remediless if her petition were refused. If circumstances arose in which the husband were able to maintain his wife she could seek a maintenance order from him under the principle in *Lilley*[97] by showing that a *de facto* separation had been imposed on her by force of circumstances.

The Extension of Matrimonial Cruelty

In the light of the foregoing analysis of the judgments in *Gollins* and *Williams*, what is their effect upon the law of matrimonial cruelty?

In the first place, the old norms of "grave and weighty conduct" and "injury to health" have been retained. What has been jettisoned is the prescribing of any particular state of mind in the offending spouse. In future, the attitude of mind will go only to the gravity and weight of the conduct complained of, and not stand on its own feet as a separate requisite of cruelty. But where there is actual intention to injure or foresight that conduct will have injurious consequences, such states of mind may in a proper case so colour a spouse's behaviour as to remove it from the spectrum of the ordinary wear and tear of married life. Again, where proof of an actual intention or actual foresight is lacking the court may still resort to the presumption that a person intends (or at least foresees) the natural and probable consequences of his acts. But in future there will be less need to have recourse to presumptions about intent or foresight. Whether or not a certain mental state has been proved or presumed, the gravity and weight of the conduct is to be assessed objectively in the sense that the court will ask itself whether (as Lord Pearce put it) "a reasonable person, after taking due account of the temperament and all the other particular circumstances, would consider that the conduct complained of is such that this *spouse should not be called upon to endure*," or (in Lord Reid's words)whether "the conduct complained of and its consequences are so bad that the petitioner *must have a remedy*."[98]

This emphasis on the court's obligation to provide a remedy, or on "justice demanding a remedy,"[99] is the second feature to notice in the two cases. In *Gollins* the wife could have had her remedy, as Willmer L. J. showed, without abandoning the requisite of intent or foresight, but the majority of the House of Lords were compelled to go further in that case in anticipation of their finding a remedy for the wife in *Williams*: hence, the rejection of any state of mind as essential for cruelty in the first case, from which could follow logically in the second the rejection of an unsound mind as providing a defence.

In regard to insanity the courts have thus achieved by a kind of consistorial equity the change in the law recommended by the Royal Commission.[1] On the other hand, they have discarded the element of intention, which the Commission thought a valuable safeguard.[2]

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[96] 1961 S.C. 158 at p. 182.

[97] See note 85, *supra*.

[98] Italics supplied.

[99] *Per* Lord Reid: [1963] 2 All E.R. 966, at p. 973, letter E.

[1] Para. 256.

[2] "These (*i.e.*, the requirements of injury to health and intention) are valuable safeguards, the removal of which would in our view lead to divorce on the ground of incompatibility of temperament" (para. 129).

Cruelty has always had an in-built equity or judicial discretion by reason of the requirement that the conduct shall be grave and weighty, the weighing being in the hands of the court. Now, however, a much wider area of discretion is being claimed: witness the reference to unendurable conduct that must afford the victim a remedy (*per* Lord Pearce) or to conduct showing an absolute impossibility that the duties of married life can be discharged (*per* Lord Evershed). Such conduct is assessed objectively from the standpoint of the reasonable man or "the objective observer," but this is only an alias for the court. The danger of any system of equity is that it may not treat like cases alike, and in consistorial law this danger is multiplied by the large number of lay justices having jurisdiction in matrimonial matters. Appeals too are encouraged where judicial discretion replaces hard legal principle.

A third feature in the cases under review is that they play down such subjective elements as intention, guilt, blameworthiness, culpability, not only in cruelty but also (as we shall see) in constructive desertion. Judged from the standpoint of the objective observer, these matrimonial offences have become, in criminal terms, offences of absolute prohibition, for which a guilty mind is no longer indispensable. But if matrimonial offences (or some of them) are to be drained of their culpability, what happens to the doctrine of the matrimonial offence as the basis of our divorce law? Once one allows that there can be cruelty without culpability, then one has divorce without fault. Lip service may still be paid to the doctrine of the matrimonial offence, but behind this legal fiction the courts are accepting the principle of the breakdown of the marriage as the basis for divorce. Much of the language of the majority in the House of Lords reflects this approach. Thus, the extensive arguments based upon a balance of hardship fit strongely into the context of the doctrine of the matrimonial offence but are more appropriate, say, to the ground of incurable insanity, confessedly a ground posited upon the principle of breakdown. And Lord Pearce stated the *ratio legis* behind the ground of cruelty to be that of alleviating the hardship to both spouses in being tied for life "to a marriage that had broken down."

On this, perhaps the most fundamental, aspect of the case, it is submitted that the House of Lords has now made curelty (and constructive desertion) a ground to be grouped with incurable insanity under the principle of breakdown. Of the present grounds for divorce[3] only adultery and its congeners (rape and unnatural practices), with actual desertion, remain unequivocally matrimonial offences in the sense of involving *mens rea* or culpability. Or at least this is so where one is dealing with the kind of blameless conduct or "constructive cruelty" which was present (as the House decided) in *Williams*. If this submission be correct the latest decisions can only discredit still further the "offence" doctrine by emphasising its superficiality. For, on deeper analysis, adultery, cruelty and either form of desertion are all equally symptomatic of marriage breakdown.

A fourth question which the cases provoke is where the limits are to be drawn to circumscribe this doctrine of constructive cruelty. In *Williams* the husband was mentally sick, but can only distinguish between categories of sickness? What of the husband, physically crippled or diseased, the nursing of whom gradually undermines his wife's health? Can that wife now seek release on the ground of cruelty? And what of the husband whose criminal tendencies land him in prison for a long term while his wife has to make shift for herself and the children, again with injury to her health? Is this cruelty? Certainly her lot might be described as a "cruel" one; fate has dealt her a "cruel" blow in her marriage. Such metaphorical usage of the epithet was called in aid by Donovan

[3] *Cf.* the numerous "causes of complaint" which confer jurisdiction upon magistrates' courts under the Matrimonial Proceedings (Magistrates' Courts) Act, 1960. Desertion and cruelty apart, these are mostly framed in terms of culpability (*e.g., wilful* neglect to maintain).

L.J. to illustrate its ordinary connotation of "merciless." It is true that Lord Reid picks out such commonplaces of language to demonstrate that the law cannot take cruelty in its ordinary or popular meaning because that is too vague; but he proceeds to discard the requisite of intention or foresight that would have given precision to the concept of matrimonial cruelty and resorts instead to the equally vague formula of "the character and gravity of his acts being such as to amount to cruelty." With respect, it is hard to see how this differs substantially from the Divisional Court's test of "cruelty in the ordinary acceptation of the term," and it is significant that Lord Evershed, who agreed with Lord Reid in both cases, states categorically that the question is whether the acts or conduct of the spouse charged were cruel according to "the ordinary sense of the word." By this test (or Lord Reid's) it is not easy to see how the doctrine of unintentional cruelty can be restricted only to situations of sickness of mind. Already indeed the cases have been followed at first instance so as to allow a wife a divorce for cruelty where her husband insisted on being tickled.[4] Clearly there will be a period of uncertainty whilst the limits of the new concept of cruelty are worked out in the courts. For limits there will have to be.[5]

A fifth question then arises. At least, it may be said, this notion of constructive cruelty will be kept within bounds by the insistence on injury to health. But even this prerequisite is not as strict as might appear. In the first place, the terms "health" and "injury" have both been progressively expanded to take account of mental conditions of which the courts have been made aware by the modern sciences of psychiatry and psychology. In the second place, it will be recalled that the full expression in *Russel* spoke either of injury to health or of "a reasonable apprehension" of such injury. The case law on this alternative of prospective injury is surprisingly scanty,[6] but further expansion of cruelty might well come by using medical evidence to estalbish that there is a reasonable apprehension that the petitioner's health will suffer in the future unless the court gives the relief sought.[7]

Quite often, one suspects, the injury to health does not materialise because the sufferer of ill-treatment takes his or her own remedy of self-help by leaving the offending spouse. In other words, constructive desertion forestalls the injury to health: what would have been a divorce for cruelty if the petitioner had not left comes before the court, sooner or later[8] as a divorce on the ground of desertion in the constructive form. It remains to consider how far this ground has been affected by the new cases on cruelty.

The Animus In Constructive Desertion

Just as cruelty used to be thought to require a certain mental attitude on the part of the offending spouse, so the offence of constructive desertion was compounded of grave and weighy conduct accompanied by an "intention to drive away." The consequence however of the ill-treatment in the latter offence was not injury to health but the withdrawal of the ill-treated spouse from cohabitation.

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[4] *Lines* v. *Lines* (1963) 107 S.J. 596.

[5] Using hindsight one way may now see that if Parliament had added to the Divorce (Insanity and Desertion) Act, 1958, a clause to implement the Royal Commission's other recommendation concerning insanity (*viz.*, that it should be no defence to cruelty) there would have been no need for judicial distortion of the concept in order to find a remedy in *Williams*; and Willmer L.J.'s propositions would have provided a remedy in *Gollins*.

[6] *Fromhold* v. *Fromhold* [1952] 1 T.L.R. 1522 (C.A.), which is cited in this context in *Rayden on Divorce* (8th ed.) at p. 121, is hardly in point as there was a previous history of violence (bruises, a black eye and a knife-wound).

[7] This might offer a way to evade the strict rules governing insanity as ground for divorce: in *Williams*, of course, there was such evasion, but injury to health had already occurred.

[8] The constructive desertion must, of course, persist for three years to be ground for divorce.

The development of the mental element in constructive desertion has hitherto followed a more or less parallel course to the *animus in cruelty*. Thus, in place of an actual intention to drive away or expel, the courts have accepted the alternative of knowledge or foresight on the part of the offender that his conduct will have this consequence. And as in cruelty they have sometimes been prepared to infer such an intention or knowledge by resort to presumptions and the standard of the reasonable man. Despite some oscillations, the judicial practice now seems settled along these lines, as may be exemplified by *Lang* in the Privy Council.[9] *W.* (*No. 2*) in the Divisional Court,[10] and, most recently, *Hall* in the Court of Appeal.[11] In this last case, a finding of constructive desertion by the justices was upheld because the husband, who persistently came home drunk at a late hour, "must have known" (*per* Diplock L.J.) or "should have known" (*per* Ormerod L.J.) that his wife would in all probability not continue to endure his conduct if he persisted in it.

Now that the House of Lords has held a particular mental attitude to be no longer essential in cruelty, will constructive desertion likewise shed its requirement of *animus*? The references to *Hall* in *Gollins* suggest that cruelty and constructive desertion will continue to march together. Thus, Lord Pearce, after defining cruelty in terms of conduct which a reasonable person would consider the ill-treated spouse "should not be called upon to endure," states that the judgments of the Court of Appeal in *Hall* propound a similar test for constructive desertion.[12] In fact, as we have seen, both Ormerod and Diplock L.J.J. emphasise that the husband must have foreseen the result of his conduct; only Danckwerts L.J. omits any reference to the husband's *animus* and states baldly: "the question is whether *this* man's conduct to *this* wife has been of such a nature that she could not reasonably be expected to endure it further . . ."[13] It seems likely, however, that Lord Pearce's view of *Hall's* case will be adopted. In this event the courts will have brought about in effect the change in the law recommended by the Morton Commission. The Commission, it may be recalled,[14] wished to have a statutory definition of desertion embracing both actual and constructive forms and so forded that *conduct of a grave and weighty nature which is such that a spouse could not reasonably be expected to continue with the conjugal life* should raise an irrebuttable presumption that the offending spouse intended to bring the married life to an end. The extension of the *Gollins* principle to constructive desertion would do away with the need to presume any such bogus intention: constructive desertion would be sufficiently defined by the passage in italics.

Whatever the merits of the concept of cruelty without culpability, there can be no doubt that it is an advantage for cruelty and constructive desertion not to be subject to different rules in regard to *animus*. Until *Gollins* and *Williams* they had in common the need for either intention or foresight. Common legal principles for the two offences are desirable because in practice cruelty and construction desertion frequently arise on the same facts: witness the cases

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[9] [1955] A.C. 402.

[10] [1961] 2 All E.R. 626, in which the Divisional Court (Lord Merriman P. and Baker J.) disapproved of *Boyd* [1938] 4 All E.R. 181 and followed *Cooper* [1954] 3 All E.R. 415, Ivens (*ibid.* at p. 446) and *Lang* (*supra*) in allowing an expulsive intent to be presumed where the offending spouse must have known the consequences of his conduct. *Cooper* and *Ivens* were both cases of cruelty, but in *Waters* [1956] 1 All E.R. 432 Lord Merriman had already observed, in following *Lang*, that the same considerations regarding *animus* should apply to both offences.

[11] [1962] 3 All E.R. 518.

[12] [1963] 2 All E.R. 966 at p. 992, letter B.

[13] [1962] 3 All E.R. at p. 524, letter F.

[14] See para. 155. This recommendation was by a majority only of the Commission, five of the nineteen members not concurring.

of *Lang* and *W.* (*No. 2*).[15] If a wife were not only injured in health but also driven from home by her husband's unendurable conduct, it would be absurd to find cruelty proved, but to reject a complaint of constructive desertion for want of an expulsive intent.

Again, if insanity is to be no defence to a charge of cruelty, it cannot logically provide a defence to acts of constructive desertion. For if the expulsive conduct consists of cruel acts it would again be absurd to say that the act constituted cruelty, despite the respondent's insanity, yet because of the insanity did not constitute constructive desertion. It is otherwise of course in actual desertion, as was hsown in *P.* v. *P.* where a wife suffered from insane delusions that her husband was committing adultery and meant to murder her; when she eventually left him, his charge of desertion failed for want of an *animus deserendi* on her part.[16] *Animus* is needed here to distinguish actual desertion from involuntary separation.

Conclusion

Due to the "metaphysical niceties" of the English law of divorce,[17] conduct between spouses in the nature of ill-treatment[18] appears to fall into six ascending legal categories or grades.[19] At the lowest point in the scale is the "wear and tear of married life." Conduct of the spouses falling into this category is disregarded by the law either on the principle of *de minimis* or by analogy to the doctrine of *volenti non fit injuria* in tort or of an implied term in contract: the spouses have made their bargain "for better, for worse" and cannot therefore complain if they get more of the latter.[20] At the other end of the scale comes cruelty, the two essentials of which now are grave and weighty conduct on the part of the offending spouse and resultant injury to, or danger to the health of, the other spouse: intention to injure or foresight that injury will result will go to the weight and gravity of the conduct complained of, but if that conduct and its consequences are so bad that the victim must have a remedy, then the state of mind, even the insanity of the offender, is immaterial.

Close behind (or alongside[21]) cruelty comes constructive desertion. This likewise involves grave and weighty conduct but the consequence is not (necessarily) injury to health but the withdrawal of the innocent spouse from cohabitation. Again, it seems that in future the *animus* of the constructive deserter will go only to the weight and gravity of his conduct and that no particular state of mind will be essential in an extreme case. Hard to distinguish from conduct amounting to constructive desertion is that providing a just cause

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[15] So too *Bowron* v. *Bowron* [1925] P. 187, where, as in *W.* (*No. 2*), the summons was for constructive desertion, rather than persistent cruelty, because the latter fell outside the six months' limitation period.

[16] *P.* v. *P.*, *The Times*, July 31, 1963.

[17] The phrase is that of Diplock L.J., (in *Hall* [1962] 3 All E.R. at p. 52, letter E).

[18] Lord Merriman P. in *Jamieson* [1952] A.C. at p. 540 speaks of cruelty as requiring conduct which can fairly be described as "ill-treatment," but does not further define the term, regarding it no doubt as self-explanatory. Variants are "ill-usage" (per Channell B. *in Kelly* v. *Kelly* (1870) L.R. 2 P.D. at p. 61), "ill-conduct" (*per* Wilde J.O. in *Power* v. *Power* (1865) 4 Sw. & Tr. at p. 177). The modern emphasis on ill-*treatment* stems probably from the wording of the Matrimonial Causes Act, 1937 (see note 60 above).

[19] See Report of Royal Commission on Marriage and Divorce (1956, Cmd. 9678), para. 153 where the first four categories in the text are distinguished.

[20] But see the comment of Danckwerts L.J. in *Hall* (at p. 524, letter F): "I would respectfully suggest that there is too much talk in matrimonial cases about a party accepting the other 'for better or for worse' ... the phrase in jurisdictions in which divorce is not recognized might have some sense, but in this country, where the law provides for divorce, it seems to me to be something of a cynical jest."

[21] Conduct amounting to cruelty or constructive desertion differs not in gravity but in consequence. Indeed, until 1925, cruelty could not form the basis of an order under the Summary Jurisdiction (Married Women) Act, 1895, unless it had caused the wife to leave the home and live apart from her husband.

for the innocent spouse's leaving as an answer to a charge of actual desertion[22]: just cause also requires grave and weighty conduct such as to make married life impossible, but it has never, it seems, required any particular *animus* on the part of the offending spouse.[23]

Somewhere below conduct providing just cause for leaving but above that which is no more than the wear and tear of married life comes "conduct conducing" to the adultery, desertion or insanity of the ill-treated spouse.[24] The remaining category of ill-treatment is that sufficient to revive condoned adultery or cruelty. It is hard to see where exactly this comes in the scale: such criteria as have been suggested would seem to equate "conduct reviving" with just cause for leaving in point of gravity.[25]

In the face of these Byzantine refinements, which cry aloud for simplification, the House of Lords has at least gone far to equate the measures of ill-treatment required for cruelty and constructive desertion.[26] But Willmer L. J., by his rationalisation in *Gollins* of the previous authorities, had already achieved this whilst preserving the safeguard of a mental element for both offences, the *animus* either of intention or of what Dr. Goodhart has described as the foresight of the reasonable man. The rejection of *animus* as an essential for either offence is consistent with the rejection of insanity as a defence to cruelty (and, *semble*, constructive desertion), but it opens the door to divorce without fault and the replacement of the "offence" doctrine by that of breakdown. The law has been thrown into confusion by seeking to engraft upon statutes framed in terms of matrimonial offences a judicial interpretation founded upon the principle of breakdown. The judgments of the majority in the House of Lords have thus made more compelling the statutory reform of the law of divorce, and one more radical than the modest proposal which failed on June 21, 1963, to commend itself to the second chamber.[27]

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[22] Or an answer likewise to a petition for restitution of conjugal rights: *Russell* v. *Russell* [1895] P. 315 (C.A.).

[23] Thus, Asquith L.J., in *Buchler* v. *Buchler* [1947] P. 25: "To afford such justification the conduct of the party staying on need not have amounted to a matrimonial offence." Also Bucknill L.J. in *Edwards* v. *Edwards* [1950] P. at p. 11: "There can be sufficient cause for desertion which falls short of cruelty."

[24] M.C.A., 1950, s. 3 (2) (iv) refers to "such wilful neglect or misconduct as has conduced to the adultery or unsoundness of mind or desertion." So far as concerns conduct conducing to desertion, Willmer J. in *Postlethwaite* v. *Postlethwaite* [1957] 1 All E.R. 909 was of opinion that the misconduct must be more than the ordinary wear and tear of married life but not sufficiently bad to amount to a just cause for a separation: "conduct which falls short of justifying the separation but which may, in part, excuse it."

[25] *e.g.*, *per* Bucknill L.J. in *Richardson* v. *Richardson* [1950] P. 16: "conduct which makes married life together impossible"; *cf.* the description of just cause for leaving propounded by Barnard J. in *Dyson* v. *Dyson* [1953] 2 All E.R. 1511: "conduct so grave and weighty as to make married life impossible." Condoned *adultery* cannot be revived after July 31, 1963 (M.C.A. 1963, s. 3).

[26] And for just cause for leaving.

[27] p. 625 above.

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APPENDIX "54"

MARRIAGE BREAKDOWN OR MATRIMONIAL OFFENSE: A CLINICAL OR LEGAL APPROACH TO DIVORCE

by

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Divorce rates in this country are among the highest in the world; and divorce procedures, in consequence of a bewildering variety of laws and practices in the various states, present in this country a pattern of unusual diversity and complexity.[1] In light of the considerable progress which has been made in the understanding of the marriage relationship, and in the development of high-level marriage counseling services, perhaps the time has come to abandon some of our present divorce procedures, based as they are on the unrealistic concept of the matrimonial offense, and the adversary principle which is its inevitable corollary. It is suggested that they should be replaced with an investigatory system which will establish with reasonable certainty whether the marriage has deteriorated to the point of being unworkable.[2]

It is hardly necessary to dwell upon the fact the present methods of handling divorce are not giving satisfaction. The wide variations in state laws may reflect that "rugged individualism" which was the glory of our frontier communities; but in the days of jet travel it becomes an absurdity to realize that as a man and his wife travel across the United States on the same plane, the basis on which they could legally terminate their marriage, in the country of which they are citizens, changes every few minutes!

That is, however, only the beginning of the tale of absurdities as they appear to an observant person not involved in administering the machinery of the law. It is, for example, illegal for a man and his wife to be divorced by mutual consent. Yet every lawyer in the land, and every divorce court judge, knows perfectly well that the overwhelming majority of divorce suits are in fact arranged by mutual consent. And it is good that they are. Otherwise, the complications that already exist might well be further compounded.

It is equally clear that divorce is granted in this country, in most instances, because a "matrimonial offense" has been perpetrated by one partner against the other. The principle, presumably, is that this offense destroys the marriage as a functioning partnership, and the union may therefore be dissolved. Yet in the

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[1] The opinions herein are those of the author and not necessarily those of the American Association of Marriage Counselors.

[2] Proposals of this kind have been made, and rejected, in the past. Nevertheless, a serious reopening of this question would seem to be justified at the present time.

This article has made use of material contributed by the author to the April 1962 issue of *McCalls*. It is based also on material from the following sources:

Blake, Nelson Manfred, The Road to Reno: A History of Divorce in the United States (1962); Ernst, Morris L. and Loth, David, For Better or Worse: A New Approach to Marriage and Divorce (1952); Harper, Fowler V., Problems of the Family (1952); McGregor, O. R., Divorce in England (1957); Rheinstein, *Trends in Marriage and Divorce Law of Western Countries*, 18 Law & Contempt. Prob. 1 (1953); Royal Commission on Marriage and Divorce, Report 1951 to 1955, (1956).

event *both* partners have committed matrimonial offenses, the marriage is presumably doubly violated, and, in most states, this prevents either partner from seeking a divorce!

The layman also observes that the law, unintentionally of course, appears to encourage perjury. A woman may appear in a divorce court in Nevada and assure the judge that she has come to the state with the intention of settling there; when in fact she has no such intention, and actually has a return ticket in her pocket. Again, in New York State, a man arranges to be found in bed in a hotel room with a woman he has never seen before, and in whom he has not the slightest sexual interest, in order that his wife may tell the divorce court judge that her husband has committed adultery. The average decent American citizen finds all this embarrassing and distasteful. Apparently, many legal authorities share this opinion.[3] There is no need to dwell further on these unpleasant aspects of our legal system. It seems to be clear that in the eyes of much of the legal profession, present divorce procedures are often dishonest, discriminatory, distasteful, and disreputable.

The question to be considered is why this unhappy situation exists. It would seem that the reason is because our laws appear to be inadequate instruments to deal with these complex human problems. The modern divorce court is a relatively new institution which came into existence not as a well-thought-out solution to contemporary problems, but by a series of events which were almost accidental.

In the ancient world, the state made no attempt to interfere in such personal questions as marriage and divorce. In Roman society, not only were there no divorce courts, but there were no divorce laws as we understand them. The function of the courts was to help to settle questions of property rights brought for solution by couples who had privately decided to divorce. By the middle of the twelfth century, the Roman Church had succeeded in establishing ecclesiastical courts to deal with marital problems throughout most of Western Christendom. These courts were entrusted with, among other duties, the task of granting annulments and separations. No divorces, in the sense in which divorce is understood today, could be granted because of the Church's doctrine of the indissolubility of the marriage bond. The ecclesiastical court could grant *separatio a mensa et thoro* but not *divortium a vinculo*. The ecclesiastical courts granted judicial separation, without the right to remarry, usually on grounds of adultery and cruelty, although other grounds were sometimes allowed. In this context, the concept of the matrimonial offense was entirely logical. The Church absolutely forbade the dissolution of a valid marriage. But in these circumstances, it would have been inhuman to insist that husband and wife should

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[3] Paul Sayre, former Professor of Law at Iowa State University: "The scheming of the parties in an atmosphere of falsehood, as well as the fraud on our courts, works a degrading influence on the quality of our civilization and brings our whole system of justice into disrepute." *Diivorce: A Reexamination of Basic Concepts,* 18 Law & Contemp. Prob. 1, 28 (1953).

Max Rheinstein, Professor of Comparative Law at the University of Chicago: "The discrepancy between the law of the books and the law in action, which we find in so many states, has, through its tolerance or promotion of collusive practices and perjury, developed into a serious threat to the morals of the bar and the respect for law among the public." *Divorce: A Reexamination of Basic Concepts, supra,* at 19.

Paul W. Alexander, Judge at the Family Court Center, Toledo, Ohio: "No one is more painfully conscious than the legal profession of the utter imbecility of our present divorce procedure and the pernicious and almost wicked philosophy upon which it is based. Every honest lawyer is ashamed of the atmosphere of hypocrisy and lies in which he usually must handle a divorce case." *Family Life Conference Suggests New Judicial Procedures and Attitudes Towards Marriage and Divorce,* 32 J. Am. Jud. Soc'y 40 (1948).

Professor Henry Bowman, of the Sociology Department in the University of Texas, reports a conversation with a judge after hearing eighteen divorces granted, at the rate of one every eight minutes, in a mid-west court: "The judge later admits that in his opinion at least half the plaintiffs did not deserve decrees on the basis of the evidence submitted; but he also feels that he was helpless to do anything about it and that refusing them divorces would only make them perjure themselves further." Marriage For Moderns 515-16 (4th ed., 1960).

continue to live together after some grievous outrage had been committed by one against the other. A man whose wife had proved unfaithful might not wish to remain with her, or to maintain her, although she must remain legally his wife. A woman who had been brutally treated by her husband might wish to be free from the obligation to go on living with him and having sex relations with him, although she was compelled to remain his wife. In such situations, after appropriate investigation, the Church would allow them to live apart. And the Church could also rule that a guilty wife could no longer expect to be maintained by her husband, and the guilty husband could no longer expect to have sexual access to his wife. These arrangements, on humanitarian grounds and under the circumstances, were eminently just and sensible.

As a more or less delayed result of the Reformation, matters concerning marriage and divorce were transferred from the ecclesiastical to the civil courts, in some nations only very recently. This transition evidently took place in the midst of a good deal of confusion, and the essential court pattern was not radically changed. The civil courts, however, had the power to grant complete dissolution of the marriage with the right of the partners to remarry. The justification of this was still the matrimonial offense, and the usual grounds were adultery and malicious desertion, which Protestants believed were justified by the Bible as actions that violated the very nature of marriage and justified its termination.

As time passed, a more liberal atmosphere replaced the rigid legalistic view, and divorce was viewed in a humanitarian rather than in a theological perspective. The newer attitude was that any state of affairs that made marriage intolerable for either partner could justify the granting of a divorce. This continued to the point, found in the United States today, where the available grounds for divorce are so numerous, and often so loosely interpreted, that any determined married person, with enough money to spend, can find a way to dissolve his union.[4]

From the Roman Catholic supremacy in the Western world to the present day, divorce procedures have undergone two radical changes. First, there was the change from the view that the matrimonial offense warranted only separation *a mensa et thoro*, to the view that it warranted divorce *a vinculo*, with the right to remarry. Second, there was the change from the view that divorce with the right to remarry could be granted only when marriage was technically (that is, theological) violated, to the view that it could be granted when a marriage was in practice rendered unworkable. These two successive changes involved a radical reorientation in our complete approach. Yet *throughout this whole process of change we have retained essentially the same machinery.* Is it any wonder that the machinery is creaking?

It would seem that today most people believe that marriage should be terminated when the husband-wife relationship is no longer able to function. This is a sound concept. If divorce is justified at all, the obvious reason for granting it is that the marriage has broken down beyond repair. On the other hand, if the state has any responsibility in this matter at all, it would be acting irresponsibly to grant a divorce as long as there is any chance that the marriage can be rehabilitated. This issue, however, simply cannot always be decided solely on the basis of establishing that a "matrimonial offense" has been committed. Nor do the concepts of guilt and innocence have any real relevance to the viability of the marriage. It is not infrequent that the marriage counselor encounters a marriage in which the husband has driven an upright wife into adultery, or where the wife has goaded her husband into acts of cruelty that were foreign to his whole nature. Ask any qualified marriage counselor to

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[4] This brief historical summary is based mainly on Blake, *op. cit. supra* note 2, chs. 1-2; McGregor, *op. cit. supra* note 2, ch. 1; Rheinstein, *supra* note 3.

distinguish the innocent from the guilty partner in the last ten marriages he has dealt with. He will tell you that it is impossible to apply such concepts to the complex interrelationships of married people.

This is not to make light of offenses committed by marriage partners against each other. Certainly married persons should not be permitted to perpetrate outrages upon their spouses with impunity. Most certainly they should have the protection of the law when they need it. But this, surely, they already have. As Professor Paul Sayre has remarked, "You don't have to marry in order to have legal protection against others punching your nose. Every citizen has this protection without marriage."[5]

It would seem, therefore, that the time may have come to consider a completely new approach to divorce. It would be consistent with what is now believed to be the true causes of marriage breakdown and consistent with what these causes entail regarding the circumstances in which a marriage should be dissolved: namely, the existence of convincing evidence that the marriage relationship has degenerated to the point where it has become intolerable for one or for both, and can not be rehabilitated.

This is not a startling new idea. It is already in operation, along with other procedures, in Greece, Switzerland, Yugoslavia, and Japan. It is already the *sole* basis on which divorce can be granted in the Soviet Union and in most of the Communist countries. In England, the members of the Royal Commsision on Marriage and Divorce were evenly divided on the recommendation that divorce procedure based on the principle of marriage breakdown become the law of the land. Here in the United States, the principle is implicit in some of the statutory grounds for divorce.[6]

The real problem, it would seem, is not accepting this principle as a basis for divorce. The problem is how to implement it in practice. There are those who believe that divorce should be granted automatically when it is sought by the mutual consent of husband and wife. The argument is that if both spouses wish to discontinue the relationship, surely that is proof that the marriage has broken down. This is a ground for divorce (with certain safeguards) in Norway, Sweden, Denmark, Belgium, and Portugal. It is said that ninety per cent of all Japanese divorces are based on mutual consent. It does not seem valid, however, to consider mutual consent a sufficient reason for granting a divorce. A marriage is not simply the business of the two people concerned. There is a third party involved: the society to which the two persons belong. Just as a marriage can be recognized only when it is socially approved and meets the required conditions, so, the power to grant a divorce should rest finally with the state.

While the mutual consent of the parties to a divorce is greatly to be desired, it should never be the ultimate criterion. One can imagine situations in which a couple, in a mood of frustration and despair, might consent to end their marriage when, in fact, with skilled help the marriage could be made workable. On the other hand, one can imagine a marriage partner withholding consent for reasons that are selfish, vindictive, or pathological.

Another presumption of marriage breakdown can be raised after a period of prolonged and sustained separation. This is a common ground for divorce in our modern world. Indubitably prolonged separation would seem to be a reliable index of marital failure. It would appear, however, that there is something inhuman about requiring people whose marriage has totally broken down to

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[5] Sayer, *supra* note 3, at 30.

[6] Grounds which imply the breakdown of marriage, rather than a matrimonial offense are: insanity (29 states), living apart (18 states), disappearance (4 states), mental incapacity (2 states, Georgia and Pennsylvania), physical malformation preventing intercourse (Kentucky), incompatibility (3 states, Alaska, New Mexico and Oklahoma), feeble-mindedness and epilepsy (Delaware). These are not listed as grounds for annulment. Bowman, *supra* note 3, at 534-35.

prove it by tolerating the misery of separation, with no right of remarriage, for a long period of years.[7]

If a marriage must be dissolved, it would appear that this should be done under essentially the same circumstances as those in which it was instituted in the first place. A marriage can be effectuated when, in accordance with the standard of the social order, the prospective partners are of age, of sound mind, and not related within the prohibited degrees of kinship. Similarly, when a claim is brought by one or both partners that, despite all hopes entertained and all efforts made, the achievement of a workable marriage has proved impossible, through investigation should be made to establish whether or not this claim is valid. If it proves to be so, dissolution of the marriage should be granted. This investigation, however, should have nothing to do with matrimonial offenses, or with the establishment of guilt or innocence. These are irrelevant concepts which only confuse the issue. Outrages committed by the partners against each other are of course signs and symptoms that will help the clinician in his diagnosis, but the investigation as such should focus upon what has gone wrong with the relationship, why it went wrong, and what are the chances of putting it right. That is to say, the investigation should not be a legal one, but a clinical one.

Can this be done? The answer is in the affirmative. In fact, this is precisely what the professional marriage counselor is doing all the time. The only difference is that the marriage counselor works with the couple who come to him voluntarily, and refers his findings to *them* for a decision concerning the course of action to be taken. This is an over-simplification, of course, because the marriage counselor is engaged not only in a diagnostic determination, but also in a therapeutic operation which often leads the couple to see their whole situation in a completely different perspective. In a sense the findings are not those of the counselor, but of the couple, arrived at with his professional help. While counseling is more than investigation, it acquires direction through the essential assistance of the investigatory process.

Could the marriage counselor function effectively in dealing with couples whose motive in approaching him was to seek a way out of their marriage, instead of seeking to improve their relationship? Why not? In fact, the marriage counselor often does have to deal at least with one partner who has given up hope that the marriage relationship can be effectively restored. The skilled marriage counselor, on the basis of his training and experience, given adequate time with the couple, can arrive at a fairly reliable verdict concerning the viability of the marriage. While he himself would never claim that such a verdict could be completely accurate, there is no doubt that it would be a far more reliable index than is provided by establishing that a matrimonial offense has been committed; far more accurate, also, than a decision to seek divorce by mutual consent, arrived at by the couple themselves.

This new approach, for the first time in history, is now practicable. In the past, not enough was known about the complexities of marital interaction, nor were there persons thoroughly trained to deal with these matters. Now this situation has been radically changed.

This approach is already being used. A number of courts are currently utilizing the talents of qualified marriage counselors.[8] Unfortunately some of the early experiments in this field were not successful. In some cases at least, as a result of ignorance or a misguided attempt to save money, some courts used so-called "marriage counselors" who did not meet even the minimal qualification

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[7] In the case of Portugal, ten years of such separation are required.

[8] Courts with which the author is personally familiar include Los Angeles County Superior Court, California; Family Court Center, Toledo, Ohio; County of Hamilton Court of Common Pleas, Cincinnati, Ohio; Denver District Court, Colorado; Family Court of Milwaukee County, Winconsin.

required for membership of the American Association of Marriage Counselors. Presumably a court of law would hestitate to accept medical evidence from persons who were not fully qualified as medical practitioners. Yet courts have used poor judgment in making use of persons whose qualifications in the field of marriage counseling were highly questionable, with the kind or results that could be expected. This situation, however, is now rapidly changing for the better.

If this procedure of using breakdown of marriage as the basis for divorce were adopted, how would it work out in practice? Divorce should still be granted, as at present, by a court of law. The law would also, of course, have to deal with the various settlements concerning maintenance, access to children, etc., that follow from divorce. The condition for the granting of the divorce itself, however, would no longer be the submission of legal proof that one of the parties was guilty of a matrimonial wrong, but the submission of satisfactory evidence that, on the basis of a thorough clinical investigation extended over a sufficient period of time, it was apparent that the marriage had broken down beyond repair. When the judge was satisfied on this account, the divorce would be granted without guilt being imputed to either party.

In reference to the financial questions involved, the investigation costs would be met, as the present legal costs of divorce are met, by the parties themselves. If the money now being collected by attorneys for establishing grounds for divorce were to be transferred to duly authorized marriage counselors, it would be sufficient in most cases to cover the cost of a final all-out attempt to save the marriage on the basis of a clinical investigation. With due respect to the legal profession, it would seem that the clients' money would be better spent in this way. Neither would it result in any serious hardship to the members of the legal profession, among whom divorce practice is by no means a popular part of their present duties. Those who are now specializing in divorce practice could gradually be transferred to more useful, and more congenial, fields of service.

Would the marriage counseling services used by the divorce courts be attached to the courts, or would they be separate? Both sides of this question have been defended. The question is not of major importance. Once the basic principle of a new approach to divorce is accepted, its practical implications can be worked out without too much difficulty.

While the primary reason for proposing this new approach to divorce is that it is long over-due, and would be preferable in every way to present procedures, there are several subsidiary reasons for regarding it with favor. It would guarantee the fullest exploration wherever a real possibility of reconciliation existed. That this is often not done under our present system is not the fault of the attorney, but of the system itself. The "adversary" concept of divorce inevitably tends, not toward easing the conflict between the spouses, but toward intensifying that conflict. Once involved in divorce proceedings, husband and wife find themselves in a climate which encourages them to fight each other for all that they can get. This is damaging and degrading, and may in fact destroy any last remaining chance of softening their hearts and bringing them together again. The counseling approach, by contrast, would focus attention of using all possible means to *resolve* the conflict in the marriage.

An opportunity, moreover, would be provided for the couple to examine, calmly and objectively, and with skilled help, the real reasons why the marriage failed. There would be no need for them to be defensive about their personal responsibility for that failure, since no one would be trying to establish their guilt. Many could undergo a healthy learning process that would drain off some of the needless bitterness and rancor that generally arise in such situations. Even if this did not result in reconciliation it would prove to be a valuable experience. Since most divorced persons sooner or later remarry, this opportunity to face the

implication of their personal deficiencies as marriage partners could show them clearly what readjustments they would have to make for a subsequent marriage.

Furthermore, the complex *sequelae* of divorce—money settlements, care and custody of the children, dealing with family and community reactions, and the like—could be settled in a much more cooperative spirit after a period of counseling, than in the atmosphere of mutual recrimination often generated by present procedures. The counseling process, even if it did not reunite the couple, could help them to achieve the kind of perspective that would be likely to result in the acceptance of wise and sensible legal settlements, especially in regard to the custody of their children.

Finally, the absence of imputations of guilt and innocence would spare children the painful sense that one of their parents had been publically exposed as an evil or malicious person, while the other had been judged to be, by comparison, a paragon of virtue. Children would suffer much less as a result of their parents' divorce if they could see it as human tragedy which everyone concerned had tried to prevent, but which despite all efforts, could not in the end be avoided.

No doubt there would be legal objections to this new way of dealing with divorce. The nature of law is to give stability and permanence to the values found to be important to human welfare, and the law is normally resistent to change. This is as it should be. Changes in the approach to divorce, however, have already taken place. Among the some forty grounds for divorce in the laws of the various states, there are already some that imply crude manifestations of marital breakdown, without the implication of matrimonial offence. Much more eloquent, however, is the fact that about half of all divorces granted in the United States stem from proof of cruelty, in some shape or form. Taken at its face value, this startling fact would suggest that Americans are vicious, sadistic people. Yet most would deny the implication that nearly a quarter of a million Americans each year treat their spouses with such brutality as to make life intolerable. What is really happening, obviously, is that "cruelty" is the legal fiction providing the way out of marriage for couples who are suffering conflict and tension in their relationship. Would it not be better to face the facts, and make the necessary clinical investigations in order to ascertain if these conflicts and tensions can be resolved?

While some lawyers would resist the proposed approach, in the belief that dealing with divorce is their preserve and should not be surrendered to any other professional group there should be no objection to the new approach being carried out by lawyers, provided they take the clinical training necessary to equip them for the task. This would require a profound change in the training and attitudes of lawyers. A few outstanding attorneys have sought to equip themselves to undertake counseling at a professional level, but they constitute a tiny minority of their profession. The proportion of clinically qualified members of the American Association of Marriage Counselors whose major professional field is law is less than one per cent. Inevitably, the legal profession is going to have to make much wider use of professional marriage counselors, or more lawyers must become qualified marriage counselors to carry out their responsibilities.

An atmosphere of humanity and realism should be introduced into divorce procedures. Any sound divorce system should operate like a flexible net, letting through those whose marriages are manifestly unhealthy and destructive to themselves and to their children; but doing everything possible to retain in being those marriages that can be made to function as the basis of effective family life. The major purpose is that all possible means of reconciliation may be fully explored by skilled clinicians before a single American marriage is allowed to end in divorce. Surely, this is not making divorce easy. In many cases, indeed, it

would be making it more difficult. It would, however, take many elements of injustice and discrimination out of our divorce procedures, by the removal of obsolete but traditional obstacles. It is expected that many needless divorces would be avoided, with obvious benefits to society.

In any human crisis, those involved deserve the best help that can be given them. A legal settlement of marital problems too often does not reach down to the level of their true need. It is no more than scene-shifting, which leaves the characters still emotionally confused, with their difficulties perhaps increased by their divorce experience. Sometimes this may be the best that can be done for them. But the evidence is strong that there is a better way. An enlightened society should be able to do more to help men and women achieve success in the great arts of living and of loving.

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APPENDIX "55"

BREAKDOWN VERSUS FAULT—RECENT CHANGES IN UNITED KINGDOM AND NEW ZEALAND DIVORCE LAW

by

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In 1963 the New Zealand divorce law was revised in the Matrimonial Proceedings Act, 1963, which came into force on January 1, 1965. At the same time in England the Matrimonial Causes Act, 1963, made a number of amendments to the law of that country. A comparison of the two on the matters dealt with by both makes an interesting study, particularly in considering the extent to which the basic principles on which the dissolution of a marriage is permitted differ between the two countries.

The Royal Commission on Marriage and Divorce which reported in 1955 (the Morton Commission) distinguished between the doctrine of the matrimonial offence, under which divorce is viewed as a remedy available to one party for an infringement by the other of the undertakings entered into at marriage, and the doctrine of the breakdown of marriage, under which it is seen as a means of legally ending what has already come to an end in fact.[1]

English law is firmly based on the matrimonial offence doctrine, though there is one notable exception amoung the grounds, namely, insanity. Nevertheless, adherence to the doctrine is evident throughout the English legislation: and the members of the Morton Commission were with one exception agreed that the existing law should be retained, though they were evenly divided on whether the time had not come to introduce an additional ground based on the breakdown principle.[2] New Zealand law, being originally derived from English law, is also built to a considerable extent on the offence theory but the influence of the breakdown principle is clearly to be seen as well, and recent additions to the structure have tended to increase that influence.

The most noteworthy move made in New Zealand towards the breakdown theory occurred in 1920 when separation by agreement for three years or more was introduced as a ground for divorce.[3] Little more than a year later, as a result of the case of *Mason* v. *Mason*,[4] public opinion induced a retreat to the extent that the respondent was given the right to prevent the granting of a decree if he or she could show that the separation was the petitioner's fault.[5] In 1953, partly as a result of a gap that had been shown in the law, divorce was made possible where the parties had been living apart for at least seven years and were unlikely to be reconciled[6]: but even then it was felt that public opinion was not ready for the idea that a so-called "guilty" person should be able to procure a divorce against the wish of the other party and the legislature

* Of the Department of Justice, Wellington, New Zealand.
[1] Report of Royal Commission on Marriage and Divorce (Cmd. 9678), paras. 56 and 57.
[2] *Ibid.* paras. 65-67.
[3] Divorce and Matrimonial Causes Amendment Act, 1920 (N.Z.), s. 4.
[4] [1921] N.Z.L.R. 955; [1921] G.L.R. 522, 635.
[5] Divorce and Matrimonial Causes Act, 1921-1922 (N.Z.), s. 2.
[6] Divorce and Matrimonial Causes Amendment Act, 1953 (N.Z.), s. 7.

imported into the ground the same proviso as attached to a petion based on a separation agreement.

The length of the period required before a petition could be presented on this ground might have been thought to preclude the likelihood of its acting as an inducement to a person to deliberately break up his marriage, even if the proviso had not been added. However, this consideration was not sufficient argument against the notion that divorce should be primarily a remedy for a wrong, which ought to be granted, if not necessarily at the instance of the wronged party, at least not against his or her wishes.

Over ten years have passed since the introduction of this ground for divorce in New Zealand, and the opposing view has now prevailed. The provision which gave the respondent a veto if the petitioner was responsible for the separation was the subject of judicial criticism, notably by F. B. Adams J. in *Towns* v. *Towns*,[7] and was protested against both by the New Zealand Law Society and by individual members of the public. In consequence, it was not repeated in the Matrimonial Proceedings Act, 1963, and since the coming into force of that Act it will be possible for either party to a marriage to obtain a divorce on that ground, despite the opposition of the other. The ground is a discretionary one only, but there is no attempt in the statute to indicate the basis on which the court might exercise its discretion to refuse a decree.[8] The words of Salmond J. in *Mason* v. *Mason*,[9] already referred to, when discussing the similar discretion then existing in separation agreement cases, are however of particular relevance:

> "A refusal on this ground must be justified by special considerations applicable to the individual instance, and must be consistent with due recognition of the fact that the legislature has expressly enabled either party, innocent or guilty, to petition for divorce on the ground of three years' separation."

It is to be noted that the New Zealand law still differs from the Australian Matrimonial Causes Act, 1959, which makes separation for five years a ground for divorce in that country. There, however, the court is bound to refuse a decree if it is satisfied that because of the petitioner's conduct or for any other reason it would, in the particular circumstances of the case, be harsh and oppressive to the respondent, or contrary to the public interest, to grant a decree. In addition it has a discretion to refuse a decree if the petitioner has committed adultery that has not been condoned or, if condoned, revived.[10]

Although it is clear that by no means all New Zealanders support the recent change, it has nevertheless been accepted with relatively little complaint. This is in strong contrast with the position in England, where it has not yet been possible to introduce seven years' separation as a ground even with the safeguard of a veto for the person not in any way responsible for the separation. This, or a more restrictive variation of it, was the additional ground on which the Morton Commission divided, the basic objection to this particular form being expressed by those who opposed in it the words "that a spouse who had committed no recognised matrimonial offense could be divorced against his will."[11]

The United Kingdom Matrimonial Causes Act, 1963, began life as a Private Member's Bill. When it was introduced into the House of Commons it made provision for divorce on the ground of seven years' separation, but with the proviso that a decree could not be granted if the respondent objected unless the court was satisfied that the separation was in part due to the unreasonable

[7] [1957] N.Z.L.R. 947.
[8] Matrimonial Proceedings Act, 1963 (N.Z.), s. 30.
[9] [1921] N.Z.L.R. 955 at p. 963.
[10] Matrimonial Causes Act, 1959 (Aust.), ss. 28 (*m*) and 37.
[11] Report (Cmd. 9678), para. 69 (xxiv).

conduct of the respondent. Despite the proviso which, as was pointed out in the Morton Commission's report,[12] was more favourable to a respondent than the present New Zealand provision which places the burden of proof on the respondent, the move was not successful. The provision had subsequently to be dropped in the Commons[13] and the Act as eventually passed adds no new grounds for divorce to English law.

Both the English Act and the New Zealand one alter the law as to collusion, but the New Zealand changes are more far-reaching. Collusion is not easy to define precisely but it is clear from the English cases that it embraces a fairly wide range of agreements between the parties relating to the initiation or the conduct of divorce proceedings, and such New Zealand cases as there are have not departed from the English decisions.

In one of the latest reported cases on the subject, *Noble* v. *Noble and Ellis (No. 2)*,[14] Scarman J.'s definition, which was implicitly accepted by the Court of Appeal, was that "A collusive bargain is one with a corrupt intention: it is an agreement under which a party to the suit for valuable consideration has agreed either to institute it or to conduct it in a certain way."[15] It is clear, however, from the examples that he gives that the corrupt intention need not in any sense involve the intent to deceive the court or to keep the true facts from it—rather in some cases the reverse. Thus he cites as instances "the reluctant petitioner induced by the offer of some benefit to take proceedings against an eager respondent" and "a co-respondent induced by a promise of some benefit...to provide evidence or to bear witness at the trial against the respondent."[16] It is not stipulated that in the one case the proceedings should not be justifiable or that in the other the evidence be false. All that is required is that "the parties intend by their agreement to match institution of suit or any aspect of its conduct with the provision of some benefit to the party instituting or in that aspect conducting the suit."[17]

This point is of particular interest in view of the fact that, whereas in section 30 of the Matrimonial Causes Act, 1857 (U.K.), which made collusion a bar to a decree, there was no qualification of the term, section 7 of the 1860 English Act provided for the intervention of the Queen's Proctor where he suspected that any parties to a divorce suit were or had been acting in collusion "for the purpose of obtaining a divorce contrary to the justice of the case." This difference was faithfully copied into the New Zealand legislation by the Divorce Act, 1898, and was continued in the Divorce and Matrimonial Causes Act, 1908, and the Divorce and Matrimonial Causes Act, 1928.[18] In the early New Zealand case of *Livingstone* v. *Livingstone*,[19] it is clear that Denniston J. thought that the additional words ought to be imported into the actual definition of collusion, and indeed he used the words in his decision.[20] Despite this, however, he did not consider he was at liberty to decline to follow the English case of *Churchward* v. *Churchward*,[21] in any case which was fairly identical on the facts, and it was on the facts that he distinguished the case he had before him.

One factor which influenced Denniston J. in his attitude towards the scope of collusion in New Zealand law was what he termed "the spirit of the divorce

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[12] *Ibid.* para. 71 (vi).
[13] An attempt was made to revive it in the House of Lords, but this too failed.
[14] [1964] 1 All E.R. 577; (C.A.) 769.
[15] At p. 581.
[16] At pp. 581 and 582.
[17] At p. 582.
[18] ss. 15, 17 and 24 (1), and s. 24 (3).
[19] [1902] 21 N.Z.L.R. 626.
[20] At p. 637.
[21] [1895] P. 7.

law"[22] of the country. That comment was made nearly twenty years before separation by agreement for three years was made a ground for divorce in New Zealand, but even then the tendency was towards less restrictive laws than those from which they had been developed. With the introduction of that ground the difference in outlook between the two countries might be considered even more pertinent in this context. When an agreement between the parties can itself form the basis of a petition a wide definition of the type of agreement which is to be regarded as a barrier to a decree hardly seems appropriate. A New Zealand judge could not borrow the words of McCardie J. in discussing the question of *Laidler* v. *Laidler*,[23] "Divorce by mutual consent is remote from the contemplation of English Law."

There is one respect in which New Zealand law has for many years favoured the petitioner more than did the corresponding English law on the subject of collusion. This is not the result of any initiative taken in New Zealand—it arises rather because a change made in England in 1937 was not, whether by accident or design, followed in the former country. The Matrimonial Causes Act, 1857 (U.K.), required the court to refuse a decree for divorce if it found that the petition had been presented or prosecuted in collusion with either of the respondents.[24] This same provision was followed in the 1867 New Zealand Act and (until the Matrimonial Proceedings Act, 1963, came into force) remained the law where adultery was the ground for the petition.[25] In other cases a finding of collusion gave the court a discretion whether or not to grant a decree.[26]

In England adultery was the only ground for divorce until as late as 1937. When in that year, arising out of a Private Member's Bill sponsored by Mr. A. P. (Now Sir Allan) Herbert, the Matrimonial Causes Act, 1937, added insanity, cruelty and desertion as grounds, a change was also made in the provisions as to collusion, and since then the petitioner has had the burden of disproving it when it was in issue.[27] Since 1937, then, the position has been that in England the requirement has been for the court to be satisfied there was no collusion and unless so satisfied to dismiss the petition; whereas in New Zealand collusion has had to be proved by the person alleging it and it has then operated as a mandatory bar to a decree only in the case of adultery.

The Morton Commission considered that it was still necessary to retain collusion as an absolute bar in England but thought that uncertainty as to its scope had created difficulties. It therefore recommended definition by statute on the basis of the following considerations:

> (i) the spouses should be restrained from conspiring together to put forward a false case or to withhold a just defence, and
>
> (ii) divorce should not be available if one spouse had been bribed by the other spouse to take divorce proceedings or had exacted a price from him for so doing.[28]

In addition the Committee recommended that it should be provided by statute that it should not amount to collusion if reasonable arrangements were arrived at between husband and wife, before the hearing of the suit, about financial provision for one spouse and the children, the division of the matrimonial home and its contents, the custody of, and access to, the children, and costs. It should be the duty of the petitioner to disclose any such arrangements to

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[22] At p. 639.
[23] [1920] 123 L.T. 208; 90 L.J.(P.) 28; 36 T.L.R. 510.
[24] s. 30.
[25] Divorce and Matrimonial Causes Act, 1928 (N.Z.), s. 17.
[26] *Ibid.* s. 15.
[27] Matrimonial Causes Act, 1937 (U.K.), s. 4. Matrimonial Causes Act, 1950 (U.K.), s. 4.
[28] Report (Cmd. 9678), para. 234.

the court at the hearing and the parties should be able to apply to the court before or after the presentation of the petition for its opinion on the reasonableness of any contemplated arrangements.[29]

Such a provision originally appeared in last year's English Bill but not in the Act as passed. The Act did, however, make a significant change in the law on this subject by reverting to the requirement of a positive finding of collusion and, despite the Morton Commission's opinion to the contrary, making collusion merely a discretionary bar to a decree in every case.[30] The probable effect of this change may be seen in the case of *Head (formerly Cox)* v. *Cox (Smith cited)*,[31] in which Wrangham J., though he did not attempt to lay down a set of principles to guide the court in exercising its discretion in respect of collusion, had to consider the matters which he thought of relevance in the case before him. One of these was the question whether the collusive agreement was likely to produce a result contrary to the justice of the case. Although this was not the only consideration, its inclusion as an important factor, along with such matters as public interest and possible prejudice to any children, seems to mean a very considerable difference in the practical results of the collusion rule.

The 1963 New Zealand act also changed collusion into a discretionary bar only, even in the case of a petition on the ground of adultery. It went further, however, and restricted the scope as well, by adding the words "with intent to cause a perversion of justice" to the relevant provision.[32] These words appear also in the Australian Matrimonial Causes Act, 1959, but there, however, such collusion, if proved, is an absolute bar to a decree.[33]

What constitutes an intent to cause a perversion of justice may be arguable but it is submitted that it is something different from the corrupt intention referred to in *Noble* v. *Noble and Ellis*, already discussed. Whatever the consideration for it, an agreement to institute proceedings where a ground for divorce exists, or to provide evidence of adultery which has been committed, can hardly be said to show any intent to cause a perversion of justice. Nor is such an intent necessarily present in every "arrangement which... tends to pervert the course of justice," an expression used by Denning J. in *Emanuel* v. *Emanuel*.[34] An agreement may be of a type which if allowed would have a general tendency to produce unjust results through the suppression of facts in some cases and yet itself be wholly lacking in any intention to bring about such a result or any likelihood of doing so.

To gauge the effect of the additional words one may usefully look again at the case of *Head (formerly Cox)* v. *Cox (Smith cited)*, already referred to. There the agreement concerned the abandonment of certain charges by both parties and of a claim for maintenance by the wife. It had been arrived at between three experienced counsel and was frankly disclosed to the court, and the judge found that there was certainly one offence of uncondoned adultery on which relief could be granted to the petitioner (the proof of the respondent's original charge of cruelty might possibly have caused the court to exercise its discretion against her). Despite the absence of any desire or endeavour to deceive the court it was freely admitted that the agreement was collusive and the question was whether or not the court's discretion should be exercised in respect of it. In New Zealand, it is submitted, since the new Act came into force an agreement entered into in similar circumstances could not be held to be even a discretionary bar to a divorce by reason of collusion.

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[29] *Ibid.* para. 235.
[30] Matrimonial Causes Act, 1963 (U.K.), s. 4.
[31] [1964] 1 All E.R. 776.
[32] Matrimonial Proceedings Act, 1963 (N.Z.), s. 31.
[33] Matrimonial Causes Act, 1959 (Aust), s. 40.
[34] [1946] P. 115; [1945] 2 All E.R. 494 .

Indeed it is arguable that the combined effect of the recent changes on the subject has probably been to remove the concept of collusion completely from New Zealand law. A perversion of justice will not occur unless the court does not have the true facts before it. Will not proof of an agreement designed to bring about that result inevitably bring to light also the very facts the knowledge of which would itself be sufficient to prevent that perversion? If for example it is shown that the respondent has agreed to withhold evidence sufficient to disprove the charge of desertion alleged against him the court has no need to rely on the collusive agreement in order to dismiss the petition. Or if adultery has been condoned the condonation will itself effectively bar a decree once it is revealed that the parties have entered into an agreement to suppress the evidence of it.

In these circumstances it appears at first sight that it would have been more logical for collusion as now defined in New Zealand to be made a mandatory bar to a decree in every case, as in Australia. In that event it might have been unnecessary but there would at least have been no inconsistency between the court's obligation to dismiss the petition on the other evidence and its discretion whether or not to dismiss it on the score of collusion. A reason for the discretion can however, be found in the possibility of parties to divorce proceedings entering into an agreement designed to hide from the court facts which they believe to be material but which even when known do not affect the result. If that happened the new law would not prevent a decree being granted unless the court considered that in the particular circumstances public interest required the petition to be dismissed as a penalty for the parties' misconduct. Then too the collusion might relate to another discretionary bar, namely that the petitioner's own habits or conduct induced or contributed to the wrong complained of.[35] The existence of the discretion is clearly consistent here.

The scarcity of reported cases in New Zealand relating to collusion suggests that it had never been of particular importance in that country. Though any move to abolish it expressly would most probably have been strenuously opposed by the legal profession it is perhaps not too much to hope that it will now in practice depart from the law "unwept, unhonoured and unsung."

The United Kingdom Act when introduced as a Bill was called the Matrimonial Causes and Reconciliation Bill and the facilitation of reconciliation attempts was one of the important purposes of the measure. The word "reconciliation" was removed from the title in the House of Lords but two of the provisions intended to assist that end remained. The Act first of all abolishes the anomalous rule under which a husband who had sexual intercourse with his wife after he became aware of a matrimonial offence committed by her was conclusively presumed to have condoned the offence. The new rule is that for both parties sexual intercourse raises a presumption of condonation which may be rebutted by evidence to the contrary.[36] The other provision allows a continuation or resumption of cohabitation for a period of not more than three months to be ignored for the purposes of condonation (and also in calculating a period of desertion) if it has been done with a view to effecting a reconciliation.[37]

Both these changes were recommended (in the one case unanimously, in the other by a majority) by the Morton Commission (though the period recommended for the second provision was one month)[38] and were made also by the New Zealand Act, though in somewhat different form and with a two-month period instead of the English three months.[39] The effect of the English sections is

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[35] Matrimonial Proceedings Act, 1963 (N.Z.), s. 31.
[36] Matrimonial Causes Act, 1963 (U.K.), s. 1.
[37] *Ibid.* s. 2.
[38] Report (Cmd. 9678), paras. 241 and 242.
[39] Matrimonial Proceedings Act, 1963 (N.Z.), s. 29 (4) and (5).

however to a certain extent negatived by another provision which makes adultery which has been condoned incapable of being revived[40]; and it is interesting to note from an English writer[41] that this section was the result of an amendment introduced into the House of Lords less than a fortnight before the Bill received the Royal Assent.

The rule as to condonation has been developed within the framework of the matrimonial offence theory and it is peculiarly appropriate to that theory. At the same time the results it achieves are not inconsistent with the breakdown doctrine, and this is the more so as a result of the two amendments to the law made in both England and New Zealand. In so far as an act which constitutes a matrimonial offence may be taken as evidence of the failure of a marriage, it is clear that where an act of that kind has been completely forgiven it cannot be used to prove there has been such a failure as would justify the granting of a divorce on that basis. But subsequent conduct reviving the offence, coupled with the other person's desire for a divorce, may once again provide evidence that the marriage is at an end. By abolishing in the case of adultery the rule that a condoned offence may be revived for the purposes of divorce, the English legislation appears not only to have made the path more difficult for couples genuinely anxious to attempt conciliation but also in one respect at least to have ensconced the matrimonial offence theory more firmly in the law.[42]

One of the provisions in English law which it was suggested at the time should have been included in the 1963 New Zealand Act was that making cruelty one of the grounds on which a divorce may be obtained. There are already a very large number of grounds in New Zealand, however, and the inclusion of any more is open to objection unless it is clear that they do not carry more disadvantages than advantages. One disadvantage of cruelty as a ground that emerges clearly from the English reports is the manner in which it encourages the washing of dirty linen in public. This is so to some extent with any defended divorce petition. However it seems to be the more so where cruelty is the ground by reason of the very nature of the charge, which involves a standard of behaviour rather than a matter of fact and may require evidence of many incidents in the married life to establish it. If it is contested the mutual recriminations that can so easily occur present a sorry spectacle that it would be preferable to avoid if possible.

A further argument against the suggestion is to be found in the anomalies and inconsistencies of the English cases on the subject. Although the worst of these have now been removed by two 1963 cases the present situation is still uncertain, as is shown in a careful review of the law in recent article by Dr. L. Neville Brown,[43] and not wholly satisfactory, as is discussed later.

These considerations would not be decisive if it could be shown that the absence of cruelty as a ground created hardship in New Zealand. The Government did not however receive any representations from persons who had suffered as a result. Moreover it is significant that, although cruelty has always been a ground for a separation decree (and the decree being little used no changes were made last year in the provisions relating to it) and such a decree can itself found a petition for divorce after three years, the number of of separation decrees on every ground is usually under ten (in contrast with well over 1,000 decrees absolute in divorce. It seems clear therefore that, in those cases where a person wishing to obtain a divorce would be able to allege cruelty, some other ground is almost invariably available under the present law.

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[40] Matrimonial Causes Act, 1963 (U.K.), s. 3.

[41] Miss O. M. Stone in 26 M.L.R. (No. 6), 676.

[42] It is to be noted, however, that the amendment was aimed at bringing the law of England into line with that of Scotland, which does not allow for revival of a condoned offence.

[43] "Cruelty Without Culpability or Divorce Without Fault," 26 M.L.R. (No. 6), 625.

The two decisions discussed by Dr. Brown in his article were those given by the House of Lords in *Gollins* v. *Gollins*[44] and *Williams* v. *Williams*,[45] which as he points out have made a very great change in the basis on which English divorce law rests by in effect removing cruelty from the matrimonial offence concept and thus giving the breakdown principle a considerable place in the law.

Both decisions were given by a majority of three to two and the composition of the court was the same in both cases. *Gollins'* case has now established that an intention to injure the other party is not an essential element of cruelty in divorce proceedings and *Williams'* case lays it down that the M'Naughten Rules are inappropriate in divorce proceedings on that ground and hence that insanity affords no defence to the petition.[46]

The general requirement of an intention to injure on the part of the petitioner, and in particular the proposition that a defendant who because of insanity did not know what he was doing should not be liable to be divorced for cruelty, are wholly in line with the doctrine of the matrimonial offence. Their rejection involves a shift in emphasis from the respondent's act to its effect on the petitioner and the marriage. The question that has ultimately to be considered now is whether in the words of Lord Pearce in *Gollins'* case, "a reasonable person, after taking due account of the temperament and all the other particular circumstances, would consider that the conduct complained of is such that this spouse should not be called on to endure it."[47] This means that the breakdown principle is gaining ground in the law, a trend which will meet with the approval of many people. Yet even a strong supporter of that principle cannot be wholly satisfied with the results of these cases, for several reasons. In the first place, as Dr. Brown suggests, they raise a number of queries, such as the limits that are to be drawn to circumscribe what he calls "this doctrine of constructive cruelty," and the effect of the decisions on the requirement of *animus* in constructive desertion.[48] Secondly, regardless of whether or not there is any implication of culpability in the legal meaning of cruelty in divorce proceedings, in the minds of most people the word imports a measure, probably a large measure, of blameworthiness; and it is unfortunate that the respondent who is not responsible for his actions should be labelled with the term. As Lord Evershed said in *Williams*[49]:

> "If the decision in this matter rested with me alone I am disposed to think that I should take the view that, on the ordinary sense of language, a man could not and would not be said to be treating another with cruelty if he was shown, by reason of mental disease or infirmity, not to be at all aware of what he was doing—if, to take an extreme case, a man who was observed to be beating physically his wife with the utmost severity were proved to be quite unaware that he was doing other than beating his drawing-room rug."

Accepting that a decree was justified, would not another basis for it be preferable?

The third comment that may be made on the law as it now stands in England is that the legislature and the courts do not appear to be pulling wholly in the one direction. It is of interest that it was one of the dissenting Law Lords in both *Gollins'* and *Williams'* cases, Lord Hodson, who was responsible for the

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[44] [1963] 3 W.L.R. 176; [1963] 2 All E.R. 966.

[45] [1963] 3 W.L.R. 215; [1963] 2 All E.R. 994.

[46] This change in the law was recommended by the Morton Commission—Report (Cmd. 9678), para. 256.

[47] [1963] 2 All E.R. 966 at p. 992.

[48] p. 646 *et seq.*

[49] [1963] 2 All E.R. 994 at p. 1009.

insertion of the provision in the 1963 Act that condoned adultery cannot be revived.

Dr. Brown ends his article with a plea for the statutory reform of the law of divorce in England, which, as he says, has been "thrown into confusion by seeking to engraft upon statutes framed in terms of matrimonial offences a judicial interpretation founded upon the principle of breakdown."[50] Although New Zealand law has long shown a tendency to admit the influence of the breakdown principle, and the tendency is increasing, it remains true that it still exhibits an ambivalence which the 1963 Act might have taken the opportunity to remove. Further substantial changes are unlikely to be made for many years. When they are it may be that a clean break with the matrimonial offence principle will be considered and the grounds for divorce reframed (whether in one comprehensive ground or in a number of grounds which all support the same finding of a total failure of the marriage) so that the decree becomes, not a penalty for wrongdoing, but the legal severance of a tie that no longer exists in fact.

[50] At p. 651.

APPENDIX "56"

DIVORCE LAW IN AUSTRALIA—FEDERAL UNIFORMITY

by

WILLIAM LATEY, Q.C.

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Both parties in the Parliament of the Commonwealth of Australia have accepted the Matrimonial Causes Bill introduced by Mr. Menzies's government in May last. The Bill embodies one of the most important changes in any of the Dominions of the British Commonwealth based on a federal system that has occurred in the present century. Put shortly, the measure brings about uniformity of jurisdiction and of the grounds for matrimonial causes throughout the Australian Commonwealth, so that no longer will there be conflicts of jurisdiction and anomalies of law as between State and State in that Dominion. Moreover, though the test of domicile will continue to be the main basis of jurisdiction in divorce, domicile will be in Australia as a whole and not merely as hitherto in each of the States of that Dominion.

Mr. Joske, Q.C., author of the well known textbook on marriage and divorce law in Australia, was the pioneer of this reform by introducing a Private Member's Bill in the House of Representatives in 1957. This had the encouragement and support of Mr. Evatt, Leader of the Opposition and himself formerly Attorney-General, and other legal members of the legislature. It found favour with the government, to whom Mr. Joske relinquished the reins when he was assured that the measure was to be adopted after redrafting.

The Second Reading

Sir Garfield Barwick, Q.C. the Attorney-General, moving the second reading of the Bill on May 14th last, paid a generous tribute to Mr. Joske for his labours as a pioneer. He said: "The object of this Bill is to give the people of Australia, for the first time in our history, one law with respect to divorce and matrimonial causes and such important ancillary matters as maintenance of divorced wives and the custody and maintenance of the children of divorced persons. Upon the Bill becoming law, Australia, so far as my research goes, will be one of the first countries under a federal constitution to deal comprehensively and uniformly on a national basis with matrimonial causes. Indeed, the power to make such a law is seldom vested by a federal constitution in the national Parliament. Matrimonial causes have usually been left to the component states or provinces. With great prescience, however, the members of the Australian Constitution vested in this Parliament a power, concurrent with that of the States, to make laws with respect to these matters. This is par. xxii of sect. 51 of the Constitution. . .For almost two complete generations this power has been left largely to the States."

Mr. Joske's Bill

Sir Garfield then referred to Mr. Joske's private member's Bill, passed by Parliament in 1955, which brought under the Matrimonial Causes Act, 1945, categories of married women not previously included, with the result that all wives resident in Australia for the prescribed period could institute divorce proceedings in the state or territory of their residence. In 1957 Mr. Joske

introduced a further Bill to bring about uniformity within the Australian Commonwealth. Sir Garfield added that the government had accepted Mr. Joske's faith that the people were ready to receive an Australian Act to preserve and protect family life, and to grant dissolution of marriage and other matrimonial relief on grounds common to all Australians.

He pointed out four principal differences between the present measure and Mr. Joske's Bill, viz.:—

(1) Development of the reconciliation provisions;

(2) Universal grounds for relief instead of partial changes;

(3) Present state courts to administer the law, instead of creating a new federal divorce court.;

(4) Maintenance proceedings in divorce and matrimonial causes generally to be regulated by federal law, claims for maintenance where no such cause is pending to be left to the State magistrates as hitherto.

Marriage Guidance

The Attorney-General, in dealing with the first of these matters, emphasised the national interest in preserving the principle of lifelong marriage and the integrity of family life, and announced that under clause 9 of the Bill the Attorney-General would be empowered to grant from time to time out of moneys appropriated by Parliament for this purpose to an approved marriage guidance organisation such financial assistance as he may determine. In this connection, it may be noted, the Royal Commission on Marriage and Divorce in this country, reporting in 1956 (Cmd. 9678 pp. 94-99) paid a tribute to the principal marriage guidance societies for their valuable work and urged on the state the need of generous subsidies to them. But, despite some measure of state financial support, the National Marriage Guidance Council at present has to depend largely on the aid of philanthropic bodies and persons.

It is proposed that in Australia as in England the marriage guidance organisations should be conducted independently of the civil service and that voluntary marriage counsellors, properly qualified and trained for their delicate duties, should undertake this sympathetic task. The Australian Bill goes further and by clause 12 provides that marriage counsellors should take an oath of secrecy and that they should not be competent or compellable to give evidence in any court as to any admission or communication made to them in their capacity as marriage counsellors. The latter alteration in the English law of evidence was proposed by the Royal Commission (par. 358), but despite sedulous campaigning by the National Marriage Guidance Council it has not found a place in the various Acts which were passed in 1958 to give effect to many of the Royal Commission's recommendations.

Judges and Reconciliation

Under the head of reconciliation a very important duty is imposed on the court by clause 14. The court must give consideration from time to time to the possibility of a reconciliation of the parties to the marriage in appropriate cases, and with that end in view the judge may either adjourn the proceedings for a fortnight, or longer if the spouses desire it; or with the consent of the spouses interview them in his chambers, with or without counsel, as he thinks proper; or nominate an approved marriage guidance organisation or a person with experience or training in marriage conciliation, or in special circumstances some other suitable person to endeavour, with the consent of those parties, to effect a reconciliation. Under clause 15, if the judge fails thus to bring about a reconciliation, the case will be remitted to another judge, unless the parties request

the original judge to try the case. Nothing said in the course of such conciliation proceedings will be admissible in any caurt: clause 16.

Commenting on these provisions, Sir Garfield Barwick said that they were designed to impress upon the legal profession that in the administration of the law with respect to matrimonial causes they must not lose sight of the human relationships with which they were dealing. The court, he said, must keep permanently in mind the paramount desirability of preserving the marriage and must not merely execute the law as if the human consequences of so doing were not its concern. "I would expect judges," he added, "not to undertake to conciliate unless there are sound prospects of success...The delay and additional expense caused by failure in a case where there were sound prospects of success I would consider a small hazard against the prize of reconciliation...Whilst this part of the Bill directed to reconciliation is clearly more useful in contested suits rather than in uncontested suits, I would expect it to have significant utility even in undefended cases...Consequently, this Bill provides a new mechanism, at the one moment designed to bring the consequences of divorce for the children to the notice of the parents, and to secure the welfare of the children when divorce ensues."

Pausing here, the writer may be pardoned for saying that that is a bold experiment which may be justified by results. The question of introducing conciliation into our judicial system was considered by the Denning Committee in 1946 (Cmd. 1024), mainly in connection with a concrete scheme outlined by the President, Lord Merriman, but that committee recommended for various reasons that marriage guidance services should not be combined with judicial procedure for divorce. Yet in one respect both the English and Australian courts have always been under a duty in suitable cases to order the return of one spouse to another by the ancient procedure of restitution of conjugal rights, surviving from the procedure of the ecclesiastical courts before the Matrimonial Causes Act, 1957. This procedure has all but fallen into disuse here, because there is no sanction to compel one spouse to return to the other. It is retained, however, in the Australian Bill (clauses 56 to 59) perpetuating the English law, and Sir Garfield in his second reading speech spoke of its function as an aid to reconciliation.

One Domicile in Australia

Hitherto the conception of domicile in Australia has been in respect of each single state, as it is in the Dominion of Canada and in the U.S.A.

Under clause 22 any person domiciled in Australia as a whole may commence proceedings for divorce. A person either domiciled or resident in Australia may commence proceedings for nullity of marriage, judicial separation, restitution of conjugal rights or jactitation of marriage, in respect of which (clause 24 (2)) the principles and rules of the old ecclesiastical courts in England as nearly may be will continue to be applied. In decrees of divorce or nullity a finding of domicile must be included.

By clause 23 for the purposes of this Act a deserted wife who was domiciled in Australia either immediately before her marriage or immediately before the desertion, and a wife who is resident in Australia at the date of instituting proceedings and has been so resident for the period of three years immediately preceding that date, will be deemed to be domiciled in Australia. The English equivalent is "*ordinarily* resident"—Matrimonial Causes Act, 1950, sect. 18 (1) (b)—a formula which has lent more flexibility to the jurisdiction. Clause 25 provides for staying and transferring proceedings to avert a conflict of jurisdiction. By clause 39 proceedings for divorce cannot be commenced within three years after the date of the marriage except by leave of the court, granted on the grounds of exceptional hardship on the applicant or exceptional depravity on the

part of the other spouse. This is in accordance with the English law, except that leave is not required under the Australian Bill on charges of adultery, wilful refusal to consummate the marriage, and rape, sodomy and bestiality (sub-sect. (2)).

Many Grounds for Divorce

When one comes to the numerous grounds of divorce formulated in the Bill, they have been collected from the various States of Australia, subject to certain differences. The grounds set out in clause 27 are:—

(a) Adultery.

(b) Wilful desertion for not less than two years (three years in England).

(c) Wilful and persistent refusal to consummate the marriage (still a ground for nullity, not divorce, in England).

(d) Cruelty.

(e) Rape, sodomy or bestiality.

(f) Habitual drunkenness or drug addiction for not less than two years.

(g) Husband's frequent convictions for crime since marriage within five years with a minimum of three years' imprisonment and habitually failing to support wife.

(h) Respondent imprisoned since marriage for not less than three years for offence punishable by death or life imprisonment or imprisoned for five years or more and still in gaol.

(i) Respondent since marriage and within one year immediately preceding the petition convicted on indictment of grievous bodily harm or the intent to inflect such on petitioner or attempt to murder petitioner.

(j) Respondent's habitual and wilful failure for two years immediately preceding the petition to maintain the petitioner under order or separation agreement.

(k) Respondent's failure to comply with a decree for restitution of conjugal rights after a year or more.

(l) Respondent of unsound mind at date of petition and unlikely to recover and since the marriage and within six years immediately preceding the petition has been for periods aggregating at least five years confined in a mental institution and is still so confined (see sect. 32 as well).

(m) Separation whether by agreement or order for a continuous period of not less than five years immediately preceding the petition and no reasonable likelihood of resuming cohabitation (but see sect. 37 for qualification).

(n) Absence of a spouse in circumstances and for a time sufficient to presume his or her death.

It will be observed that, though several of the grounds above mentioned might come under the heading of cruelty in English law, those which allow divorce for serious crime or neglect to maintain go beyond the English law, despite the recent judicial trend here to regard repeated convictions for crime as a form of cruelty.

Divorce by Consent

To English lawyers and sociologists the ground for divorce contained in (m) above should be of absorbing interest, in view of the Royal Commission's refusal

to recommend divorce by consent in this country. What the Australina Attorney-General said about this in the early part of his speech was as follows:—

"There are those who feel that recognition of the importance of family life must itself cause us to seek some way out of the situation that arises when man and wife, without misconduct or matrimonal offence on the part of either, become estranged and break off their relationship beyond all possibility of reconciliation, and out of that other situation where the innocent party refuses to take the initiative and to seek a dissolution, preferring to imprison the other party within the bonds which have become meaningless and little more than a provocation. Accordingly, some communities have provided a means whereby two people so placed may be enabled with regularity within the law to start a family afresh with another."

The communities to which he was referring are Western Australia, South Australia and New Zealand, which already allow divorce after certain periods of separation, seven years in the case of New Zealand, to either spouse whether the other is willing or not. There is however a saving clause which is reproduced in sect. 33 of the Australian Bill, and should be read with ground (m) in sect. 27 as follows:—

(1) Where the court is satisfied that, by reason of the conduct of the petitioner, whether before or after the separation commenced, or for any other reason, it would, in the particular circumstances of the case, be harsh and oppressive to the respondent, or contrary to the public interest, to grant a decree on that ground to the petitioner, the court shall refuse to make the decree sought. (That might be a sufficient safeguard for the respondent spouse if he or she opposed the petition and the petitioner were exposed to cross-examination, but in undefended cases it would not appear to be any safeguard and the divorce would go through as if by consent of both parties.)

(2) The court may, in its discretion, refuse to make a decree of dissolution of marriage on the ground of separation if the petitioner has, whether before or after the separation commenced, committed adultery that has not been condoned by the respondent, or having been so condoned, has been revived. (As the exercise of the discretion of the court notwithstanding the adultery of the petitioner follows the English model, this would be some safeguard against a collusive divorce by consent.)

(3) Where petitions by both parties to a marriage for the disolution of the marriage are before a court, the court shall not, upon either of the petitions, make a decree on the ground of separation if it is able properly to make a decree upon the other petition or any other ground. (This sub-clause would appear to impose upon the judge the duty of probing into matters which might not be the subject of any pleading.)

The Royal Commission, in summing up on this matter as regards England, said (Cmd. 9678, 1956, at p. 16): "Our objection to divorce by consent is so fundamental that it cannot be met by the provision of conditions or safeguards, however stringent these might be." Even if the condition were laid down, said the commission, that the consent (of the other party) should be fairly given, it would put a very difficult burden on the court. It would usually be impossible to find out if an unwilling spouse had been worn down by pressure into giving an unwilling consent. Then the ground would be open to abuse and a weak or self-sacrificing spouse, who genuinely did not want a divorce would be left virtually unprotected. However, in his review of this difficult matter, Sir Garfield Barwick expressed the opinion that the safeguards in clause 33 of the Australian Bill would prevent any abuse of this ground for divorce, i.e., separation for five years or more.

The figures of decrees of divorce throughout Australia for the five years ending 1956 were:

1952	7042
1953	7962
1954	6457
1955	6724
1956	6435

The majority of marriages so dissolved were of less than 15 years' duration; about 40 per cent of less than ten years' duration.

Constructive Desertion

This Bill includes some definitions that in the English system are left for judicial interpretation. Thus one the ground of desertion clause 28 effects a change in the law relating to constructive desertion by providing in effect that the spouse whose conduct caused the withdrawal from cohabitation of the other will be deemed guilty of desertion notwithstanding that the other spouse may not in fact have intended to cause the aggrieved spouse to leave. This aspect of constructive desertion was considered by the Judicial Committee of the Privy Council in *Lang* v. *Lang* ((1954) 3 All E. R. 571) on appeal from Australia. Clause 29 enables desertion to begin where one of the parties to a separation agreement requests the other to resume married life in good faith and the other refuses to do so without reasonable justification. Clause 30 alters the present law by providing that where desertion has begun, the desertion shall not be deemed to be terminated by reason only that the deserting spouse has become insane, if the court is satisfied that the desertion would probably have continued if the deserter had not become insane.

On these two points, as well as on most others, the proposed Australian law bears a close resemblance to the English. Inasmuch as there is no party opposition to the Bill it is believed that there will only be minor alterations, if any, before it becomes law.

APPENDIX "57"

MARRIAGE AND DIVORCE

UNITED KINGDOM
ROYAL COMMISSION ON MARRIAGE AND DIVORCE
SOME POINTS OF INTEREST FOR CANADA

by

W. KENT POWER

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—"I cannot remember reading a report of a Royal Commission[1] which is so clearly expressed and which puts the case in such an interesting way. If any of your Lordships is ever in need of a little light reading I would recommend this particular Report as one which is worthy of consideration... [It] will long be a reference book on the vital problems that [the Commission] studied." With these statements made by Lord Silkin in the House of Lords[2] the present writer fully concurs. In its conciseness, lucidity and skilful arrangement in parts, divisions and subdivisions, and in its absolute freedom from stuffiness and technical jargon, it furnishes a model for all those who write on legal or sociological subjects. Lord Mancroft said that he found it on sale in Venice but was "slightly startled to see that it was listed, not as one would expect under 'Law' or 'Sociology', but under 'Romance' "!

By thus introducing this brief commentary the present writer does not wish any of his readers to infer that the Report of the United Kingdom Royal Commission on Marriage and Divorce is not a very serious and very useful production. It will be extremely helpful, not only to sociologists and academic students of law, but also, especially its appendices, to legal practitioners. The appendices cover fifty pages, and Appendix III, which tabulates the grounds of divorce (1) in some other Commonwealth countries, (2) in some European countries, and (3) in the states of the United States of America and its possessions, furnishes a wealth of information useful both to the divorce-law reformer and to the practising lawyer. The use of the word "other" preceding "Commonwealth" is significant, as indicating clearly that the distinguished commission look upon England and Scotland as "Commonwealth countries".

Another fact very interesting to Canadians is that this is the third such report in England in a little over a century. The first, that of 1853, resulted in the act of 1857 (c. 85), which is law to-day in five of our provinces (those between Lake Ontario and the Pacific). The second report, that of 1912, resulted finally (World War I having intervened) in the revolutionary "Herbert Act" of 1937. This act greatly enlarged the grounds for divorce in England, by adding to the then existing grounds, namely, adultery and (for a wife) sodomy and bestiality, the new grounds of desertion, cruelty and incurable insanity (with qualifications as to time in respect of desertion and insanity), and it also made the wilful refusal to consummate a marriage a ground in itself for annulment. Before this, such a refusal was merely evidence (as it still is in the five Canadian provinces)

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[1] Royal Commission on Marriage and Divorce; Report 1951-1955 (London: Her Majesty's Stationery Office, 1956, Cmd. 9678, 11s. 6d. net).

[2] Parliamentary Debates (Hansard), House of Lords Official Report, Vol. 199, No. 133, Oct. 24th, 1956.

from which the court might infer, in a proper case, impotency. These enlargements did not, however, go far enough to meet the views of the extreme "leftists" among the reformers; and in March 1951 Mrs. Eirene White, M.P., succeeded in obtaining, by a vote of 131 to 60, a second reading for her bill, which had for its object, broadly speaking, that either a husband or wife should be entitled to obtain a divorce if the parties had been separated for not less than seven years. The "inconvenient" question which the government was then confronted with was, in the words of Lord Silkin, "shelved for a number of years" by the government's promise to set up a royal commission covering the whole subject of marriage and divorce.

The scope of the inquiry the present Royal Commission was directed to make was "very wide, embracing not only the law relating to divorce and other matrimonial proceedings but also the administration of that law in all courts, and the law governing the property righs of husband and wife. Moreover, for the first time, the subject of the inquiry extended to Scotland, as well as to England and Wales." (para. 13 of the report). It is worthy of note that no similar commission has ever been set up in Canada, although one was suggested by Senator Aseltine a few years ago when reporting on the work of the Senate Divorce Committee, of which he was the conscientious chairman. The present writer ventures the prophecy that some day in the not distant future that suggestions will be adopted, if only, to quote Lord Silkin, as a "recognised and timely method of shelving inconvenient questions", and some, at least, of the recommendations of that commission will be made law. Action was eventually taken on the first and second of the English reports, and in each case the action was in the direction of facilitating divorce in the case of unfortunate marriages.

An indication of the conscientious thoroughness of the commission's investigation is the fact that it held 102 meetings and heard evidence from 67 organizations and 48 individual witnesses; and it spent £35,463 4s. 6d.

The results were not, however, revolutionary. The commission was much concerned by the large number of cases in which marriage had broken down, but it did not believe that a restricting of the grounds for divorce would cure that situation. It did not, therefore, recommend that any of the grounds established by the "Herbert Act" should be dropped. On the other hand, it recommended that sodomy and bestiality should be grounds which a husband, as well as, at present, a wife, could invoke (para. 1204, sub-para. 11) (it distinguished, however, between sodomy by a wife and lesbianism); that wilful refusal to consummate should be a ground for divorce instead of, as at present, annulment (sub-para. (5) (a)); and that acceptance by a wife of artificial insemination by a donor without her husband's consent should be a ground (sub-para. (5) (b)).

On the fundamental question before it, namely, whether an irretrievable breakdown of a marriage should be a ground for divorce, in addition to the existing grounds, nine of the eighteen members, including Lord Morton of Henryton, the chairman, opposed the adoption of this additional ground, and nine of them supported it, and, in a separate statement (p. 340), one of these nine, Lord Walker (Senator of the College of Justice in Scotland), went so far as to advocate the abandonment of the doctrine of matrimonial offence and its replacement by a provision that marriage should be indissoluble unless, the parties having lived apart for three years, either party shows that the marriage has broken down, in the sense that it is one where the facts and circumstances of the lives of the parties adversely to one another are such as to make it improbable that an ordinary husband and wife would ever resume cohabitation. In his speech in the House of Lords[3] Lord Merriman, President of the Probate, Divorce and Admiralty Division of the High Court (referred to by some wag as the

[3] *Ibid.*, cols. 1002 ff.

"Wills, Wives and Wrecks Division") called these two sides of the commission the "Morton party" and the "Keith party". "But what nobody supported", said Lord Morton of Henryton, speaking in the same debate, "was that men who had gone off leaving a guiltless wife for seven years, should come back and divorce her against her will, notwithstanding that she might have conscientious scruples, and thereby deprive her, she having committed no matrimonial offence at all, of her status as wife", and of the rights pertaining to that status.[4]

Children and marriage guidance. The report indicates very forcefully the commission's concern with the well-recognized fact that the children are often the innocent victims of a broken home. It therefore recommended that the decree nisi be not made absolute until the court is satisfied that the arrangements proposed for the care and upbringing of the children are the best which can be devised in the circumstances. (In British Columbia, where there is no decree nisi, this practice would, of course, mean that no decree would be granted until the court was so satisfied.) It will be noted that the present writer used the word "often" in referring to the children of a broken home as "the victims", but "children of a broken home" has not, in my opinion, the same meaning as "children of a divorced couple". The latter children are very often the beneficiaries of a divorce; in other words, it is far better, in my opinion, for their health, physical and mental, and their happiness, that they be enabled by a new marriage of a divorced parent to be brought up in a home where there is mutual kindness, respect and understanding than to be compelled by the restrictions of the law to remain in one where they live in an atmosphere made tense by recriminations, and, in many cases, are witnesses of scenes of violence and have to listen to foul language.

As Lord Chorley said in the House of Lords debate:[5]

> Where there is failure, where marriage has broken down, I think it is best to face up to the fact frankly and to grant divorce as they do in so many other countries. I think it is time that we followed their example. It is easy to make jokes about divorce in America, but when I was in America I came into personal contact with a number of cases of successful divorce, and I was very much impressed with what I regard as the sensible attitude of the Americans in this matter . . .
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> I appreciate that to those who take a deeply religious view it may seem revolting. Nevertheless, I think it is common sense; and I think the trend of opinion in this country is going the same way . . . It is significant that over the last years judgments of the courts have tended to mould themselves to the feelings of the people.

The commission also wisely emphasized the need of much more pre-nuptial and post-nuptial guidance on the difficulties and responsibilities of marriage. It, therefore, recommended (para. 1204, sub-para. 25) that a suitably qualified body be set up to review the marriage law and the existing arrangements for pre-marital education and training; and also (sub-para. 26) that the state "should give every encouragement to the existing agencies engaged in matrimonial conciliation, as well as to other agencies which may be approved in the future; [but] it should not define any formal pattern of conciliation agencies or set up an official conciliation service". It further recommended (sub-para. 27) that "Exchequer grants to voluntary agencies towards the cost of training and central administrative expenditure should continue to be made", and (sub-para. 30) that "the provisions of the Legal Aid and Advice Act, 1949, relating to legal advice should now be brought into operation".

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[4] *Ibid.*, col. 985.
[5] *Ibid.*, cols. 1026-1027.

> The only real hope [said Lord Silkin] of making the marriage institution more successful is by action at the beginning. If it were possible, the right solution would be to make marriage more difficult and divorce more easy; but that is not a matter which is within the realms of possibility, except when the parties are too young. The fact remains that one of the great difficulties is that in many cases marriages are too hastily entered into by people without guidance and without experience. That, I would say, is probably the greatest cause of the breakdown of marriages. Frequently they are entered into without a realisation on the part of either party of what the obligations of marriage are.[6]

Evidence of facts learned by a guidance councillor in the course of conciliation work should, it was recommended (sub-para. 31), be inadmissible in any matrimonial proceedings between the spouses.

Collusion. The commission found that "it is still necessary to retain collusion as an absolute bar...there is no need for a change of principle", but they recommended that collusion should be defined by statute on the basis that "husband and wife should be restrained from conspiring together to put forward a false case or to withhold a just defence", and also that "a divorce should not be obtained if the petitioner has been bribed by the other spouse to take proceedings or has exacted a price from him for so doing. The present difficulties have arisen, in our opinion, because of the absence of a clear definition of the latter consideration." (para. 234) "We accept that it may be advantageous that the parties should be able to discuss through their solicitors arrangements which will adjust their position after the divorce, provided that any arrangement reached is not the result of a bargain of the nature [of bribery]. We recommend, therefore, that it should be expressly provided by statute that it should not amount to collusion if reasonable arrangements are arrived at between husband and wife, before the hearing of the suit, about financial provision for one spouse and the children, the division of the matrimonial home and its contents, the custody of, and access to, the children, and costs." The parties should be able to apply to the court, before the presentation of the petition or while the suit is pending, for the court's opinion on the reasonableness of any such arrangements. (para 235)

This recommendation should suggest to Canadians the important query whether, under the division of powers between the federal and provincial legislatures, it may not be possible for valid provincial legislation to deal with the making of such arrangements, in respect at least of some of the subjects which the commission recommends should be dealt with.

Speaking in the House of Lords, Lord Merriman said, "I feel it very important that the ignorance about what collusion is, or may be, should be dispelled...To my mind, 'collusion' means a corrupt bargain; and the corruptness is the essence of it. It may be to bribe the other party to bring the petition—it need not necessarily be on false grounds, and the bribe need not necessarily be money, though those are merely palliations. The essence is that it is a corrupt bargain to bribe the party to bring the petition, or, it may be, to suppress a defence or falsify the facts. That is the essence of collusion."[7]

The fact is, as Mr. Justice Coyne of the Manitoba Court of Appeal has pointed out,[8] that some judges have been led to their disagreement with the policy of the divorce act to give a much wider meaning to "collusion" than it originally had.

Lord Merriman, who was opposed to the "break-down" theory, said that he had tried between 1933 and 1947 between 12,000 and 15,000 undefended divorce

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[6] *Ibid.*, col. 977.
[7] *Ibid.*, cols. 1008, 1007.
[8] *Riley* v. *Riley*, [1950] 1 W.W.R. 548, at p. 563, 57 Man. R. 527, [1950] 2 D.L.R. 694.

cases and that it was "sheer nonsense to suppose that the bulk of undefended divorce cases are collusive". As to divorce by consent, he said that "the mere fact that the parties are both thankful to be rid of each other is not an answer to the suit and does not turn what is a remedy for a proved wrong into a divorce by consent", that is, one "where the agreement of the parties is the only basis on which divorce is sought".

The religions aspect. The report stated that "this Report will contain no discussion of what may be called the religious aspects of marriage and divorce" (para. 38). Speaking in the House of Lords,[9] Lord Morton of Henryton, the chairman, said, after referring to the fact that there are many people who sincerely believe that a marriage can never be ended except by death, "It was not for us to go into matters of that kind at all. We were appointed in a country where legislation has been passed to enable people to get a divorce on certain grounds and it was for us to consider simply this: are these the best grounds that can be devised?" If this view of the duty of such a commission be correct in relation to England and Scotland, in each of which a state church exists (and the writer firmly believes that the view is the only correct one, so long as a divorce law exists), it is infinitely more appropriate in Canada; and legislators and writers on the subject should keep it in mind. No divorce-law reformer wishes to interfere with any person's religious beliefs, but, especially in a country where there is no state church, it is not consistent with democratic principles that any denomination or group of denominations should be allowed to impose by law their beliefs on very large numbers of their fellow citizens who do not adhere to those beliefs. The proper solution, in the writer's opinion, is to require a civil ceremony *as the legal basis* of marriage; and to permit all those who wish to do so to add a religious ceremony and to feel bound by it in their religious lives. The duty of legislators is to concern themselves solely with the law applicable to all citizens.[10] This view will, I think, ultimately prevail.

Insanity as a ground. The report said:

> We do not think that the arguments against having insanity as a ground are any more cogent than before. Where a spouse, at the end of sufficient period of care and treatment, is held to be incurably insane, the continuance of a normal married life has clearly become impossible; as the Gorell Commission said, 'the married relationship has ended as if the unfortunate insane person were dead, and the objects with which it was formed have become thenceforward wholly frustrated'. [para. 176]
>
> [But] insanity has no precise definition and is a term used to describe varying degrees of mental disorder ranging from a mild delusional state to the extreme cases of paranoia or schizophrenia. In our view, divorce should be available only to a person whose spouse is suffering from insanity to such an extent that it can be said that the objects of the marriage relationship have been wholly frustrated. It seems to us, therefore, that the adoption of incurability as the sole test would not be satisfactory and that some additional safeguard is required which will serve as a criterion of the mental disorder. [para. 187]
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> In our opinion the most satisfactory safeguard is to require a sufficient period of care and treatment in a hospital or similar institution to have elapsed before proceedings can be started. This is a test which has worked quite satisfactorily in both England and Scotland over a number

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[9] *Ante*, footnote 2, col. 987.

[10] In an interesting B.B.C. broadcast (printed in The Listener of Oct. 25th, 1956) under the title "Marriage, Real and Legal" the religious conception of marriage is referred to as a "metophysical union" or real marriage, which, in that speaker's opinion, is indissoluble, as contrasted with a merely legal marriage, such as the marriage of a divorced person while the other party to the divorce is living.

> of years. But we think that the present statutory definition of care and treatment is too narrow in the light of modern developments in the treatment of persons suffering from mental illness... [para. 189]

Condonation. Fourteen of the commission believed that a successful reconciliation would likely be best promoted, once a matrimonial offence is discovered (in, may the writer add, both the oldfashioned and present sense of "discovered"), by permitting the husband and wife to live together in the matrimonial home. They therefore proposed that the husband and wife be allowed to have a trial period of cohabitation up to one month, which should be deemed not to amount to condonation. The other five members, including the chairman, were unable to support this proposal, but all nineteen agreed that husband and wife should be on the same footing with regard to the presumption of condonation raised by acts of sexual intercourse between them (paras. 240-243).

Cruelty. Of especial practical interest to Nova Scotia readers is the commission's view that the present law in the United Kingdom with regard to cruelty as a ground for divorce should remain unaltered as to the present legal requirements on injury to health and intention, except in one respect, namely, it should not be necessary for the plaintiff to prove that he or she needs protection, but proof of cruelty should in itself confer a right to divorce (paras.129-132). The commission rejected the suggestion that cruelty should be defined by statute.

Single act of adultery as ground. The commission rejected the suggestion that a divorce should be denied, or the court should at least have a discretion to deny it, where the suit is based on the commission of a single act of adultery (para. 119).

Proposed new restrictions. Proposals for introducing new restrictions on the granting of divorces were rejected. One such was that the court should have a discretion to refuse a decree where it thinks the refusal would be in the interests of the children. After referring to the extremely difficult task such a rule would impose on the court, the commission said: "It may also be doubted whether the children's interest would be best served if they could be regarded by their parents as the reason for the failure of the divorce proceedings" (para. 219).

Property rights. The most valuable part of the report, so far as its immediate usefulness to Canadian practitioners is concerned, is Part IX dealing with property rights as between husband and wife. This part covers 30 pages (124 paragraphs) and constitutes a helpful monograph on this subject, especially on a deserted wife's right to remain in the matrimonial home, a phase of the law which is still not settled by the highest authority, although "In recent years the law has developed in such a way as to give the wife some sort of right to remain in the matrimonial home if the husband has deserted her and left her in occupation" (para. 603). In Canada, in those provinces in which "homestead" statutes (sometimes called Dower Acts) are in force, this problem is of course simplified, where the home is owned by the husband (and, also, in some provinces, by the wife) by the restriction which such statutes place on its sale or other disposal.

The domicile factor. To Canadians, especially, an extremely valuable section of the report is Part XII, The Basis of Matrimonial Jurisdiction and the Recognition of the Jurisdiction of Other Countries, and the accompanying Appendix IV, Draft Code (Jurisdiction and Recognition). Most Canadian practitioners will agree with the statement that "The most pressing problem revealed by the evidence is the hardship occasioned by a 'limping marriage', that is to say, a marriage which is regarded in one country as dissolved but in another country as still in being . . ." (para. 789). "We take the view that a greater measure of recognition should be given to the exercise of jurisdiction in other countries.

Only in this way can a start be made towards lessening the number of 'limping marriages'...Furthermore [critics of *Travers* v. *Holley*, [1953] P. 246, [1953] 3 W.L.R. 507, [1953] 2 All E.R. 794, will note this] we are proposing that recognition should be given to a divorce obtained in the exercise of a jurisdiction which is not based on the domicil or the nationality of the spouses, but which is substantially similar to that which is to be exercised by the English and Scottish courts, for instance a jurisdiction based on residence. We do not exclude the possibility of setting up an international Convention for the recognition of divorce decrees." (para. 812)

"The majority [of the Standing Committee on Private International Law set up by the Lord Chancellor in September 1952] favoured the retention of the present rule that domicil should consist of residence in a country accompanied by an intention to live in that country permanently. However, to assist in the determination of a person's domicil, the majority recommended the adoption of certain presumptions designed to facilitate proof of the necessary intention. The most important of these presumptions is that where a person has his home in a country, he should be presumed to intend to live there permanently. The presumption is to be rebuttable, but it was said that the practical effect of the proposal will be that in cases which go to trial the burden of proof will be placed upon the person who seeks to show that the domicil of origin has not been abandoned for a domicil of choice . . . We therefore accept the suggestions of the majority in the Standing Committee, which we think represent an improvement on the existing law, and we are content to endorse their recommendations as they stand." (paras 816 and 818) "We think, however, that the court should be able to exercise divorce jurisdiction in favour of a husband or wife who satisfies certain residential conditions provided that it does so in circumstances which are favourable to the recognition of its decrees in oher countries." (para. 827)

The conclusion of the commission was (para. 810):

> We consider that the time has come for a comprehensive set of rules to be framed in a Statute, which will set out clearly:
>
> (i) the circumstances in which the English and Scottish courts will have jurisdiction in divorce proceedings;
>
> (ii) the law which should be applied for a proper determination of the issues in such proceedings; and
>
> (iii) the circumstances in which recognition will be granted in England and Scotland to pronouncements of divorce in other countries.

and (para. 811):

> We consider that domicil should continue to be the main basis, but not the sole basis, upon which divorce jurisdiction is exercised by the English and Scottish courts. We think that there should be some relaxation in the strict requirements of the law as to domicil in order to bring it more into line with the concept which obtains in other countries...

and (para. 825):

> We recommend, therefore, that a wife who is living separate and apart from her husband should be entitled to claim a separate English or Scottish domicil for the purpose of establishing the jurisdiction of the English or Scottish court to entertain divorce proceedings by her, notwithstanding that her husband is not domiciled in England or Scotland, as the case may be. The burden of proof should be on the wife to establish that the circumstances are such that, had she been a single woman, she would be held to have acquired an English or Scottish domicil...

To the present writer one of the most significant aspects of these recommendations on domicile is the great advance in realistic thinking disclosed by the report over the very unrealistic attitude of the Judicial Committee in *Cook* v. *Atty. Gen. for Alta. and Cook*,[11] which applied the separate country doctrine as between the different provinces of Canada. With all due respect for the members of that august tribunal, they indicated, or a majority of them did, an appalling lack of appreciation of the way life is carried on in this country of branch offices and frequent changes of residence from one province to another. To expect a man working in Toronto, who is told by his company to report in, say, Calgary tomorrow, to have any definite intention on arriving there about remaining there is the sort of decision which exasperates the intelligent layman. It is true that the decision can be defended as an application of established rules, but if that defence is resorted to then it is only fair to point out that the rules in question are judge-made law and did not come to fruition until almost forty years after the act of 1857 was passed.[12] Therefore it was not necessary for the same high tribunal which declared it to give such an unrealistic extension. Is it not now open to the present highest court for this country to decline to follow the *Cook* case?

The report has been, of course, the subject of comment in the legal journals of the United Kingdom.[13] A most interesting criticism was made by Lord Chorley, the distinguished practitioner, teacher of law and General Editor of the Modern Law Review, in his speech in the House of Lords already referred to. He attacked, among other things, the composition of the commission. In his view it was "top-heavy" with lawyers, eight, including only one solicitor. "After all", he said, "the barrister is not the person who sees this type of case in the raw; it is the solicitor who does that. If we had to have all these lawyers I think it would have been better to have a number of knowledgeable solicitors." Possibly this opinion may be cited in support of the Canadian system of not separating the two branches of the profession. His other "serious criticism" of the composition of the commission was that there were "practically no people who could approach his matter in a scientific way . . . this sort of problem has been intensely studied in the sociology departments of the universities and in other institutions over the last fifty years or more. Yet no social scientist was put on this Commission."

More important, felt Lord Chorley—and certainly important in the light of the growing interest in legal research in Canada—is his criticism "in regard to the method of taking evidence. The witnessess...largely gave evidence on the basis of conjectures and value judgments, and even prejudice. There was very little research into actual facts...some of the witnesses...indicated how extremely difficult it was to form conclusions on a number of these problems because of the absence of real research...Lord Morton of Henryton was evidently of the opinion that these questions are so intimate that it is not really possible to do research into them, but I do not think that is so; and I think that if he were aware of some of the work which has been done in this country, in America, and perhaps particularly in some of the Scandinavian countries into this sort of problem, he would be prepared to revise his judgment on this sort of point."[14]

W. KENT POWER*

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[11] [1926] 1 W.W.R. 742, [1926] 2 D.L.R. 762, [1926] A.C. 444.

[12] *Le Mesurier v. Le Mesurier*, [1895] A.C. 517, 64 L.J.P.C. 97.

[13] For example, the Special Family Law Number of the Modern Law Review (November 1956).

[14] *Ante*, footnote 2, cols. 1017-1018.

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APPENDIX "58"

MATRIMONIAL CAUSES JURISDICTION: THE FIRST YEAR

BY

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Early in 1961 the present authors published *Matrimonial Causes Jurisdiction*. That was a study of the law of jurisdiction, choice of law and recognition of foreign decrees under the *Matrimonial Causes Act* 1959. That Act did not come into operation until after the book went to press, and the present article is intended as a review of the subsequent case and statute law bearing on the matters dealt with in the book.

1. *Constitutional Questions.*

The *Matrimonial Causes Act* 1959 depends on various provisions of the Commonwealth Constitution, for the greater part, though not entirely, on s 51 (xxii) supported by s. 51 (xxxix). The authors drew attention to possible questions of constitutional validity which might arise in connexion with particular provisions.[1] The only discussion of constitutional questions so far has been by Barry J. in the Supreme Court of Victoria in *Skitch* v. *Skitch*[2] with reference to s. 71 of the Act. Barry J. said: "I may add that I do not think that the extent of the impact of s. 71 upon the traditional divorce law will be fully realized for some time to come. It stipulates in imperative terms that where there are children of the marriage who are under sixteen years of age, or who come within sub-s. 3, a decree *nisi* shall not become absolute unless the court is satisfied that proper arrangements in all the circumstances have been made for the welfare and, where appropriate, the advancement and education of those children. The court must therefore satisfy this obligation unless it finds under s. 71 (1) (b), there are 'such special circumstances' that the decree *nisi* should become absolute notwithstanding that the court is not satisfied that the arrangements envisaged by s. 71 (1) (a) have been made. This obligation may require the judge to exercise powers created by s. 85 in a case where there are children under sixteen of the marriage sought to be dissolved, and to do so without the consent of the parties or even in disregard of their wishes. Indeed, it seems that the consent of the parties to arrangements under s. 71 (1) (a) is in no sense conclusive, but is only one of the elements to be considered in arriving at the state of satisfaction necessary before a declaration under s. 71 (1) (a) may be made by the court. The judge may thus be taken from his traditional role and required to be an active instrument of social policy designed, presumably, to safeguard and promote the interests of such children. Whether the imposition of this obligation is constitutionally valid may require to be determined by the High Court of Australia".

The investment of State Supreme Courts with federal jurisdiction, which is the device favoured by the Act[3], is authorized by s. 77 (iii) of the Common-

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[1] See *Cowen and Mendes da Costa, Matrimonial Causes Jurisdiction* (1961), p. 4; see also Ch. 2 *passim*.

[2] (1961) 2 F.L.R. 8, at p. 12.

[3] See ss. 23 (2), 92 (2).

wealth Constitution. But only judicial power may be invested; see *Queen Victoria Memorial Hospital* v. *Thornton*[4] and *Insurance Commissioner* v. *Associated Dominion Assurance Society*[5], and the question raised in *Skitch* v. *Skitch* was whether the obligations cast on State Supreme Courts by s. 71 were properly within the definition of judicial power. The sections confers broad discretionary powers; as the judge observed, State courts are required to act as active instruments of social policy. Section 71 has been considered and applied many times in the course of the first year of the Act without further question of validity, and while therefore no decision has been given on the point, it is submitted that the exercise of such discretion as s. 71 requires, while very extensive, is nevertheless not so unconfined and atypical as to warrant the conclusion that it is not properly described as an investment of judicial power.

2. *Jurisdiction*

The scheme of the Act is that proceedings under the Act, so far as they are instituted in the Supreme Court of a State, and so far as they are taken on appeal therefrom to the Full Supreme Court of a State, shall be in federal jurisdiction (ss. 23 (2), 92 (2)). Similar provision is made for pending proceedings, defined by s. 110 as proceedings which have been instituted before the date of commencement of the Act, but not completed before that date. Such proceedings shall be continued only in accordance with Pt. XIII of the Act entitled "transitional provision"[6]. Section 23 (2) (b) invests State Supreme Courts with federal jurisdiction to hear and determine matrimonial causes continued in accordance with Pt. XIII. These provisions led *Pape* J. in the Supreme Court of Victoria in *Dorney* v. *Dorney*[7] to conclude that "...on 1st February 1961, the Commonwealth *Matrimonial Causes Act* 1959 came into operation, and thereafter the entire matrimonial causes jurisdiction became Federal jurisdiction...".

The decision of the High Court in *Schumann* v. *Schumann*[8] shows, however, that this statement requires some qualification. Before the Act came into operation a decree of divorce was pronounced in the Supreme Court of South Australia. An appeal to the Full Supreme Court was heard before the Act came into operation but reserved judgment was not delivered until after that date. The question was whether an appeal from that decision to the High Court was subject to the requirement of special leave as prescribed by s. 93 of the Act. The High Court held that it was not subject to s. 93, and that the case was covered by the express provisions of s. 115 of the Act. In its judgment, the High Court pointed out that while the Act expressly authorized the continuance of the appeal in the Full Supreme Court and thereby authorized it to give judgment, the exercise of jurisdiction by the Full Supreme Court *throughout* was state and not at any time federal jurisdiction; and the express provisions of the Act make it clear that this is so; see ss. 23 (2) (b) and 92.

In *Howe* v. *Howe*[9] only federal jurisdiction was exercised, but a question arose as to the jurisdictional basis for the making of the decree. It was held that the provision for a statutory domicile in s. 24 (1) of the Act applied to a deserted wife whose proceedings for divorce were continued under Pt. XIII. The wife had instituted proceedings in Victoria before the Act under Pt. IIIA of the Commonwealth *Matrimonial Causes Act* 1955, on the basis of three years' residence.

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[4] (1953) 87 C.L.R. 144; *Cowen, Federal Jurisdiction in Australia,* (1959), p. 155.

[5] (1953) 89 C.L.R. 78, at 85 per *Fullagar* J. Cited by *Barry* J. in *Skitch* v. *Skitch* (1961) 2 F.L.R. 8, at p. 12.

[6] Sections 8 (1) (b); 111.

[7] (1961) 2 F.L.R. 18, at p. 19.

[8] (1961) 35 A.L.J.R. 289.

[9] (1961) 2 F.L.R. 2.

She was however domiciled in Australia immediately before her marriage, and *Barry* J. held that she could petition upon that jurisdictional basis. Section 112(6) appears clearly enough, to support this conclusion[10]. In *Tweedie* v. *Tweedie*[11] *Barry* J. confirmed the opinion[12] that s. 112(1) of the Act temporarily preserved the operation of the Commonwealth *Matrimonial Causes Act* 1945-1955 in pending proceedings. *Barry* J. held, notwithstanding the general repeal effected by s. 4, that s. 112 authorized the continuance of proceedings commenced under Pt. IIIA of the Commonwealth *Matrimonial Causes Act* 1945-1955 and that a decree could therefore be pronounced upon the basis of the wife's residence for three years. He preferred, however, to invoke s. 112 (6) and to make a decree on the jurisdictional basis that the parties were domiciled according to the principles of the common law in Australia. The wife had petitioned in the Supreme Court of Victoria, and her husband was domiciled either in Queensland or New South Wales, and therefore, for the purposes of the Act, in Australia. And in *Morkunas* v. *Morkunas*[13], *Barry* J. said that it was "consonant with the general intention of the *Matrimonial Causes Act* 1959 to invoke the jurisdiction created by that Act rather than to use the procedural device provided by Pt. III of the *Matrimonial Causes Act* 1945-1955". Whether any practical consequence, for example, in respect of international recognition of a decree, results from preferring one basis of jurisdiction to the other, it is not easy to say.

The fact that State Supreme Courts exercising jurisdiction by authority of the Act exercise federal jurisdiction—except in such cases as *Schumann* v. *Schumann* which are not likely to arise very frequently and only during the transitional period—raises some interesting problems. One of these was adverted to by *Barry* J. in *Cooper* v. *Cooper and Ford*[14]. "As judges of the Supreme Court who sit in this jurisdiction are exercising Federal jurisdiction, it will be essential for the satisfactory working of the Act that a judge in the one State should follow the decision of a judge in another State unless there is some compelling reason for him not to do so,. . .".

One of the main objects of the Act, indeed its principal design, is the enactment of a uniform matrimonial causes law for Australia. Yet it is clear that many of the provisions of the Act will call for authoritative construction; and in some areas of matrimonial causes law the Act preserves the rules of the common law, some of which, particularly in the conflict of laws field, are uncertain and will therefore also call for authoritative exposition. The High Court may of course provide this, although the appeal to that Court is restricted by s. 93. Section 91, however, provides useful machinery for an authoritative exposition of a point of law by the High Court when the matter arises on trial in a Supreme Court. This is a legislative grant of original jurisdiction to the High Court[15] and in *Skitch* v. *Skitch*[16] *Barry* J. expressed the hope that various difficulties arising out of the Act would "be dealt with as promptly as possible under the provisions of s. 91, so that an authoritative elucidation may be obtained from the High Court of Australia. If I am asked by any party to do so, I shall be glad to state a case for the determination of the High Court upon any question of law arising under the Act".

But failing an authoritative determination by the High Court—and determination by that Court whether in original or in appellate jurisdiction would be authoritative—the question adverted to by *Barry* J. in *Cooper* v. *Cooper and Ford* is an important practical one. The State Supreme Courts sit in federal

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[10] *Cowen* and *Mendes da Costa* op. cit., pp. 146-147.
[11] (1961) 2 F.L.R. 21.
[12] *Cowen* and *Mendes da Costa* op. cit., p. 8.
[13] (1961) 2 F.L.R. 24, at p. 25.
[14] (1961) 2 F.L.R. 303, at p. 304.
[15] See *Cowen* and *Mendes da Costa* op. cit., p. 21.
[16] (1961) 2 F.L.R. 8, at pp. 13-14.

jurisdiction as Australian courts; among State Supreme Courts a petitioner does not have to select one rather than another, and the choice of forum is subject only to the controls of s. 26. Interesting problems of authority may arise. In *Cooper* v. *Cooper and Ford*[17], *Barry* J. declined to follow two recent decisions of the Supreme Court of New South Wales on the interpretation of s. 72 (3) (b) of the Act, specifically on the question whether a court, in the exercise of its discretion, could reduce the period at the expiration of which a decree *nisi* will become *absolute* to less than twenty-one days. *Barry* J., answering that question affirmatively, declined to follow the New South Wales decisions, and found compelling reason in the construction of the Act itself for the course he adopted. *Barry* J.'s view was subsequently preferred and followed by *Bibbs* J. of the Supreme Court of Queensland in *Alcock* v. *Alcock*[18]. As between co-ordinate jurisdictions it is to be expected that there will be some disagreements, though *Barry* J.'s emphasis on the importance of uniform decision will surely be heeded. But interesting problems in federal jurisdiction may arise when a single judge of a State Supreme Court is faced with what he regards as an erroneous or unsatisfactory decision of the Full Supreme Court of another State. As a practical matter, resort to s. 91 of the Act for an authoritative determination by the High Court would be highly desirable in such a case, though the judge cannot state a case for the High Court without the agreement of at least one of the parties. But failing such a reference, there is a question as to whether the rules of precedent would constrain a single judge sitting in federal jurisdiction under the Act to follow the Full Supreme Court decision. There is no authority directly in point, though it would appear that the scheme and policy of the Act point to the conclusion that the Full Court decision should be regarded as binding. As between Full Courts, it would seem that the principles and practice stated in *Cooper* v. *Cooper* and *Ford* would apply in the same manner as they do as between co-ordinate courts of first instance.

A question of some difficulty was posed by *Barry* J. in *Skitch* v. *Skitch*. It was whether a decree of divorce made in pending proceedings was a decree to which s. 8 (4) of the Act applied. Section 8 (4) provides that where a marriage is dissolved or annulled by a decree under the Act, a prior maintenance order made by a court of summary jurisdiction ceases to have effect upon the making of the decree. The issue was whether a divorce decree made in pending proceedings was a decree under the Act within the meaning of s. 8 (4). There is much to be said for what *Barry* J. described as the "sensible conclusion"[19] that such a decree fell within s. 8 (4) and he held accordingly. But there are difficulties in the way of this conclusion. Section 8 (1) draws a distinction between matrimonial causes instituted under the Act and matrimonial causes continued in accordance with Pt. XIII; s. 23 (2) draws a distinction with respect to the investment of jurisdiction in courts to hear and determine matrimonial causes instituted under the Act and matrimonial causes continued in accordance with Pt. XIII; s. 112 in Pt. XIII provides that except as otherwise provided in that Part, the law to be applied and the practice and procedure to be followed in and in relation to pending proceedings for a decree of divorce, nullity or judicial separation shall be the same as if the Act had not been passed, and s. 113 expressly makes various sections of the Act applicable to pending proceedings "as if those proceedings had been instituted under this Act and any decree made in the proceedings had been made in proceedings so instituted". Section 8 (4) is not included amoung the sections made applicable by s. 113.

The conclusion to which these various provisions points is that a decree made in pending proceedings, while obviously made by authority and operation

[17] (1961) 2 F.L.R. 303.
[18] (1961) 2 F.L.R. 333.
[19] (1961) 2 F.L.R. 8, at p. 12.

of the Act, is not a decree "under this Act" for the purposes of s. 8 (4). But *Barry* J. in reaching the contrary conclusion in *Skitch* v. *Skitch* relied, it would seem, on the fact that the State Supreme Court whether entertaining a matrimonial cause instituted under the Act of a matrimonial cause in pending proceedings was exercising federal jurisdiction. In the context he was considering, this was undoubtedly true, but with respect, not determinative of the point. It is clear on the face of the Act that in pending proceedings, a State Supreme Court while exercising federal jurisdiction may apply under s. 112 rules of law, practice and procedure which would have applied had the Act not been passed. The determination of the applicable law depends on the construction of the Act, not on the exercise of federal jurisdiction, *simpliciter*. And for the reasons already adumbrated, there is a strong argument for the conclusion that s. 8 (4) does not apply where a decree has been made in pending proceedings.

Francis v. *Francis*[20], in the Supreme Court of South Australia, dealt with the question of a stay of proceedings, for which provision is made by s. 126 of the Act. In that case a wife domiciled in Victoria presented a petition for divorce in South Australia in November 1959 under Pt. IIIA of the Commonwealth *Matrimonial Causes Act* 1945-1955. In November 1960, the husband filed a defence. On 15th March, 1961, the husband applied for a stay of proceedings under s. 13A (1) of the 1945-55 Act, and on 16th March, 1961, he instituted proceedings for divorce in the Supreme Court of Victoria. If an application for a stay had been made to the Victorian Court after 16th March, 1961, s. 26 of the Act would have been directly in point. But on the hearing of the application in the Supreme Court of South Australia, it would appear that s. 13A (1) of the previous Commonwealth Act provided the only remedy as s. 8 and Pt. XIII of the Act of 1959 do not seem in these circumstances to make s. 26 applicable to pending proceedings. Section 13 A (1) (a) and (b) of the Act 1945-1955 contain provisions similar to those of s. 26 (1) and (2) of the Act of 1959. The sub-section which *Mayo* J. considered as relevant to the application was the parallel provision to s. 26 (2). Section 26 (2) provides: "Where it appears to a court in which a matrimonial cause has been instituted under this Act (including a matrimonial cause in relation to which the last preceding sub-section applies) that it is in the interests of justice that the cause be dealt with in another court having jurisdiction to hear and determine that cause, the court may transfer the cause to the other court".

Mayo J. stated[21] "There is, however, the more serious question concerning what the 'interests of justice' may demand. It is on that aspect that I thought it desirable to have my reasons reported, so that if the application goes further, the reasons can be looked at. It can be seen whether, if I have a discretion, I have exercised it rightly, and, if I have not, whether I have gone wrong in my conclusion. I have not, as I mentioned before, found authority amplifying what constitutes in a like purpose to the present, the 'interests of justice'. No doubt, questions of costs are involved in the interests of justice. It may be that the costs here will be greater than the costs if the matter were proceeded with in Victoria, due in part to the transport of witnesses. But I doubt whether I should accede to the application in the circumstances, the defendant having acted in such a dilatory way, as can be seen from the dates given. From the affidavits it would appear that it is entirely a matter of the personal dilatoriness of the defendant. I do not think in the interests of justice the decision of the issue should be postponed until the pleadings have been filed in the Victorian action. It is impossible to hazard a guess when that action would be ready to be set down for hearing, and more difficult still to say when it would come on for hearing. I have no idea when that action would be likely to be heard in Victoria".

[20] (1961) 2 F.L.R. 263.
[21] *Ibid.*, at p. 266.

There seems no reason to doubt that these observations are equally applicable to s. 26 (2) and, despite the difference of wording, that they also serve as a general guide to the interpretation of s. 26 (1).

3. *Australian domicile.*

Section 23 (4) and (5) confer jurisdiction in matrimonial causes by reference to a domicile or residence *in Australia*. This breaks new ground; before the Act came into operation, domicile, so far as Australia was concerned, was determined by reference to a State or Territory: an *Australian* domicile as such was unknown. This had been the subject of critical comment in the Full Supreme Court of Victoria in *Armstead* v. *Armstead*[22] and also in the Supreme Court of the Northern Territory in *Fullerton* v. *Fullerton*[23]. The Act provides that proceedings for a decree of dissolution or nullity of a voidable marriage should not be instituted except by a person domiciled in Australia. As *Barry* J. observed in *Lloyd* v. *Lloyd*[24], "Although that Act does not in terms state that there is an Australian domicile, the existence of an Australian domicile is assumed, and it is implicit in the provisions of Pt. V of the Act that a domicile in Australia is a juristically acceptable concept". As to this, *Barry* J. had some interesting observations: "The Parliament of the Commonwealth of Australia has legislated either on the basis that, independent of the Act, there is an Australian domicile, or that, for the purposes of the law it has made relating to matrimonial causes, there is now an Australian domicile by virtue of the Act. The Parliament is competent to make laws with respect to marriage and with respect to divorce and matrimonial causes (Constitution s. 51 (xxi), (xxxi)), and the *Matrimonial Causes Act* 1959 was enacted in the exercise of constitutional power... There is thus unity of law with respect to matrimonial causes throughout Australia, and when the *Marriage Act* 1961 (No. 12 of 1961) comes fully into operation, there will be a similar unity of law with respect to marriage. It appears a necessary incident of the power to make a law with respect to matrimonial causes that the foundation of jurisdiction should be prescribed"[25].

In so far as the prescribed basis of jurisdiction was domicile in Australia, *Barry* J. said: "The proposition that a person cannot have more than one domicile at a given time *(Dicey's Conflict of Laws,* 7th Ed., p. 89) seems designed to avoid conflicts and inconsistencies in respect of personal law, and in a constitutional framework such as exists in Australia it may require qualification. (Cp. *Graveson, The Conflict of Laws,* 4th ed., p. 75.) I see no reason inherent in the common law concept of domicile why the Parliament of the Commonwealth is not competent to create or recognize the existence of an Australian domicile for the purposes of its law with respect to matrimonial causes, even though for other purposes the domicile of an Australian citizen may be connected only with a State or Territory. Probably difficulties will not often arise, because if a person is domiciled in Australia, ordinarily he would be resident and domiciled in a State or a Territory. If it is necessary, a domicile in one of those localities would satisfy the strict requirements of private international law, even if, contrary to the view I hold, the assertion of the Act that there is an Australian domicile is not in conformity with classical notions. However, cases do occur where evidence is not available from a husband whose domicile of origin was in another country, and although it may be clear that he has abandoned that domicile, and has resided in Australia with the intention of permanent or indefinite residence in this country, the court may not be able to find with sufficient assurance that he has acquired a domicile in a particular State or Territory. In such a case the ques-

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[22] [1954] V.L.R. 733, at p. 736.

[23] (1958) 2 F.L.R. 391. Decided by *Kriewaldt* J. in 1958, but not reported until 1961.

[24] (1961) 2 F.L.R. 349, at p. 350.

[25] *Ibid.*, at pp. 350-351.

tion whether there is, for the purposes of private international law, an Australian domicile may be of importance, and in my opinion it should be answered affirmatively"[26].

The present writers have elsewhere discussed various questions raised by this very interesting passage[27] and it may suffice briefly to summarize what was said there. It is believed that *Barry* J.'s view that for the purposes of the Act a domicile may be acquired in Australia without deriving that domicile from one necessarily acquired in a State or Territory is correct; and that the purposes of the Act are better served by this conclusion. As the late *Kriewaldt* J. put it in *Fullerton* v. *Fullerton*[28] in advance of the enactment of the Act: "There would seem to be good reasons, however, for Australia being regarded as one 'country' for the purpose of the loss of a domicile of origin. It is easy to conceive of a person as having become a permanent member of the Australian community without having identified himself with any one State or Territory. The 'New Australian' immigrant furnishes a ready example. Is he to be denied domicile in Australia until after he has selected the State in which he proposes to reside permanently?"

If *Barry* J.'s view is correct, an Australian domicile will be established by satisfying the common law requirements of *animus* and *factum*, but operating within the wider geographical area of Australia as defined by the Act. As the judge pointed out, the conclusion that such an Australian domicile might be established for the purposes of the Act could mean that a person was domiciled in Australia for the purposes of matrimonial relief, while at the same time he was domiciled, say in England, for purposes of succession to movable property. An example may readily be provided: if X who has been domiciled in England throughout his life, emigrates to Australia and resides in Victoria with the intention of living in Australia indefinitely, though he has not yet made up his mind whether he will stay in Victoria or settle elsewhere in Australia, his domicile for purposes of matrimonial relief will be Australia, and, for purposes of succession to movable property, in England. And to this extent the classical rule of singleness of domicile will call for qualification in Australia because there is statute law binding on Australian courts which, on this reading of the Act, compels them to reach this conclusion.

But there is a further question with respect to recognition of a decree made under the Act on the jurisdictional basis of domicile in Australia. If a domicile in Australia depends on a domicile within a State or Terirtory no difficulty will arise because *Armitage* v. *Attorney-General*[29] will lead to recognition on settled common law principles. But if, on the facts stated above, an Australian court grants a decree of divorce to X on the footing of a domicile in Australia, *without* a domicile in a State or Territory, will an English court recognize the decree? No certain answer can be given because it is a new question, but, on principle, it is submitted that the answer should be affirmative. The reason has been stated by the present authors in these terms: "As Gravenson points out, the citizen of a federation is subject to two legal systems, state and federal, in both of which domicile may be relevant. And within Australia, as *Barry J.* said in *Lloyd* v *Lloyd*, there is unity of law with respect to matrimonial causes throughout the country. This follows from the distribution of legislative power by the constitution, and from exercise of that constitutional power. The legislative framework within which this unity of law is established contemplates Australia as a single law district within which a domicile by reference to the common law concepts of

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[26] *Ibid.*, at p. 351.

[27] "The Unity of Domicile" (1962) 78 L.Q.R. 62.

[28] (1958) 2 F.L.R. 391, at p. 399.

[29] [1906] P. 135. The effect of that decision is briefly stated by *Cowen* and *Mendes da Costa*, op. cit., pp. 83-84.

animus and *factum* may be established: why, having regard to these considerations, should an English court insist that the only domicile which can be established at common law in Australia is one established in a State or Territory? Is there not more practical good sense, more adequate appreciation of the character and organization of a federal structure, in accepting the notion of an Australian domicile in such a case...?"[30]

If an English court accepts this argument, it follows that a court not constrained by statute to do so would accept a view of the law at variance with the classical rule of singleness of domicile, because such a person as X would for various other legal purposes, be held to be domiciled in England.

It may also be observed that the question posed by *Lloyd* v. *Lloyd* with respect to an Australian domicile arises not only in the context of jurisdiction, but also in determining questions of capacity to marry by reference to the relevant provisions of the Matrimonial Causes Act 1959 and the *Marriage Act* 1961.

4. *The Operation of ss. 10 and 22 of the Marriage Act 1961.*

Section 18 (1) (b) of the *Matrimonial Causes Act* 1959 provides that, subject to ss. 18(a) and 20, a marriage is void where the parties are within the prohibited degrees of consanguinity or affinity. Section 19(1) provides that after the commencement of the Act, the prohibited degrees of consanguinity and affinity shall be those only which are prescribed by the Act, while s. 19(2) declares that a marriage solemnized before the Act is not voidable on the grounds of consanguinity or affinity of the parties unless the parties were at the time of the marriage within one of the degrees of consanguinity or affinity prescribed by the Act. Section 20 makes provision for certain dispensations where parties within the prohibited degrees of affinity desire to marry. If these were the exclusive provisions of the Act on this matter, it would appear that in such a case as *Sottomayor* v. *De Barros* (*No. 1*)[31] a different result would have been reached. There a marriage between two Portuguese domiciliaries, celebrated in England, was held void by the Court of Appeal because in the circumstances, the law of Portugal prohibited the marriage of cousins. Marriages between cousins are not within the prohibited degrees of consanguinity as prescribed by the Act. But ss. 22(2) and 25(3) of the Act have to be taken into account. Section 22(2) provides in very general terms that a provision of the Act does not affect the validity or invalidity of a marriage where it would not be in accordance with the common law rules of private international law to apply that provision in relation to that marriage, while s. 25(3) affirmatively directs the courts to apply the laws of any country or place where it would be in accordance with the common law rules of private international law to do so. While the common law rules bearing on questions of the essential validity of marriage are not perfectly clear[32], s. 22(2) would appear to allow *Sottomayor* v. *De Barros* (*No. 1*) to stand, even though the marriage had been celebrated in Australia.

But this situation is not altered—because of the operation of s. 22(1) of the *Marriage Act* 1961. Part III of the Act, in which s. 22(1) appears, came into operation in May 1961 when the Act received the assent. Section 22 provides:—(1) Notwithstanding sub-section (2) of section twenty-two or sub-section (3) of section twenty-five of the Matrimonial Causes Act 1959, the provisions of sections eighteen, nineteen and twenty of the Act relating to the prohibited degrees of consanguinity and affinity and the Second Schedule to that Act apply in relation to marriages in Australia, other than marriages to which

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[30] (1962) 78 L.Q.R. 62, at p. 68.

[31] (1877) 3 P.D. 1.

[32] See *Miller* v. *Teale* (1954) 92 C.L.R. 406, at p. 414; See also *Cowen* and *Mendes da Costa* op. cit., pp. 57-58.

Division 3 of Part IV of this Act applies, and to marriages under Part V of this Act, wherever the parties are domiciled or intend to make their home.

(2) Nothing in the last preceding sub-section shall be taken to prevent the application of any common-law rule of private international law in relation to a marriage or purported marriage that takes place outside Australia otherwise than under Part V of this Act.

It follows that the validity of any marriage *celebrated in Australia* (subject to the very limited exception referred to in s. 22 (1)) is, so far as consanguinity and affinity are concerned, governed by the degrees prescribed by the *Matrimonial Causes Act* 1959 as extended by the *Marriage Act* 1961 which by s. 23 extends them to cover degrees of consanguinity traced through or to a person who is or was an adopted child. Since a marriage of cousins is not prohibited thereby, it follows that such a marriage as that in *Sottomayor* v. *De Barros (No. 1)*, if celebrated in Australia, would be held valid by Australian courts notwithstanding that the parties were Portuguese domiciliaries and that by Portuguese law the marriage was void. But on the actual facts of *Sottomayor* v. *De Barros (No. 1)* s. 22 (2) of the *Matrimonial Causes Act* 1959 and s. 22 (2) of the *Marriage Act* 1961 would apply, and the case would not be supject to the peremptory control of s. 22 (1) of the *Marriage Act* 1961.

Section 18 (1) (e) of the *Matrimonial Causes Act* provides that a marriage that takes place after the commencement of the Act is void where either of the parties is not of marriageable age. That Act does not prescribe a marriageable age; but this is fixed by s. 11 of the *Marriage Act* as eighteen for males and sixteen for females. Section 11 and its associated provisions are not yet in operation, so that for the present marriageable age for persons domiciled in Australia must be determined by reference to the appropriate State or Territorial law. Section 10 (1) (a) of the *Marriage Act* provides, *inter alia*, that notwithstanding any common law rule of private international law, s. 11 applies to marriages celebrated in Australia. When this part of the *Marriage Act* comes into operation, it follows, in respect of all marriages celebrated in Australia, that domiciliary prescriptions of marriageable age are to be disregarded, while the requirements of the Act in this respect must be satisfied. Section 10 (1) furnishes for marriageable age the same office as s. 22 (1) of the *Marriage Act* provides for the prohibited degrees. This is a specific departure from the common law rules of private international law; but s. 10 (2) (b) in providing that the requirements of marriageable age, as specified in the Act, shall apply to the marriage of a person domiciled in Australia, wherever the marriage takes place, does not involve a departure from the common law rules. In *Pugh* v. *Pugh*[33] a marriage celebrated in Austria between a domiciled Englishman and a domiciled Hungarian girl aged 15 was held void by an English court, though it was valid by Austrian and Hungarian law. Section 2 of the English *Age of Marriage Act* 1949 provides that a marriage between persons either of whom was under the age of sixteen shall be void, and this section was held to apply to render the marriage void.

It is to be observed that ss. 10 and 22 (1) of the *Marriage Act*, so far as they operate in disregard of common law rules of private international law, and require compliance with the Australian *lex fori*, may produce limping marriages; that is to say marriages which are good in Australia but invalid elsewhere, or marriages that are invalid in Australia, but good elsewhere by operation of common law rules. This is the policy to which the Act gives expression, and it suggests an analogy to the common law rule stated in *Sottomayor* v. *De Barros (No. 2)*[34] that where a marriage is celebrated in England, and one of the parties is domiciled in England and has capacity to enter into it, the marriage

[33] [1951] P. 482.
[34] (1879) 5 P.D. 94.

will be valid in England, even though the other party is domiciled in a foreign country under the law of which he or she has no capacity to enter the marriage. This doctrine has been stigmatized as "unworthy of a place in a respectable system of the conflict of laws"[35] and as 'inelegant'"[36], and in the English cases it has been applied, *inter alia*, to the issue of prohibited degrees[37] and the requirement of parental consent[38]. But in *Miller* v. *Teale*[39] four judges of the Australian High Court spoke of this rule as furnishing "dubious guidance", and it would seem that this is a sufficiently clear indication that *Sottomayor* v. *De Barros* (*No. 2*) would not in this respect be followed as a matter of common law in Australia. Sections 10 and 22 (1) of the *Marriage Act* go beyond *Sottomayor* v. *De Barros (No. 1)*, s. 22 (2) of the *Matrimonial Causes Act* 1959 and s. 22 (2) though the requirements of the *lex domicilii* of *both* parties are not satisfied.

5. *Capacity to Marry*

In *Miller* v. *Teale*[40] it was observed in the High Court that: "Neither English nor American law has perhaps yet reached a final conclusion as to the choice of law governing general capacity to marry and the choice of law governing particular impediments or prohibitions. American law has shown a greater persistence than English law in the preference for the *lex loci celebrationis* over the *lex domicilii* in all matters affecting the essential validity of the contract of marriage".

And as the present writers have pointed out, there is ambiguity in the reference to the *lex domicilii* for one of the uncertainties in English law is whether the reference to that law is to the ante-nuptial *leges domicilii* of husband and wife, or the *lex domicilii* of the husband as at the date of the marriage, or to the intended law of the matrimonial domicile[41].

This obscurity and uncertainty is in no way clarified by the Act, and the recent cost of *Breen* v. *Breen*[42] raises a further problem. There the husband married his first wife in Ireland, and this marriage was dissolved in 1952 by an English court which was the *forum domicilii*. In 1953 the husband married a second time in Ireland, while his first wife was still living. At the time of the second marriage, the second wife was aware of the divorce, but she now petitioned for nullity. Her argument was based on a provision of the *Constitution of Ireland Act*, the operation of which was said to deny recognition to the English divorce, so that the husband was still married to the first wife when he entered the second marriage. *Karminski* J. carefully examined the Irish provision and concluded that it did not have this operation; that the divorce was valid, and that the second marriage was therefore valid.

What is of particular interest is the judge's assumption that Irish law was relevant to the disposition of the case: On what basis? It may have been that the second wife's ante-nuptial domicile was Irish, in which case there is no special difficulty. But there is no evidence of this from the report, and it seems more likely that the reference to Irish law is not to be explained on this ground, and if this is so, it would seem that it must be explained on the footing that Ireland was the *locus celebrationis*, and that a reference to that law was appropriate not only for the determination of questions of formalities, but *also* to determine questions of capacity and essential validity of the marriage. While the reference to the *lex loci* on questions of formal validity is well established law, the reference of

[35] *Falconbridge, Selected Essays on the Conflict of Laws*, 2nd ed. (1954), p. 711.
[36] *Graveson, Conflict of Laws*, 4th ed. (1960), pp. 146-147.
[37] *Sottomayor* v. *De Barros* (*No.* 2) (1879) 5 P.D. 94.
[38] *Ogden v. Ogden* [1908] P. 46.
[39] (1954) 92 C.L.R. 406. Applied. *Sakellaropoliuls* v. *Davis* (1960) 24 D.L.R. (2d) 524.
[40] (1954) 92 C.L.R. 406, at p. 414.
[41] *Cowen* and *Mendes da Costa* op. cit., p. 58.
[42] [1961] 3 W.L.R. 900.

matters of capacity and essential validity to that law is not so clear. That parties to a marriage must have capacity under the *lex loci celebrationis* was dogmatically asserted by *Westlake*[43] and *Dicey*[44] supports this view though he draws some distinctions suggesting that this rule is not so certainly applicable where the marriage is celebrated *out* of England as was the case in *Breen* v. *Breen*, though compliance with the *lex loci* is, in *Dicey's* view, required in the case of a marriage celebrated in England. On the other hand, in *In the Will of Swan*[45], *Molesworth* J. in the Supreme Court of Victoria said that it was appropriate to refer to the *lex loci celebrationis* only the context of "ceremonial and so forth". And very recently in *Ross-Smith* v. *Ross-Smith*[46] Lord *Morris* said: "The particular place where the ceremony of marriage takes place may have no relevance as between the parties so far as their marriage status is concerned, assuming that the ceremony did bring about such a marriage status. It seems to me that it would be most unlikely that parties who enter into a valid marriage in one particular country, which is not intended to be the country of their domicile or residence, would intend that the law to be applied to their future married status should be the law of the country in which the actual ceremony of marriage took place, and I cannot think that any agreement to such effect ought to be implied".

The tenor of the other majority speeches supports the view that the *lex loci celebrationis* has no concern with questions of capacity.

Section 18(1) (c) of the *Matrimonial Causes Act* provides that a marriage is void where it is not a valid marriage under the law of the place where the marriage takes place, by reason of a failure to comply with the requirements of the law of that place with respect to the form of solemnization of marriages. This reference to the *lex loci celebrationis* for a *specific* and limited purpose suggests a legislative intent that this is also the limit of the applicability of the *lex loci*, and that so far as *Breen* v. *Breen* holds that other questions of validity of marriage are referable to the *lex loci*, at least where that is not Australian law, it is not the law in Australia.

6. *Recognition of Foreign Relief*

Section 95 (2) (a) of the Act provides that the dissolution of a marriage effected in accordance with the law of a foreign country shall be recognized as valid in Australia where at the date of the institution of the proceedings that resulted in the dissolution, the party at whose instance the dissolution was effected was domiciled in that foreign country. There is a question[47] whether the rule in the *Hammersmith Marriage Case*[48], later affirmed and applied in *Maher* v.*Maher*[49], that recognition will not be given to a form of divorce apt to dissolve a polygamous marriage when it purports to operate on a monogamous marriage, survives in face of the broad language of s. 95 (2) (a). Recent decisions suggest a movement away from the *Hammersmith Marriage Case* doctrine as a matter of common law[50], and in *Russ v. Russ*[51] *Scarman* J. narrowed the *Hammersmith Marriage Case* rule by holding that while a Talak divorce (a divorce by declaration which, under Moslem law, dissolves a marriage) obtained in the absence of a

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[43] *Private International Law*, 7th ed. (1925), p. 19.

[44] *Conflict of Laws*, 7th ed. (1958), p. 256. See also *Cheshire, Private International Law*, 6th ed. (1961), p. 316.

[45] (1871) 2 V.L.R. (1 P. & M.) 47. See also (1951) 4 I.L.Q. 389.

[46] [1962] 2 W.L.R. 388, at p. 416.

[47] *Cowen* and *Mendes da Costa* op. cit., pp. 82-83.

[48] R. v. *Hammersmith Superintendent Registrar of Marriages; Ex parte Mir-Anwaruddin* [1917] 1 K.B. 634.

[49] [1951] P. 342.

[50] *Yousef* v. *Yousef* [1957] C.L.Y. 515; *El-Riyami* v. *El-Riyami* [1958] C.L.Y. 497; *Khan* v. *Khan* (1960) 21 D.L.R. (2d) 171, at p. 176.

[51] [1962] 2 W.L.R. 708.

wife and without court proceedings is not entitled to recognition—and this was the position in the *Hammersmith Marriage Case*—such a divorce, when recognized and recorded in the courts of the domicile and in the presence of the wife, should be recognized. It was open to *Scarman* J. only to distinguish the *Hammersmith Marriage Case* which was a decision of the Court of Appeal; but *Russ* v. *Russ* marks a further stage in a movement away from a rule which at least in its broadest stated terms is believed to be unsound[52]. *Russ* v. *Russ* should furnish guidance to Australian courts in the interpretation of s. 95 (2).

In *Abate* v. *Abate*[53], the common law rule in *Armitage* v. *Attorney-General*[54] was carried over into annulment, a process already accomplished in Australia by s. 95 (4) of the Act. In *Abate* v. *Abate*, the court treated the matter as one of nullity of a voidable marriage, and the case does not answer the question whether the common law extension of *Armitage* v. *Attorney-General* is limited to voidable marriages; and if it does extend to void marriages, what if the formulation of the rule in respect of such marriages. Section 95 (4) expressly extends to void marriages, and provides for recognition if the domicile of *either* party would recognize the annulment effected in accordance with the law of a foreign country. The present writers have argued that on principle the statutory extension of *Armitage* to void marriages should have been framed in wider terms[55].

Abate v. *Abate* is also of interest in that it is one of the very few cases in which declaratory proceedings *simpliciter* have been invoked to test the validity of a foreign annulment[56]. Although such proceedings are included in the definition of matrimonial causes in the Act, the Act does not specify the jurisdictional basis upon which the court may grant declaratory relief, so that this question must be referred to the common law. The present writers have suggested that declaratory jurisdiction should exist if the petitioner is domiciled *or* resident in Australia[57] and this view may be supported by *Abate* v. *Abate* where the husband petitioner was temporarily resident but not domiciled in England. The Court did not, however, state the basis on which it assumed jurisdiction.

Section 95 (5), a "catch-all" subsection, provides that any dissolution or annulment of a marriage that would be recognized as valid under the common law rules of private international law but to which none of the preceding provisions of the section apply shall be recognized as valid in Australia and that the operation of the subsection shall not be limited by any implication from those provisions. This subsection gives rise to some interesting and enticing questions[58]. In *Ross-Smith* v. *Ross-Smith* [59] which was discussed by the present writers at an earlier stage of its history [60], the House of Lords, resolving earlier uncertainty held that English courts have no jurisdiction to annul a voidable marriage on the ground that England was the *locus celebrationis*. This decision has no *direct* relevance to Australian law, because the grounds of domestic nullity jurisdiction are prescribed by s. 23 (4) and (5) of the *Matrimonial Causes Act*, and these provisions are exhaustive. In this connexion it may be observed that the treatment of *Simonin* v. *Mallac*[61] by the majority of the Law Lords appears to vindicate the judgment of the draftsmen of the Act in not conferring jurisdiction on Australian courts *qua forum celebrations* even in the

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[52] *Cowen* and *Mendes da Costa*, op. cit., pp. 82-83.
[53] [1961] P. 29.
[54] [1906] P. 135.
[55] *Cowen* and *Mendes da Costa*, op. cit. p. 92.
[56] See also *Hooper v. Hooper* [1959] 1 W.L.R. 1021.
[57] op. cit. at pp. 70-76.
[58] op cit. at pp. 93-97.
[59] [1962] 2 W.L.R. 388.
[60] *Cowen* and *Mendes da Costa*, op. cit., pp. 55-56.
[61] (1860) 2 Sw. & Tr. 67.

case of a void marriage. But *Ross-Smith* v. *Ross-Smith* is relevant in that it will preclude recognition under s. 95 (5) of the Act of a foreign decree of nullity made on the basis that it was pronounced by the foreign *forum celebrationis*[62]. Section 95 (5) may nevertheless give rise to questions of recognition which will raise the question, as yet unresolved, whether *Travers* v. *Holley*[63] is, as a matter of common law, law in Australia. *Travers* v. *Holley* was discussed in two cases recently decided in the Supreme Court of Alberta. In one[64] the Court preferred *Fenton* v. *Fenton*[65]; in the other [66] decided very shortly afterwards, *Travers* v. *Holley* appeared to be a "natural conclusion".

7. *Ancillary Proceedings.*

Section 84 of the *Matrimonial Causes Act* 1959 empowers the court to order maintenance. Section 84 (1) provides: "Subject to this section, the court may, in proceedings with respect to the maintenance of a party to a marriage, or of children of the marriage, other than proceedings for an order for maintenance pending the disposal of proceedings, make such order as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances".

In *Sowa* v. *Sowa*[67] the decision in *Hyde* v. *Hyde*[68] was pushed a stage further. *Hyde* v. *Hyde* decided that the matrimonial jurisdiction of the English courts is not available to parties to a polygamous marriage. The decision specifically related to divorce, but has been applied to nullity suits[69] and also to suits for judicial separation and restitution of conjugal rights[70]. In *Sowa* v. *Sowa* the issue was whether the wife of a potentially polygamous marriage could claim maintenance under the English *Summary Jurisdiction (Married Women) Act* 1895. The Court of Appeal found the reasoning of *Hyde* v. *Hyde* "inescapable"[71], and held that the wife was not entitled to a maintenance order. This decision would appear to be applicable to maintenance suits under the various State Acts, and also to proceedings under Pt. VIII of the *Matrimonial Causes* Act 1959. And there seems no reason to distinguish the situation where the husband has taken only one wife from that where he has lawfully taken several: nor is it considered material whether the applicant for relief is the first wife or a subsequent wife. But there is a question whether *Sowa* v. *Sowa* ought to be followed in Australia.

Hyde v. *Hyde*, it is considered, was a product of its time, since when the attitude of the courts to polygamous marriages has radically changed. From denying effect to such marriages[72], the trend in recent cases is to afford them broad recognition[73]. It appears that a polygamous marriage is sufficient to raise the presumption of marital coercion[74], and in recent cases the Privy Council has upheld a claim of children of a polygamous marriage to succeed on intestacy to their father's property[75], and the claim of a wife of a polygamous marriage to

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[62] See *Cowen* and *Mendes da Costa*, op. cit. pp. 95-97.
[63] [1953] P. 246.
[64] *La Pierre* v. *Walter* (1960) 24 D.L.R. (2d) 483.
[65] [1957] V.R. 17.
[66] *Bednard and Bednar* v. *Deputy Registrar General of Vital Statistics* (1960 24 D.L.R. (2d) 238.
[67] [1961] P. 70.
[68] (1866) L.R. 1 P. & D. 130.
[69] *Risk* v. *Risk* [1951] P. 50.
[70] *Dicey's Conflict of Laws*, 7th ed. (1958), p. 288.
[71] [1961] P. 70 at p. 83.
[72] *Warrender* v. *Warrender* (1835) 2 Cl. & F. 488; *Harvey* v. *Farnie* (1880) 6 P.D. 35 *affirmed* (1882) 8 App. Cas. 43; *In re Bethell* (1887) 38 Ch. D. 220; *R.* v. *Naguib* [1917] 1 K.B. 359.
[73] *The Sinha Peerage Claim* [1946] 1 All E.R. 348, n.; *Srini Vasan* v. *Srini Vasan* [1946] P. 67; *Baindail* v. *Baindail* [1946] P. 122.
[74] *R.* v. *Caroubi* (1912) 7 Cr. App. R. 149, at p. 152.
[75] *Bamgbose* v. *Daniel* [1955] A.C. 107.

the grant of letters of administration upon her husband's death[76]. Further, in some situations legislation has made express provision for polygamous marriages[77].

The rule denying matrimonial jurisdiction to parties to a polygamous marriage may, as in *Sowa* v. *Sowa*, work a denial of justice and the court acknowledged that it did so[78]. In *Lim* v. *Lim*[79], *Coady* J. refused the claim of a wife of a polygamous marriage to alimony, but stated: "It does not seem to me consistent with common sense that this plaintiff who was admitted into this country under our immigration laws as the wife of the defendant and who, in China prior to her coming to this country, enjoyed the full civil status of wife, should be denied that status under our law, when, after a residence here of almost thirty years with the defendant as her husband, and after acquiring a domicile in this country she seeks against her husband the remedy which our law provides to a wife to claim alimony . . . The implication arising from refusal to recognise the plaintiff's status for the purpose in question are so many and so repellent to one's sense of justice that it is with regret that I come to the conclusion which I am on the authorities as I read them forced to arrive at".

If *Hyde* v. *Hyde* is regarded as too well established to be judicially reversed, there still remains the question as to whether it ought to be so broadly interpreted as to apply to a *Sowa* v. *Sowa* situation, where the alternative to relief may be to throw a financial burden upon the public as a whole.

Whatever the common law rule, the answer in Australia depends upon the construction of the words "a party to a marriage" in s. 84 of the Act. It may be relevant to note that s. 83 of the Act defines, for the purposes of Pt. VIII (in which those sections appear) "marriage" to include a purported marriage that is void. And both s. 6 of the Act and *Bamgbose* v. *Daniel*[80] go some way to suggest that "children of the marriage" ought, under Pt. VIII, to be construed to include the legitimate children of a polygamous marriage.

Section 86 of the Act empowers the court to order a settlement of property[81]. Section 86 (1) provides: "the court may, in proceedings under this Act, by order require the parties to the marriage, or either of them, to make, for the benefit of all or any of the parties to, and the children of, the marriage, such a settlement of property to which the parties are, or either of them is, entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of the case."

A question may arise as to whether a court can exercise the powers conferred by this provision where the party against whom an order is sought is domiciled and resident outside the jurisdiction of the court. In *Hunter* v. *Hunter and Waddington*[82] the husband applied for a settlement of the wife's property for the benefit of the children of the marriage. At the date of the application the wife had remarried and was domiciled and resident in Kenya. She had property in England and the registrar, so far as concerned this property, reported in favour of such a settlement. The husband now sought a confirmation of that report. The wife entered an appearance under protest and, citing *Tallack* v.

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[76] *Coleman* v. *Shang* [1961] 2 W.L.R. 562. And see *Russ* v. *Russ* [1962] 2 W.L.R. 708. See also *Estate Mehta* v. *Acting Master High Court* 1958 (4) S.A. 252 (F.C.) *In re Estate Koshen* 1960 (2) S.A. 174 (S.R.).

[77] For example, the *Family Allowances and National Insurance Act* (1956) (U.K.).

[78] [1961] P. 70 at p. 82, *per Holyroyd Pearce L.J.*: "The merits are entirely on the wife's side. The husband has behaved so badly that I fully share the regrets expressed by the Divisional Court at finding itself unable to uphold the magistrate's order. One is inclined to echo the words of *Crew* C.J. in the case of the Earldom of Oxford when he said that there was none but would 'take hold of a twig or twine thread to uphold it' ".

[79] [1948] 2 D.L.R. 353, at pp. 357-358. See also *Sara* v. *Sara* (1962) 31 D.L.R. (2d) 566 and see *Bartholomew, Recognition of Polygamous Marriages in Canada* (1961) 10 Int. & Comp. Law Quarterly, 305, 318.

[80] [1955] A.C. 107.

[81] See *Cowen* and *Mendes da Costa* op. cit. p. 122.

[82] [1962] P. 1.

Tallack and *Broekema*[83], contended that her lack of an English domicile necessarily entailed lack of jurisdiction. *Scarman* J. rejected this contention which he considered "altogether too sweeping a proposition". The learned judge pointed out that in *Tallack* v. *Tallack and Broekema* the wife had no property in England, and stated[84]: "In my opinion the true principle to be gathered from the judgment of Lord Merrivale P. in *Tallack*'s case is that in a case where the wife is neither domiciled nor resident in England the court may, nevertheless, exercise its jurisdiction to order a settlement if the property to be settled is within the jurisdiction so that it may be the subject of an effectual order of the court".

The practical difficulty then arose as to how the settlement could be drafted and executed. The wife contended that the court could not make an effectual order, for attachment was not possible and it would be infringing the authority of the Kenya courts to seek to enforce any order that might be made personally against her. After a consideration of *Style* v. *Style* and *Keiller*[85], this contention was also rejected on the basis that even if the court was not empowered to refer to conveyancing counsel of the court the drafting of settlements it orders, the court had power to give directions for the preparation of the instruments it considered to be necessary, and that there was nothing unjust in this procedure. *Scarman* J. stated[86]: It is, however, unnecessary for me to reach a conclusion on the point, as I am of the opinion that the court, even if it cannot of its own motion refer the drafting to conveyancing counsel of the court, has power to give directions for the preparation of the instrument it considers to be necessary. The words of the section seem to me conclusive upon the point: for the court, having power 'if it thinks fit', to order 'such settlement as it thinks reasonable', must have power to give directions as to its drafting and finally to approve a submitted draft. The language is quite clear, requiring the court first to decide whether the case is a fit one for settlement and then to decide and order whatever settlement it considers reasonable".

Finally, the court pointed out that s. 47 of the *Supreme Court of Judicature (Consolidation) Act* 1925 enabled the court to ensure the due execution of the deed once so approved.

Hunter v. *Hunter and Waddington* seems correct in principle, and, it is considered, is equally applicable to the wording of s. 86 of the Act. It may be noted that s. 88 (1) provides that where a person who is directed by an order under Pt. VIII to execute a deed or instrument refuses or neglects to do so, the court may appoint an officer of the court or other person to execute the deed or instrument in his name, and to do all acts and things necessary to give validity and operation to the deed or instrument.

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[83] [1927] P. 211.
[84] *Hunter* v. *Hunter* and *Waddington* [1962] P. 1, at p. 6.
[85] [1954] P. 209.
[86] *Hunter* v. *Hunter and Waddington* [1962] P. 1, at p. 8.

APPENDIX "59"

DIVORCE—AUSTRALIAN STATUTE ESTABLISHES UNIFORM FEDERAL LAW FOR MARITAL ACTIONS—MATRIMONIAL CAUSES ACT 1959, ACT. NO. 104 OF 1959 (AUSTL.)

Harvard Law Review, Vol. 74, No. 2, pp. 424-427, December 1960.
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The Australian Matrimonial Causes Act 1959 is a federal statute, passed pursuant to an explicit enabling provision of the Australian Constitution,[1] and will, when it is proclaimed effective, supersede the marital-actions laws of the several states and establish a uniform law for the whole of Australia. Section 8 preempts the states' powers to legislate concerning divorce, annulment, and matters of maintenance and custody incident to divorce or annulment. Especially noteworthy features are the law's provisions aimed at saving marriages, which enable a trial judge to act as a conciliator and which authorize government subsidization and court use of marriage-guidance organizations, and also its provisions for the recognition of divorces granted by the courts of foreign countries.

The statute does not provide for the establishment of federal domestic-relations courts, but rather follows in section 23 the usual Australian practice of investing the state courts with jurisdiction to hear causes arising under the federal statute. Since the full Supreme Court of one state may be expected out of judicial comity to follow the previous decisions of the full Supreme Court of another state, and since appeals from the full Supreme Courts to the High Court of Australia are available when the High Court gives its leave, a high degree of national uniformity seems obtainable. The most notable advantages that might be derived from such uniformity in the United States would be the elimination of the emigration of litigants from one state to another in search of more favorable substantive law and the alleviation of the problems of interstate recognition of divorces so obtained. In Australia, however, prior to the present statute the laws of the most lenient state were not such as to invite migrants and those of the strictest state did not make divorce so difficult as to induce extensive migration. Thus whatever migratory divorce business there was in Australia seems never to have reached the proportions long prevalent in the United States.[2] This may be why Australian courts have in the divorce area generally interpreted strictly their country's constitutional and statutory full faith and credit requirements.[3] In addition, the dimensions of the interstate recognition problem had been further narrowed by prior federal statutory provision for the recognition of limited classes of divorces.[4] Thus the fact that the present statute eliminates the differences between the substantive divorce laws of the several states seems to be less important to Australians than the fact that it is a measure of social reform which seeks to improve on the prior laws.

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[1] AUSTL. CONST. ch. 1, § 51 (xxii).

[2] See 23 H. R. DEB. 2233 (1959) (Austl.); Note, 17 U. CHI. L. REV. 134, 143 (1949; Selby, *The Federal Matrimonial Causes Bill* 31 AUSTL. Q. No. 3, at 11, 12 (1959).

[3] See Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study* 65, HARV. L. REV. 193, 219-23 (1951).

[4] Matrimonial Causes Act 1915, Act No. 22 of 1945, § 13 (Aust., Matrimonial Causes Act 1955, Act No. 29 of 1955, § 6 (Austl.).

Whether a national imposition of reform is appropriate in the area of divorce, which has traditionally been regarded as a matter of local concern, is perhaps questionable. While the differences in grounds for divorce between the Australian states are not so great as those which exist among certain American states, there remain variations which may reflect the cultural or religious sentiments of particular localities. In Queensland, for example, where there is the largest Catholic population, the local statute permits divorces on only five grounds, which include neither habitual cruelty nor habitual criminality.[5] Because such omissions may lead to collusion[6] or to the artificial preservation of irretrievably broken marriages, it is arguable that the need for reform outweighs the advisability of deference to local sentiments. On the other hand, it may be both fairer and administratively wiser to delay attempted imposition of more liberal grounds until the argument for local legislative adoption has overcome the resistance of what, though a national minority, is a numerically significant force in the state.

All of the divorce grounds which the act accepts and many of its other substantive features were taken from the prior law of at least one Australian state. However, the machinery for saving marriages established by sections 14-17, which was stressed by proponents of the act and which received little opposition, is new. These sections impose on the court a duty of considering the possibility of reconciliation. If at any time during the trial the judge feels that there is such a possibility, he may adjourn the proceedings and, with the consent of the parties, assume the role of a conciliator; alternatively he may nominate an approved marriage-guidance oragnization or some other suitable person to try to effect a reconciliation. The Attorney-General is authorized in sections 9-13 to approve and, out of money appropriated by Parliament, to subsidize competent marriage-guidance organizations, which will presumably be available to couples independently as well as on nomination by a judge during a divorce proceeding. The governmental approval, subsidization, and supervision of such organizations will probably enhance both their professional expertise[7] and their prestige, thereby encouraging couples to visit them before instituting divorce proceedings. Visits to such organizations having the time and the facilities to examine marital problems confidentially and in a non-adversary atmosphere may save a substantial number of marriages. The provisions for conciliation at trial, however, are not likely to prove as efficient as the measures which can be taken by an American family court, where the judge hears only domestic-relations cases and has a trained investigative staff at his disposal.[8] While the act presumably leaves the states free to establish such courts so long as they apply the act, and while section 85 authorizes use of investigative officers where children are concerned, more positive encouragement of such practices might have been provided. In any event, it would seem desirable to require reports concerning the circumstances of the family in proceedings involving the custody of children. Such a requirement would facilitate application of section 71, a new provision declaring that, absent special circumstances, decrees of divorce shall not become absolute until the court is satisfied that proper arrangements for the welfare of the children have been made.

Although Australian courts have been liberal in their recognition of domestic divorce decrees, Parliament deemed it necessary to broaden the bases on which divorces granted by the courts of foreign countries were to be recognized. Since conflict-of-laws rules are usually formulated by judges rather than by legislatures, the provisions contained in section 95 of the present act constitute

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[5] See 23 H.R. Deb 2233 (1959) (Austl.).

[6] See Kahn-Freund, *Divorce Law Reform?* 19 Modern L. Rev. 573, 582, (1956).

[7] See 23 H.R. Deb. 2225 (1959) (Austl.).

[8] See Chute, *Divorce and the Family Court*, 18 Law & Contemp. Prob. 49 (1958).

one of the first attempts to particularize the grounds for the recognition of foreign divorces.[9] Section 95 codifies two common-law rules: first, that a divorce granted in accordance with the law of a foreign country or one of its subdivisions shall be recognized in the forum country if the plaintiff was domiciled in the granting country; and second, that a divorce shall be recognized in the forum if it would have been recognized in the country where both parties were domiciled when it was granted.[10] It then creates a special definition of domicile to deal with the problem of wives of persons absent from the granting jurisdiction at the time of divorce, stating first that a wife who has been deserted by her husband shall be deemed to have been domiciled in the granting country if she was domiciled there immediately before either her marriage or the desertion, and second that any wife shall be deemed to have been domiciled in the granting country if she was resident there for the three years immediately preceding the institution of proceedings. This subsection has a tortuous history. The British concept of unitary domicile, that a wife's domicile is always that of her husband, had prevented a wife from suing for divorce unless she bore the expense of following her husband to his new domicile. The Australian states had, in common with England, alleviated this hardship by enacting statutes permitting suit under the circumstances now described in section 95.[11] A Victorian court had, however, refused to recognize a divorce so obtained in England;[12] this led to statutory reversal by the Victorian Parliament.[13] The present statute incorporates in section 24 all bases of divorce jurisdiction under prior state law and, in section 95, ensures nationwide recognition of divorces obtained in a foreign country on a jurisdictional basis like that provided for locally by the present statute.

As a comprehensive codification of recognition law, section 95 provides for continued recognition of divorces which would have been recognized by the common-law rules of conflict of laws. One common-law doctrine specifically perpetuated is that divorces need not be recognized when a party to the marriage has been denied "natural justice." The presence of this provision seems to nullify the one advantage which legislation on recognition could have over the common law, that of predictability. Since, however, it seems necessary to permit courts to deny recognition to unfairly granted divorces in an unforeseeable variety of circumstances, it appears that legislation can be no more definite in this respect than the common law. It might therefore have been preferable for Parliament to have foregone the cumbersome detail of section 95 and to have accomplished its purpose by a simple declaratory statement empowering courts to recognize divorces granted on a jurisdictional basis which they themselves find sufficient.

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[9] *But see* S. 1960, 80th Cong., 2d Sess. (1948); Sherrer v. Sherrer, 334 U.S. 343, 358 n.13 (1948) (Frankfurter, J., dissenting).

[10] See Le Mesurier v. Le Mesurier, [1895] A.C. 517, 540 (P.C.); Armitage v. Attorney General, [1906] P. 135.

[11] See 72, HARV. L. REV. 786 (1959).

[12] Fenton v. Fenton, [1957] Vict. L.R. 17, *But cf.* Travers v. Holley, [1953] P. 246 (C.A.); see Griswold, *The Reciprocal Recognition of Divorce Decrees*, 67 HARV. L. REV. 823 (1954).

[13] Marriage (Amendment) Act 1957, Act No. 6186 of 1957, 4 (Victoria, Austl.), 72 HARV. L. REV. 786 (1959).

First Session—Twenty-seventh Parliament
1966-67

PROCEEDINGS OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON

DIVORCE

No. 18

THURSDAY, FEBRUARY 23, 1967

Joint Chairmen

The Honourable A. W. Roebuck, Q.C.

and

A. J. P. Cameron, Q.C., M.P.

WITNESSES:

(1) *The Anglican Church of Canada:* The Right Reverend S. E. Read, M.A., D.D., Bishop of Ottawa; Reverend Canon M. P. Williams, M.A., L.Th., General Secretary, Department of Christian Social Service; Reverend A. R. Cuplet, Rector of parish of New Liskeard; and Professor H. F. R. Ryan, Q.C., Faculty of Law, Queen's University.
(2) Professor C. Gordon Bale, Faculty of Law, Queen's University.
(3) Professor Bernard L. Adell, Faculty of Law, Queen's University.
(4) Professor H. F. Stuart Ryan, Q.C., Faculty of Law, Queen's University.

APPENDICES:

60.—Brief by the Anglican Church of Canada.
61.—Brief by Professor C. Gordon Bale.
62.—Brief by Professor Bernard L. Adell.
63.—Brief by Professor H. F. Stuart Ryan.
64.—Brief by Professor H. F. Stuart Ryan.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1967

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MEMBERS OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

FOR THE SENATE

Hon. A. W. Roebuck, Q.C., Joint Chairman

The Honourable Senators

Aseltine	Connolly (*Halifax North*)	Flynn
Baird	Croll	Gershaw
Belisle	Denis	Haig
Burchill	Fergusson	Roebuck—(12).

FOR THE HOUSE OF COMMONS

A. J. P. Cameron, Q.C. (*High Park*), Joint Chairman

Members of the House of Commons

Aiken	Forest	McQuaid
Baldwin	Goyer	Otto
Brewin	Honey	Peters
Cameron (*High Park*)	Laflamme	Ryan
Cantin	Langlois (*Mégantic*)	Stanbury
Choquette	MacEwan	Trudeau
Chrétien	Mandziuk	Wahn
Fairweather	McCleave	Woolliams—(24).

(Quorum 7)

ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the House of Commons: March 15, 1966:

"On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—that a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67 (1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee."

"By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19, an Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bills be referred to the Joint Committee of the Senate and the House of Commons on Divorce".

March 16, 1966:

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce".

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce."

25898—1½

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Goyer, Honey, Laflamme, Langlois (*Mégantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams."

LÉON-J. RAYMOND,
Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate and the House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative."

March 29, 1966:

"With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, namely, the Honourable Senators Aseltine, Baird, Belisle, Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig, and Roebuck; and

That a message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—
Resolved in the affirmative."

May 10, 1966:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19 intituled; "An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief".

The question being put on the motion—

In amendment, the Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative."

J. F. MACNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

THURSDAY, February 23, 1967.

Pursuant to adjournment and notice, the Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3:30 p.m.

Present: For the Senate: The Honourable Senators Roebuck *(Joint Chairman)*, Aseltine, Belisle, Fergusson, Flynn, Gershaw and Haig—7.

For the House of Commons: Messrs. Cameron (*High Park*) (*Joint Chairman*), Aiken, Baldwin, Brewin, Fairweather, Honey and McCleave—7.

In attendance: Peter J. King, Ph.D., Special Assistant.

The following witnesses were heard:

(1) *The Anglican Church of Canada:*
The Right Reverend E. S. Reed, M.A., D.D., Bishop of Ottawa;
Reverend Canon M. P. Wilkinson, M.A., L.Th., General Secretary; Department of Christian Social Service;
Reverend A. R. Cuyler, rector of parish of New Liskeard;
Professor H. R. Stuart Ryan, Q.C., Faculty of Law, Queen's University.

(2) Professor C. Gordon Bale, B.A., M.A., LL.B., LL.M., Faculty of Law, Queen's University.

(3) Professor Bernard L. Adell, B.A., LL.B., Faculty of Law, Queen's University.

(4) Professor H. R. Stuart Ryan, Q.C., Faculty of Law, Queen's University.

Briefs submitted by the following are printed as Appendices:

60. The Anglican Church of Canada;
61. Professor C. Gordon Bale;
62. Professor Bernard L. Adell;
63. Professor H. R. Stuart Ryan.
64. Professor H. R. Stuart Ryan.

At 5.45 p.m. the Committee adjourned until Tuesday next, February 28, 1967 at 3:30 p.m.

Attest.

Patrick J. Savoie,
Clerk of the Committee.

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THE SENATE

SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

EVIDENCE

OTTAWA, Thursday, February 23, 1967.

The Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3.30 p.m.

Senator Arthur A. Roebuck and Mr. A. J. P. Cameron (*High Park*), Co-Chairmen.

Co-Chairman Senator ROEBUCK: Ladies and gentlemen, will you please come to order. We have a very distinguished delegation before us today representing the Anglican Church of Canada, and I shall introduce them one at a time as their turn to speak arrives. The first of the delegation to address us is the The Right Reverend E. S. Reed, M.A., D.D., Bishop of Ottawa, and chairman of the committee appointed to prepare the brief.

The Right Reverend E. S. Reed, M.A., D.D., Bishop of Ottawa, The Anglican Church of Canada: Thank you, Mr. Chairman. On behalf of the Anglican Church of Canada I should like to say that we are deeply grateful for this opportunity to present a brief on this very important matter to the joint Parliamentary Committee. Associated with us are those whose names you have before you; they will be speaking to a brief and will also be prepared to answer questions which any of you may wish to address to us. Mr. Chairman, would you like me to read the brief?

Co-Chairman Senator ROEBUCK: I have read the brief. It is concise and I would think that it is the voice of the Anglican Church of Canada. It is very important in every sentence and my thought is that we should hear it read.

Bishop REED: Thank you, Mr. Chairman, I shall be glad to do that. We have tried to keep it brief in recognition of the fact that you have heard a great deal of evidence on suggested changes in what might be a new law on divorce, and also because so much ground has been well covered in other briefs.

Co-Chairman Senator ROEBUCK: May I ask you, sir, would you like us to ask questions as you go along or shall we wait until you have finished your presentation and reading before you receive questions?

Bishop REED: It is immaterial, Mr. Chairman. We do not mind in the least if any member wishes to ask a question as we proceed. However, because it is not a long brief—it is brief in fact as well as in name—it might be better to get the whole brief presented, but I have no feeling about this. Sometimes questions asked at the time may be more meaningful.

Co-Chairman Senator ROEBUCK: Then members are at liberty to ask questions as they see fit.

Bishop REED: On behalf of the Canadian House of Bishops of the Anglican Church of Canada, we appreciate the opportunity of presenting a brief to this Joint Parliamentary Committee on Divorce. In its preparation we have been assisted by other

clergy and laymen specially qualified in moral theology, civil law and pastoral care. Normally the General Synod of the Anglican Church of Canada, composed of the bishops and representative clergy and laity from its twenty-eight dioceses, determines policy at its biennial meetings. As there has been no meeting of the General Synod since this joint parliamentary committee was set up, no action by our General Synod has therefore been possible. In view of this situation the House of Bishops at its last annual meeting passed the following resolution:

> That this House of Bishops authorizes the preparation of a brief to be presented to the Joint Parliamentary Committee on Divorce and requests the Primate to set up a committee of this house with invited representatives from the Department of Christian Social Service and the General Synod Commission on Marriage and Related Matters to prepare and present such a brief on our behalf.

This brief has been prepared and is presented on the authority of this resolution of the House of Bishops. I might just interject at this point that Professor Ryan, professor of law at Queen's University, is with us today as one of those selected by our Primate, who serves, as I do, on the General Synod Commission on Marriage and Related Matters. Canon Wilkinson is with us as the General Secretary of the Council for Social Services. The Reverend Robert Cuyler is here as a parish priest. We felt it was important that those various facets of our church life should be represented.

We first record the view of marriage held by the Anglican Church of Canada. This may best be expressed by quoting the following short excerpt from the proposed Canon *On Marriage in the Church* which was passed by the General Synod of the Anglican Church of Canada in 1965, and which will be presented for ratification at the 1967 session:

> The Anglican Church of Canada affirms, according to our Lord's teaching as found in Holy Scripture and expressed in the Form of Solemnization of Matrimony in the Book of Common Prayer, that marriage is a lifelong union in faithful love, for better or for worse, to the exclusion of all others on either side. This union is established by God's grace when two duly qualified persons enter into a contract of marriage in which they declare their intention of fulfilling its purposes and exchange vows to be faithful to one another until they are separated by death. The purposes of marriage are mutual fellowship, support, and comfort, the procreation (if it may be) and nurture of children, and the creation of a relationship in which sexuality may serve personal fulfilment in a community of faithful love. This contract is made in the presence of witnesses and of an authorized minister.

In view of the fact that the Anglican Church of Canada affirms the lifelong nature of marriage, why is it presenting a brief on the subject of divorce? Several reasons may be noted.

The church legislates for its own members and claims no right to impose its canonical legislation on others.

Pastoral experience with our own members leads us to recognize that while it is the church's responsibility to do all it can to help and support its members so that they may live in accordance with the principles of marriage as we conceive them, nevertheless failure sometimes occurs. What to do in such circumstances must constantly engage the attention of pastors, counsellors, the church's membership, and the community as a whole.

The experience of the church in ministering to those whose marriages are threatened or have actually broken down indicates that the present divorce law of Canada is inadequate, that it is the cause of unreasonable hardship and that in some cases it is even a factor contributing to the hastening of marriage breakdown.

The church conceives its legislative function as being restricted to its own membership as described above. In fulfilling its responsibility to its members the Anglican

Church of Canada is considering a change in its canon law which in certain circumstances would permit the re-marriage of divorced persons within the church during the lifetime of a former spouse. The grounds for such possible permission are set forth in the proposed canon to which we have made reference. Briefly summarized, the decisions of the church regarding permission for re-marriage will be determined not on the basis of the parties concerned being judged innocent or guilty of a matrimonial offence but on recognition of the breakdown of a first marriage and a belief on substantial grounds that a second marriage as far as possible in keeping with the church's view of the nature of marriage is now possible.

In addition to this legislative function for its own members the church recognizes its obligation to work with other private and public bodies in Canada in promoting the enactment of civil and criminal laws designed to give justice to all citizens, irrespective of their religious affiliation, race or economic status. Such a concept of the church's role in society precludes us from being silent on such an issue as the one before this joint committee. Thus for its own members who have failed in marriage, as well as for other citizens in similar plight, the Anglican Church of Canada, through this committee of the bishops, makes its submission regarding a new divorce law for Canada.

There have been available to us many previous studies on the subject of divorce including notably the book, *Putting Asunder—A Divorce Law for Contemporary Society*, being the report of a group appointed by the Archbishop of Canterbury for the Church of England in January, 1964. It is our understanding that the members of your joint committee, Mr. Chairman, have all had access to this book. We had been considering attaching it to this brief, but we were told that all of you know it and understand it.

Co-Chairman Senator ROEBUCK: That would have been unnecessary.

Bishop REED: In addition to such studies, our committee has the advantage of appearing before you towards the end of your hearings and thus having available the previous briefs presented to this Joint Parliamentary Committee. We are particularly indebted to the brief presented after many years of study, by the United Church of Canada on November 22, 1966. By reason of the ground already covered we feel free to focus our attention on a few central principles.

Any changes made should:

(a) continue to uphold the ideal intent of marriage as a lifelong union.

(b) respect the integrity of human personality.

(c) help to strengthen family life.

(d) provide for custody and care of children and the protection of any other defenceless victims of divorce.

The present divorce law is based on the principle that a matrimonial offence, for example, adultery, should determine the granting of dissolution. This assumes that a "matrimonial offence" should be unforgivable, whereas we believe that forgiveness is a constant element in marriage relationships. "Matrimonial offence" is often a symptom of deeper trouble rather than a cause of failure in marriage. By adhering to this principle the present law encourages disrespect for honesty and integrity. This is graphically described in the following statement by a person involved in a divorce suit, as stated in a private communication.

> Then my lawyer asked the question which must be asked: "Do you forgive your husband this adultery?" and I answered, as I must answer before the law, "No." It was first of all and basically the irrelevancy of the whole business. Adultery was not the cause of our marriage breakup, and therefore all the questions and answers were off the point. The lawyer and judge had to ask and we had to answer questions that had nothing whatsoever to do with why we were there. We denied the possibility of truth and honesty by our very actions in being there. And yet this is what society demands.

For this reason, we do not favour the addition of new grounds for divorce to the present law, but we consider that marriage breakdown should be substituted for matrimonial offence as the basis for divorce in any new legislation.

Since this concept has already been ably set forth in the briefs of The United Church of Canada (Minutes pp. 408-420) and of Messrs. McDonald and Ferrier (Minutes pp. 499-513) as well as in the English Report, *Putting Asunder*, our comments will be brief.

It is our opinion that this concept provides a better basis for dealing effectively with the needs of people whose marriages have failed because it requires that a marriage be dealt with in its total social and moral context.

We therefore recommend that in dealing with divorce petitions the breakdown of marriage should be recognized as a question of fact and that no rules of law defining marriage breakdown should be established, lest the present recriminatory attitudes and procedures continue to be fostered.

We are aware of the objections raised against the principle of marriage breakdown as a basis for divorce. They are discussed on pages 41 to 56 of *Putting Asunder*. We are in agreement with the answers there set forth.

Our conclusion is that the principle of marriage breakdown and the methods necessary to determine it as a matter of fact are basically incompatible with the principle of the matrimonial offence, and that marriage breakdown should replace the existing grounds rather than be added as a further ground for divorce.

Now we have some further considerations and I would request that Professor Ryan might read the brief from there on.

Co-Chairman Senator ROEBUCK: Before Professor Ryan takes over might I say something about him, because it is important, at least in the record.

Professor H. R. Stuart Ryan, Q.C., is of the Faculty of Law of Queen's University, Kingston. He is a B.A. in classics, Toronto 1930; a graduate of Osgoode Hall Law School in 1933, with honours and a bronze medal. He has been in the general practice of law at Port Hope, Ontario, from 1934 to 1940 and again from 1946 to 1957. He has been a member of the Town Council of Port Hope and mayor in 1940. He was solicitor for Northumberland and the United Counties of Northumberland and Durham from 1953 to 1957.

I think it is interesting to know that he has been a member of the John Howard Society of Kingston since 1958, and he is past president of that branch and past vice-president of the John Howard Society of Ontario.

He was Chancellor of the Anglican Diocese of Ontario in 1962, and a member of the General Synod Commission on Marriage and Related Matters of the Anglican Church of Canada since 1962.

As I have already indicated, he is of the Faculty of Law of Queen's University, Kingston. He has published a number of articles, one of which is *Nullity of Marriage*.

I have pleasure in introducing a very distinguished lawyer who comes before us in a representative capacity of the Anglican Church, Professor Ryan.

Professor H. R. Stuart Ryan, Q.C., Queen's University, Kingston, Ontario: Thank you, Mr. Chairman. Going on from where Bishop Reed left off, we are dealing with further considerations. We believe that before proceeding with hearing for divorce on the grounds of marriage breakdown the court should be assured that every effort had been made to achieve reconciliation and that further attempts would be in vain. This would require exploration concerning the availability and use of professional services and the provision of the same when they do not at present exist.

We recognize that the adoption of the principle of marriage breakdown as the sole ground for divorce would necessitate procedural changes. The court will be concerned with investigation of the state of the marriage rather than with determination of guilt.

Every possible means should be explored to ensure that the cost of divorce is not beyond the financial capabilities of those requiring it. It may be possible to deal with divorce cases in lower courts.

While we appreciate that your committee's instructions are specifically related to dissolution of marriage, we suggest that no adequate examination of this subject can omit a study of the nature of marriage as a social and legal institution, the requisites of valid marriages and the defects causing nullity of purported marriages.

As in many areas of social concern, research heretofore conducted into these aspects of marriage in Canadian society and law has been insignificant. We urge therefore that your committee recommend that as soon as possible properly organized and adequately staffed and financed studies in this area be undertaken with governmental authority and support, with a view to establishing a body of knowledge on which a statute embodying a Canadian law of marriage can be based. Here we are referring, not to dissolution of marriage, but to the nature of and entry into marriage and the grounds of a nullity. Such research should include attempts to ascertain the causes and consequences of marriage breakdown.

When we consider the present law of marriage, outside the Province of Quebec, and omitting from consideration solemnization of marriage which is within provincial legislative jurisdiction, we find that some aspects of that law are obscure and others are unsatisfactory. For example, the following areas call for investigation:

(a) The intention of marriage. At its inception it should be defined clearly as a life-long union. This does not seem to be explicit at present.

(b) The minimum age for capacity to marry. The study we propose would indicate what the minimum age should be.

(c) The scope of coercion, duress or fear should be studied and clearly defined.

(d) The definition of fraud, misrepresentation or concealment should be studied with a view to their extension as grounds of nullity.

(e) The territorial jurisdiction of the courts should be examined with a view to eliminating some of the hardship caused by the law of domicile.

Co-Chairman Senator ROEBUCK: Professor Ryan, at the end you mentioned the possibility of government investigation and said that at its inception the intention of marriage should be defined clearly as a life-long union and so on. That could easily be inserted in a marriage law, but is not that the duty of a church? Should you not ask for perhaps amendments to your church ritual for the celebration of marriage? Surely that is your function rather than ours.

Professor RYAN: With respect, I do not think I can accept that. We do endeavour to set these principles out in our law and in our pastoral ministry, but what we are discussing now is a law for the whole people of Canada. I intend to deal later in greater detail with what I suggest are defects in the existing law of marriage, or areas of obscurity in which I think there is a great deal of room for improvement. These are not matters for the church; these are matters for the state. Not everybody will be married through the ministry of this church or any church. In fact, in all provinces but two at the present time civil marriage is permitted, and the civil law is concerned with the marriage of not only Christians but non-Christians of other faiths and people of no faith; the law should provide for all of them.

Bishop REED: We understand that the soleminization of matrimony is governed by provincial law, but we also understand that in some provinces when persons are united in a civil ceremony the words used to not contain the expression "a life-long union", and Professor Ryan's contention is that the law should make it clear that this is the intention of people in marriage.

Co-Chairman Senator ROEBUCK: Where do they get the ritual that must necessarily be used in a civil marriage? I have never been present at one.

Professor RYAN: In Ontario it is defined in the Marriage Act.

Co-Chairman Senator ROEBUCK: Which of course is Ontario legislation.

Professor RYAN: That is correct, but the nature of marriage is not a subject for provincial legislation. It is a subject for Canadian legislation.

Co-Chairman Senator ROEBUCK: That is right, but celebration is a matter of provincial law.

Canon Maurice P. Wilkinson, M.A., L.Th., General Secretary, Department of Christian Social Services, Anglican Church of Canada: Could I comment on that, Mr. Chairman?

Co-Chairman Senator ROEBUCK: Before you do, Canon Wilkinson, may I, for the sake of the record more than anything else, say that the next speaker will be the Reverend Canon M. P. Wilkinson, M.A., L.Th., General Secretary, Department of Christian Social Services of the Anglican Church of Canada.

Canon WILKINSON: The comment I would like to add to what has already been said in response to your question, Mr. Chairman, is that we believe quite strongly that the permanence of marriage is a fundamental foundation of stable society. The only body which has responsibility and authority for making pronouncements, rules and regulations about the nature of society is that society's own governing body, and we therefore feel it is important that in enunciating its law of marriage the Canadian parliament should make abundantly clear that it is envisaging a stable society. I think this is a very important aspect of why we make this kind of recommendation. The church law itself for its own people is quite explicit, quite firmly made, and clear to all persons applying to it for marriage. Those who do not agree with what the church upholds have the opportunity of either agreeing with it or going elsewhere. In the state, however, it is a matter of state law and fulfilling requirements, and therefore this kind of principle should be upheld, and upheld clearly.

Bishop REED: The other member of our delegation Mr. Chairman, is a parish priest who has had experience in children's aid work, and he may wish to add something, with your permission, to what has been said before we get into some other discussion. He is the Reverend Robert Cuyler.

Co-Chairman Senator ROEBUCK: The Reverend Cuyler has shared with me some experiences. I lived in the town of New Liskeard for ten years and was editor of the local paper during all that period. I see that the Reverend A. R. Cuyler is the Rector of the parish of New Liskeard, and was formerly a children's aid worker, Metropolitan of Toronto. I hope that your stay in New Liskeard is as happy as mine was. It is, of course, much more recent, because I left that town to engage in the practice of law in Toronto as long ago as 1914. May we hear from you, Mr. Cuyler?

The Reverend A. R. Cuyler, Anglican Church of Canada, Rector of the Parish of New Liskeard: I have no comment which would augment what has already been said by Professor Ryan and Canon Wilkinson on this matter.

Bishop REED: Perhaps we ought to mention, in case it has not been brought to the attention of the members of the committee, that one of the members of our House of Bishops appointed by the Primate to serve on this committee which prepared the brief is the Right Reverend G. N. Luxton, a brief from whose diocese has already been presented to this committee and is found in your records beginning at page 184. It takes a different approach from the one the House of Bishops have now presented, and Bishop Luxton requested us to attach to this brief this comment, which I will read:

> This member of the committee records his dissent from the report of this committee because it has not been submitted to the House of Bishops and has

> not had sufficient reference and study in the life of the church to be considered as an authoritative opinion of the Anglican Church of Canada.

I thought in fairness I should read that statement, and if anyone wishes to have further clarification of it I should be glad to answer questions.

Professor RYAN: Before we complete our submission I would like to refer to Bill C-264, submitted by Mr. Brewin, which in the main I think sets out the principles on which our brief is founded. I notice that that bill refers to marriage breakdown as the sole ground of divorce, and while it refers to the parties living separate and apart for a period of at least one year, the object is merely to use this as evidence to create a prima facie presumption that the marriage has irretrievably broken down. However, I would suggest that in this bill, as I read it, there is no provision for civil jurisdiction of courts in the territories. Clause 7 refers to certain provinces, and I presume it was intended to provide for jurisdiction of territorial courts.

Mr. BREWIN: Perhaps I might interrupt Professor Ryan to tell him that I think that whole clause needs improvement after further consideration, because I intended to include county courts. I thought I had included them, in Ontario at any rate, with superior courts. I am informed that I was wrong in that assumption, so that whole clause needs to be looked at very carefully.

Bishop REED: We studied this proposed bill in our discussions in preparing our own brief and we felt in regard to the explanatory notes on page 2 of the bill—

> The bill does not provide for divorce by consent but does provide that the marriage is to be presumed to have broken down when the parties have lived separate and apart for one year—

that something more is required in the determination of marriage breakdown. I think Professor Ryan may like to comment further on that.

Professor RYAN: My comment would be that one would expect that substitution of breakdown for the existing grounds of divorce would result in a greater number of divorces in Canada than are experienced today. The figures that I have are for 1963, and they show a total of 7,681 divorces in Canada at an average rate of 40.4 divorces per 100,000 of the population. That average rate is not evenly distributed across Canada. It is at its lowest in Newfoundland, at 1.7 per 100,000, then comes Prince Edward Island with 7.5, and in Quebec it is 9.0. In the other provinces it rises to a maximum of 90.2 per 100,000 in Alberta.

Experience in Britain would indicate that the rate of divorce would go up considerably as a result of an extension of the grounds of divorce, but my submission—and I think the facts would bear it out—would be that this would not indicate an increase in the breakdown of marriage; it would merely be the result of permitting divorce in a number of cases where marriages have now broken down but where, for one reason or another, divorce does not seem to be available.

One thing that anyone who has practised law for any length of time is aware of is that there are in this country many marriages, or purported marriages, which are not marriages for one reason or another; either the parties have never been married—they are very often living in adultery in what is mistakenly called a common-law union, a common-law marriage—or the union may be the result of a quick trip to Nevada, Idaho or Mexico. Only yesterday I learned of another example of the practice of running across the border for a quick and easy divorce and purported remarriage. On coming back the parties live together, they are known and accepted in society as husband and wife, but the union is not recognized by our law.

There are thousands of such cases in Canada. There are probably hundreds of thousands of unions which are not marriages at all but are adulterous relationships. Many of these would, I think, be terminated and brought into the status of marriage, with I believe desirable results, if we were to substitute breakdown of marriage for the present law. My submission is that although perhaps the rate would appear to double,

or at any rate be more than the present rate, the actual result on marriage should be stabilization.

Senator ASELTINE: Do not you think it would level off when all these cases had been dealt with?

Professor RYAN: There would probably be a rush for a few years and then it would level off at a rate somewhat higher than the present rate.

Co-Chairman Senator ROEBUCK: Would not that be the case if we had breakdown of marriage in addition to the present law, reformed I hope to some extent from as it stands at the present moment? That is, if we added to the present grounds for divorce could we not add what you have said with regard to marriage breakdown?

Professor RYAN: The result would be somewhat similar, I am sure. We do not recommend that. No doubt it would be an improvement over the present situation.

Co-Chairman Senator ROEBUCK: Why do not you recommend it?

Professor RYAN: Because, as we have said, we feel that divorce is not made a sort of vindictive procedure, at least as far as the law is concerned, and yet this is not a real estimation or real understanding of what has happened. I may say that in looking back over my years of practice I have been impressed by the number of times that people have come in and the, say, wife has said, "We have talked it over and he is going to give me a divorce." This is not necessarily a collusive or fraudulent divorce. It means, as I have seen it, that the parties are more civilized than the law. I do not think we should continue with this type of law. I suggest that recognition of the perhaps surgical nature of divorce through dissolution for breakdown would remove this promotion of hostility.

Co-Chairman Senator ROEBUCK: Would not marriage breakdown involve the same disagreement between the parties that is now evident when one or other of them asks the court for a divorce?

Professor RYAN: It would result from that type of disagreement, but I do not think it would tend to promote the type of hostility in the procedure which exists today, nor would it lead to the attitude of suspicion, and almost cynicism, with which divorce is dealt with in the courts.

Bishop REED: I think that those of us who have listened in a pastoral experience to many people who have gone through divorce actions under the present law would feel that, while it would no doubt help to have some extension of grounds, some of the same things would still pertain, and would feel that they have been subjected to procedures that are quite unworthy of human beings.

I can recall many such cases in my pastoral experience, where two people have arrived at the stage where they feel that for the sake of themselves as individuals, for the sake of their children, and many other factors, their marriage should be terminated, and in order to procure a divorce they are subjected to things which are quite dishonest. We feel that a new approach is what is urgently required, that it would really make for stabilization in a way that the present law, even with an extension of grounds, would not do, and further that it would place an emphasis upon social factors which are involved in marriage in our society.

Co-Chairman Senator ROEBUCK: Now Mr. Honey of Durham of the commons has a question in his mind.

Mr. HONEY: I should like to ask Professor Ryan a question about the principle on which a new law might be formulated on the basis of marriage breakdown. Would you not feel that some yardsticks should be defined, some sort of categories within which it could be said that the marriage had broken down if those facts were proved? If you do not define marriage breakdown will you not leave a great looseness in the courts over the first few years, at least until a body of jurisprudence has been built up?

Professor RYAN: I realize that judges and lawyers seek definitions and are happier if they have definitions, and I know both you and I are in that category. However, I feel that by defining you tend to limit, and by limiting you detract from the principle. I think it is possible to define marriage breakdown as a fact and to recognize it as a fact. By attempting to say that it is has not occurred until there has been separation for three, five or seven years is to depart from reality and simply to create arbitrary terms which are not necessarily related to the fact of breakdown.

Mr. HONEY: Maybe you have not said this, but do you think the law would say in essence that a divorce could be granted when the court is satisfied the marriage has broken down?

Professor RYAN: Yes.

Mr. HONEY: And nothing more?

Professor RYAN: That is right.

Mr. HONEY: Carrying it to extremes, although I appreciate that after some years this situation may not exist because over the years the courts could determine what set of facts should be proved before a judge could make a finding, in the initial stages you could have a ridiculous situation where a judge could find a marriage had broken down because the husband ate crackers in bed.

Professor RYAN: The reason why it broke down would be irrelevant. If it broke down because the husband ate crackers in bed, I do not think that would matter as long as the court was satisfied there was no hope of reconciliation.

Bishop REED: I would just add this, if I might, to what Professor Ryan has said in answer to Mr. Honey. It would seem that in order to make court procedures possible in connection with marriage breakdown one has to conceive of a different kind of court procedure one which would be more related to what takes place in family court situations, where there would need to be facilities for the court in terms of social workers, psychiatrists, psychologists and others who would bring in the kind of report which would determine whether there was any hope of reconciliation in the particular case or whether the evidence was such from investigation that the marriage had in fact broken down. I think that if this were written into the procedures, assuming a law such as this were enacted, it would certainly be the way in which to determine the fact of marriage breakdown, which is the point at issue.

I feel that this kind of reporting to the court by a competent service is very important to this whole matter. It also makes recognition of the fact that while marriage is a contract between two persons, it is a different kind of contract from many civil contracts, and the procedures used in courts to determine the legality or otherwise of civil contracts are not applicable to relationships which are so important in regard to marriage.

Canon WILKINSON: I think it is important to realize that this brief has as a basic concept behind it that marriage is a matter of human relationships, positive relationships, into which some sort of breakdown seems to inject itself, but the primary basis is a positive one. This is reflected on page 2, where we talk about the experience of the church in ministering to those whose marriages are threatened or have actually broken down, where in some cases the existing law is not only inadequate but even a factor contributing to the hastening of marriage breakdown.

What is in mind here is the concept which every pastoral counsellor dealing with troubled marriages is so well aware of. People come to him repeatedly and say, "He committed adultery" or "She committed adultery; therefore my marriage is ended," saying that that ended the marriage rather than that it was a symptom of marriage breakdown or otherwise, ruling out any concept that it might be something which could be forgiven or dealt with in any other way.

Again on page 5, the brief states quite specifically that the court will be concerned with investigation of the state of the marriage rather than with determination of guilt. This is the positive aspect of dealing with the healthiness of a relationship and whether or not it is possible to salvage it, to rebuild it, to continue it.

As a parish priest until five or six years ago, and one who still gets involved in this kind of counselling relationship, I can testify quite clearly, as any parish priest can, that this is the church's constant business, the positive building of this kind of relationship. Every one of us knows how difficult it is to overcome the popular concept, "Because the law says certain things are grounds for divorce, if this happens my marriage has broken down and I must have a divorce". This is what I think it is important to realize as a totally new approach, which adoption of the principle of marriage breakdown entails as opposed to a concept of marriage offence. This is why we say these two are incompatible within one law, they are fighting against each other, one saying, "All right, if these things happen your marriage has had it", and the other, "What is the state of health of your marriage relationship. Is it possible to salvage it and keep it alive?

Mr. BREWIN: I want to preface my question to Professor Ryan by saying that I very much agree with what the Bishop of Ottawa has said, that a new type of inquiry, more along the lines of the family court, into the status of the marriage and so on, with the possibility of reconciliation arising out of that sort of procedure, is important. However, I wanted to ask Professor Ryan about the comments of the Law Reform Commission of the United Kingdom, where they discuss *Putting Asunder* and say they agree in principle with the breakdown approach and a full inquisition into the marriage, but that they are afraid this would be impracticable with the courts we now have because that sort of inquiry would put a tremendous additional burden on the courts which they are not fitted to carry at the present time.

Frankly, it was for that reason that I incorporated in the bill I drafted and presented the idea that a certain period of separation would be prima facie evidence and might in many cases be accepted without a tremendously detailed inquisition.

I wondered if Professor Ryan or some other member of the delegation had examined this practical objection by Mr. Justice Scarman's commission in England in their review for the purpose of reforming the English law, which they apparently found unsatisfactory despite the extension of grounds. Has Professor Ryan looked at that practical problem?

Professor RYAN: Yes. I may say that in commenting on Mr. Brewin's bill I intended to say, and thought I had said, that I realized this was a device which would provide presumptive evidence of a marriage breakdown without defining it, and I thought that was a good way of dealing with it.

I read the report of the Law Reform Commission and noticed that although it professed not to come to a conclusion but merely to set out the arguments for or against the recommendations in *Putting Asunder,* it managed to find more arguments against than for, and the question of practicality was a very important one in the reasoning. However, I think the finding on that ground was based in part on the belief that the judge would have to conduct the investigation.

The type of investigation which I believe would be involved would be very like the type of investigation now carried out on behalf of the Official Guardian of Ontario when infants are concerned in the divorce or annulment. It is done by an investigating officer. In Ontario I think the duty is delegated largely to officers of children's aid societies.

The principle of the pre-trial investigation and the report on which the judge would act, and which he would accept unless it was contested by one or both of the parties, involves a certain departure from our concept of the trial as involving merely the presentation of evidence, largely oral evidence by witnesses who appear before the court. In my suggestion, by extending this type of investigation the court could inform itself through the pre-trial study of the problem by officers whose duty would include

this type of investigation, and I do not see any reason why it should in any way increase the burden of the trial judge.

The difficulty of obtaining a sufficient number of officers to make this type of investigation is a real one. There is a very grave shortage of social workers in Canada at the present time, but I may say that steps are being taken by way of undergraduate training in the field of social work which it is hoped within, say, five years will greatly increase the flow of social workers into the profession. These men and women will not be as fully qualified as a graduate social worker, but they will be adequately qualified for certain functions and I therefore believe that in a reasonably short time there will be available people who can make these investigations and report to the court. For this reason I am not as deeply afraid of the impracticality of the proposal as Mr. Justice Scarman's commission.

Co-Chairman Senator ROEBUCK: What would be the situation in Canada? Nowadays in Canada all these people are provincial employees, and if we adopted a dominion rule with regard to divorce which required the attendance and contributions of a very considerable number of provincial employees, would there be any guarantee of the success of our efforts?

Professor RYAN: Well, one would hope that each province would undertake its responsibility in the administration of justice.

Co-Chairman Senator ROEBUCK: There are ten provinces.

Senator ASELTINE: What about Quebec and Newfoundland?

Professor RYAN: Whether or not you legislate for Quebec is a difficult question. I would like to leave that to parliament. It is quite possible that Quebec is not yet ready to have divorce legislation imposed on it. I say nothing on that point.

Bishop REED: It may be possible, may it not, to establish some form of federal court which would make it possible for those whose domicile is in Quebec to have the opportunity—

Senator ASELTINE: We tried, in 1956 I think, to bring in an amendment giving the Exchequer Court of Canada divorce jurisdiction in so far as Quebec and Newfoundland were concerned, by making a simple amendment to the Exchequer Court Act.

Co-Chairman Senator ROEBUCK: They were not quite ready for it then.

Professor RYAN: In 1921 the late W. F. Nickle introduced a bill which would have given the Exchequer Court of Canada jurisdiction over divorce throughout the whole country. I suppose it got the usual rush and may not have got first reading. I do not know.

Co-Chairman Senator ROEBUCK: It was a private bill, was it not?

Professor RYAN: Yes.

Co-Chairman Senator ROEBUCK: And was talked out.

Professor RYAN: Yes, that is right. The provinces have claimed to exercise—and in the main I think have reasonably efficiently exercised—the duty of providing for the administration of justice.

Senator BELISLE: In view of the last discussion perhaps I should localize myself by saying that I am from Sudbury, Ontario. First I should like to thank his lordship the Bishop for having supplied a French copy of the brief; that kindness is greatly appreciated. Secondly, I was pleased to note from the reference to the Right Reverend Bishop Luxton that the Anglican Church is as much alive as the Roman Church.

Knowing that you have had a very wide experience in counselling, I should like to ask whether you could tell us what percentage of marriages you have saved by your counselling, and whether the counselling should be done by people from the churches or by welfare agencies.

I ask that because last Tuesday, I think it was, the Unitarian Church said, if my memory serves me aright, that it would be preferable to have welfare agencies rather than church people doing the counselling.

Bishop REED: That is a very important question in this field, and I think the answer is both. Often times people go to their pastor when in trouble. Throughout my life as a parish priest, and even since I have been the bishop, I have counselled many people in this situation. Sometimes, because of the nature of the divorce law, people tend to seek legal advice, and while we know that many lawyers also adopt a counselling procedure because they are not anxious to see divorces and try to discover if any reconciliation is possible, they are not there to do that and are under some limitation.

We feel that in addition to the counselling services which churches can provide there should be readily accessible counselling services in communities. There are in some cities across Canada, but in many others people do not have ready access to places where they can go to receive expert help.

Turning to the first part of the question, I am afraid I cannot give statistics on how many marriages one is able to save, but I know that one can look back and think of many such situations. I can think of one from over twenty years ago, when a couple had decided they ought to get a divorce, but they are still living happily married today.

Our contention is that if this new approach were made, surely it is within the competence of Canadian legislators and Canadian jurisprudence to work out the appropriate facilities, so that if these suggestions were adopted people might more readily seek help before reaching the point of considering divorce proceedings. Very often when they get into the accusatorial situation which the present law seems to encourage pride and other things prevent them from seeking reconciliation.

Rev. Mr. CUYLER: I am glad I waited before speaking, because I think the comments I have to make fit in well with the last question. It is fine for people in the large urban and metropolitan areas to suggest that the counselling be done by welfare agencies, but small communities in areas such as that from which I come are completely devoid of any such agencies that could handle anything of this nature, and therefore by its very nature the counselling would fall heavily upon the church people.

Reference has been made to the cost. One thing I have found in social work is the tragedy of our present accusatorial method whereby one discovers, not only as a parish priest but others in different capacities, when visiting the home that something has happened which fits within the present accusatorial system and one partner charges the other, which breaks down the relationship even further and in many cases makes the work of those trying to effect any sort of realistic approach, whether for reconciliation or eventual divorce, much more difficult, it tends to hamper them greatly.

I am sure that if we took the cost across our country in social workers' time in dealing with problems arising from the inability of many people to get a divorce, who are therefore living in common-law or other situations which merely create more and more problems, on an overall basis I do not think adoption of this new approach would result in an increased burden on the taxpayer; I think one would balance the other.

Co-Chairman Senator ROEBUCK: Would it make any difference if we said that marriage breakdown is a ground for divorce but left it to the person applying to supply the court with the necessary evidence or reasons for believing the marriage had broken down, if we left it to the applicant to produce the evidence?

Bishop REED: Would that not really amount to divorce by consent?

Co-Chairman Senator ROEBUCK: Not at all.

Bishop REED: You do not think it would?

Co-Chairman Senator ROEBUCK: No.

Senator GERSHAW: The words "marriage breakdown" are rather indefinite; one judge may look at it one way and another in a different way. There are such things as drug addiction, alcoholism, desertion, insanity, cruelty, adultery and so on. Should not the marriage breakdown be based upon one or more of those particular offences so that there would be a pretty definite guide to what "marriage breakdown" meant?

Bishop REED: Certainly those factors would all be involved in the kind of investigation made and the report which it would be necessary for the court to have, upon which to make a judgment of marriage breakdown. It might involve those kinds of things.

Senator GERSHAW: Should it not be written into the statute of regulations?

Bishop REED: I do not think so, because sometimes those things are the symptom of trouble rather than the cause of it. You mentioned alcoholism and drug addiction. Drug addiction by itself may reveal certain things about the personality, disposition and character of the parties concerned in regard to which they need help. Drug addiction as such would not be written in as a cause of marriage breakdown. I do not know whether I make my point clear.

Co-Chairman Senator ROEBUCK: Mr. Baldwin of the commons has something to ask and then Senator Fergusson, but I should point out that we have another delegation this afternoon so I think those will be the last questions.

Mr. BALDWIN: My question will be brief and will merely invite a statement or comment. I hope I am not dirsespectful when I say that marriage breakdown might be compared with intoxication. A certain substance may be said to be intoxicating, but whether or not a man drinking is intoxicated is a question of fact. Mr. Brewin and I have different temperaments and the same consumption of liquor may make me intoxicated but have no effect on Mr. Brewin.

Mr. BREWIN: Can we try it some time?

Mr. BALDWIN: One of Mr. Brewin's colleagues introduced into the house a scientific method of measuring the effect of alcohol by using a breathylizer, and Mr. Brewin's bill might be a domestic breathylizer for measuring marriage breakdown. I would invite comment on whether I am justified in saying that this is a question of fact. What might be the cause of marriage breakdown in one case may not be in another. There are millions of sets of different people living together under completely different circumstances. At present in most divorce cases only one party gives evidence. I do not say there would be no real practical difficulty following adoption of the marriage breakdown approach, but much of the difficulty would be overcome after a certain amount of experience, because I would hope the courts would call upon both parties to give evidence. From an examination of husband and wife in court into the factual circumstances in which they were living, supplemented by a report from the type of specialized social service agencies referred to, surely there would be no insuperable difficulty in coming to a decision whether or not there had been a breakdown of the marriage, just as one determines whether or not certain actions by a man indicate whether or not he is intoxicated.

Senator FERGUSSON: In view of the time I will be very brief. One suggestion made by Bishop Reed was that perhaps the philosophy adopted in family courts might be adopted in considering applications for divorce. A previous witness suggested that divorce cases should be heard by family courts instead of by the higher courts. Would you agree with this?

Bishop REED: I myself feel that, and I think Professor Ryan does. Perhaps he might like to comment on it more fully.

Professor RYAN: I do not have anything to add. I think perhaps it could be done in family courts. Of course, this might mean that we would have to be more careful in

selecting family court judges than we are in some jurisdictions. Apart from that I do not see any reason why not.

Senator FERGUSSON: I have one other very short question. On page 6 you refer to the fact that there should be some examination of the hardships caused by domicile. Would you suggest that we have a Canadian domicile? Do you think that might be practicable?

Professor RYAN: Professor Bale will shortly make a submission in this respect, so perhaps the question could be raised again then.

Co-Chairman Senator ROEBUCK: It is ten minutes to five and we have another delegation to hear.

I find it difficult to express the gratitude that I and the rest of my committee feel to you for coming here and assisting us in the very difficult task that has been given to us. The Anglican Church of Canada is a very important institution, and to proceed without knowing what your position was was something I could not get over. You have stated your position in the clearest terms, shortly and concisely, and I think we understand each other thoroughly. On behalf of the whole committee I express their view, as I can see in their eyes, when I thank you.

Bishop REED: Thank you, Mr. Chairman. We appreciate it very much.

Co-Chairman Senator ROEBUCK: May I note the fact that the Right Reverend R. K. Maguire, the Bishop of the Diocese of Montreal is not here, as I expected he would be, and also that the Reverend Dr. C. R. Fielding, Professor of Moral Philosophy at Trinity, is not here as we had expected.

Bishop REED: Both these members of the committee were of great assistance to us and they regret that other duties in Montreal and Toronto respectively prevented them from being present at the hearing today. Dr. Fielding, for instance, has for a long time been a member of our General Synod Commission on Marriage and was of great help to us in preparing this brief.

Co-Chairman Senator ROEBUCK: So they are not here because it was impossible for them to be here.

Bishop REED: Yes, sir.

Co-Chairman Senator ROEBUCK: Thank you. I wanted that on the record.

May I present something that I think is very pleasant. We had before us, as you know, Mr. Hogarth, who made a wonderful presentation on behalf of the Mothers Alone Society, All Alone Parents Society, Canadian Single Parents and Parents Without Partners. Honourable members of the committee will all recollect his forceful and very clear presentation. I have now had a letter from him in which he thanks us for the courtesy with which he was heard, and he says:

> My clients are extremely grateful for the reception which I received and the helpful assistance offered to me by Mr. Savoie,

our secretary.

We now have another distinguished delegation of three professors from Queen's University. They are Professor H. R. Stuart Ryan, Q.C., whom you have already heard in another delegation, Professor Bernard L. Adell and Professor C. Gordon Bale. I think these gentlemen scarcely need any introduction from me, and I will ask Professor Bale to open the presentation.

Professor C. Gordon Bale, Queen's University: I would like to thank you very much for the privilege of presenting a submission to the committee. I appreciate that the committee is concerned primarily with reform with respect to the grounds for divorce. However, I think it would be unfortunate if the opportunity were not taken to reform the jurisdictional rules and also the rules with respect to the recognition of

foreign divorce decrees, so my submission is restricted to the rules for jurisdiction and the recognition of foreign divorce decrees. I am very sorry that the submission did not reach the committee until today, and I must also apologize for the fact that it is only in English.

Co-Chairman Senator ROEBUCK: Is it very long?

Professor BALE: It is a fairly lengthy one.

Co-Chairman Senator ROEBUCK: Would you summarize it and let us read it later?

Professor BALE: That is fine, sir.

I believe that the major problem in this field is the fact that a married woman has the domicile of her husband, and even though she may be living separate and apart, and even though she may be judicially separated in those provinces where there is judicial separation, she still cannot acquire a separate domicile. The common-law basis upon which divorce courts assume jurisdiction is the domicile of the petitioner, or more simply the domicile of the husband.

The Canadian Parliament did in 1930 attempt to alleviate the hardship a married woman encounters when she has grounds for divorce but is not able to bring an action for divorce. However, that act, the Divorce Jurisdiction Act, 1930, has been described as a grudging palliative rather than an effectual remedy. I think that effective reform of the jurisdictional rules entails either giving to the married woman who is living separate and apart the capacity to acquire a separate domicile, or on the other hand permitting the court to assume jurisdiction on the basis of a certain period of residence by the wife.

Co-Chairman Senator ROEBUCK: Would you give us your opinion as to which of those courses we should adopt?

Professor BALE: I would prefer to see parliament adopt the basis of a separate domicile for the wife.

Co-Chairman Senator ROEBUCK: It did that, you know, in the act of 1930.

Professor BALE: But I do not think the act of 1930 is really adequate. There are so many cases where—

Co-Chairman Senator ROEBUCK: Still, it did do something.

Professor BALE: Yes.

Co-Chairman Senator ROEBUCK: It gave to a great many women entrance to the courts that they would not otherwise have. It did not go far enough, I agree with you thoroughly in that; it did not attempt to give a domicile to the woman. What it did was to give access to the courts.

Professor BALE: I believe this is certainly the primary consideration, that she should have access to the courts. I do, however, feel that the best way of giving her access to the courts is to give her the capacity to acquire a separate domicile. I think this would be in accord with social reality. I also think it would be in accord with the Canadian Bill or Rights.

Senator ASELTINE: If the domicile of the husband was Prince Edward Island and the wife went to British Columbia and could start her action for divorce there, do you realize what that might cost in witness fees and everything else?

Professor BALE: Well—

Senator ASELTINE: I do not see how you could cope with it.

Senator FERGUSSON: You say she would start her action there. Where do you mean? Prince Edward Island or British Columbia?

Senator ASELTINE: I have considered the question very carefully for a long time, and I would like to give the wife more leverage, but I do not know how it can be done.

Professor BALE: But you are going to encounter the same problem, if you should try to solve this problem by saying that the wife should have access to the courts on the basis of three years' residence in a particular jurisdiction. She may go to British Columbia and live there for three years and then the British Columbia court might assume jurisdiction, if Parliament says that three years' residence is adequate.

Senator ASELTINE: You would have to do something like that, otherwise it might create undue hardship.

Co-Chairman Senator ROEBUCK: Do you not have access to the courts in ordinary law, where you happen to live, where the cause of action arises, or where the defendant lives? You can sue in all those jurisdictions. The same problems would arise.

Senator ASELTINE: In the civil courts you could start your action where the action arose or where the defendant resides.

Co-Chairman Senator ROEBUCK: Or where the plaintiff resides.

Senator ASELTINE: No, not where the plaintiff resides. No, not necessarily. We do not have that law in Saskatchewan.

Co-Chairman Senator ROEBUCK: You certainly can in Ontario. At any rate, I think we should beg the pardon of the witness for that interruption. Will you go ahead, please? That was my fault.

Professor BALE: Not at all, sir. So that it seems to me that there are these two alternatives, either to say that the married woman shall have access to the courts on the basis of three years' residence or any other particular time that Parliament might decide, or to say that she should have the capacity to acquire a separate domicile.

New Zealand, for instance, to solve this problem has given to the wife the capacity to acquire a separate domicile. However, the solution to the problem adopted in Australia and in the United Kingdom is to say that she shall have access to the court on the basis of three years' residence. My feeling is that it would be preferable to permit her to go to the courts on the basis of her own domicile.

I think it is important, if it is decided that domicile shall be the sole basis upon which divorce courts assume jurisdiction, that the rules relating to domicile be reformed.

The Commissioners on Uniformity of Legislation in Canada have drawn up a draft model act to reform and codify the law of domicile. This draft act provides that a person acquires and has a domicile in the state in which he has his principal home and in which he intends to reside indefinitely. It also provides a presumption that unless a contrary intention appears, a person shall be presumed to intend to reside indefinitely in the state where his principal home is situate.

I think with this definition of domicile, together with this presumption—

Co-Chairman Senator ROEBUCK: To what extent does that differ from the law as it stands?

Professor BALE: I think that there is too much rigidity in the concept of domicile at the present time, in that someone can be resident in a jurisdiction for an extended period of time and yet the proof of his intention is so high that he is held to be domiciled in his domicile of origin.

Senator ASELTINE: That is *animus non revertendi*. You have to prove that they are there for good and have cut themselves off from their former domicile.

Professor BALE: Yes. For instance, there were two decisions of the House of Lords—

Senator ASELTINE: You have to prove that their minds are made up not to return.

Professor BALE: The two cases are *Winans v. Attorney General* and *Ramsay v. Liverpool Royal Infirmary*. In these two cases persons had resided in England for

thirty-seven years and thirty-five years respectively, and yet they were still held not to be domiciled in England.

Co-Chairman Senator ROEBUCK: Would you give the references of those cases, please?

Professor BALE: The references to these cases are 1904 Appeal Cases 287 for *Winans v. Attorney General*, and 1930 Appeal Cases 588 for *Ramsay v. Liverpool Royal Infirmary*.

Now, I am not contending that the Canadian courts have required as much proof of intention with respect to domicile, but nevertheless I do feel that it would be of considerable advantage to have a definition of domicile and the presumption that I mentioned which the commissioners on uniformity of legislation have set out in their draft model act.

Co-Chairman Senator ROEBUCK: Have they given any argument along with the bill that we could trace?

Professor BALE: I am not sure that they have. I am sorry, but I would have to look into that, sir.

Co-Chairman Senator ROEBUCK: Let us know, will you?

Professor BALE: Yes, I will, sir.

Senator ASELTINE: Well, we will read your brief on that point.

Professor BALE: Fine. I was just going to make one other submission with respect to a Canadian domicile. If, for instance, Parliament decided to have a uniform divorce code for all of Canada, I think it would be very advantageous to have a Canadian domicile for the purposes of divorce jurisdiction. It is sometimes said that you can have only one domicile, but in a federal country I think that this must be rephrased to read that you can have only one domicile for a particular legal question. So that I think it is quite consistent to have a domicile in Canada for purposes of divorce and yet, for purposes of succession for instance, a domicile within a province of Canada.

This would eliminate many problems. For instance, there was a recent New Brunswick case where a man who had enlisted in Alberta and had been posted to Gagetown, New Brunswick, brought an action for divorce and it was held that he was still domiciled in the jurisdiction in which he was domiciled when he enlisted. Therefore he could not bring his divorce action in New Brunswick and would have to return to Alberta. However, if we had a Canadian domicile, he could bring his action where he is resident. I think that a Canadian domicile is only practical if Parliament should decide that there should be a uniform divorce act applying throughout Canada.

Co-Chairman Senator ROEBUCK: What about the recognition of domicile by other jurisdictions? Do you foresee any difficulty regarding foreign recognition of domicile as we define it?

Professor BALE: At the present time I think the way in which domicile is defined varies widely. In the United States the concept of domicile is very different. For instance as early as 1869 in the case of *Cheever v. Wilson*, Justice Swayne, in delivering the opinion of the Supreme Court of the United States, said: "The rule is that she may acquire a separate domicile whenever it is necessary or proper that she should do so. The right springs from the necessity for its exercise, and endures as long as the necessity continues." So that in the United States it has been recognized for a long time that a woman should have the capacity to acquire a separate domicile for the purposes of divorce jurisdiction.

Senator ASELTINE: Would not that be a domicile of convenience?

Co-Chairman Senator ROEBUCK: Of necessity rather than convenience, I should imagine.

Professor BALE: New Zealand has also declared that a married woman should be able to acquire domicile. Thus the concept of domicile already varies between nations, and I really do not think it would be a serious problem if Parliament decided on a particular definition of its own.

I realize the time is getting late so I will briefly touch on the question of foreign divorce decrees. I deal with this on page 16. To summarize my submission, I submit there should be a statutory enactment providing that, first, the foreign divorce obtained in a country in which the husband was domiciled at the institution of the proceedings should be recognized. This, of course, would only be a statutory enactment of the basic common law rule.

Second: The foreign divorce, although not obtained in the country in which the husband was domiciled, was recognized as valid by the law of that country at the date the decree was granted. So that if the foreign divorce decree, although not granted by the country of the husband's domicile, were recognized as valid, we should recognize this decree. This is simply a statutory enactment of the case of *Armitage v. the Attorney General.*

Third: If the foreign divorce was obtained in a country in which the wife, but not the husband, was domiciled at the institution of proceedings, this would be a statutory enactment of *Travers v. Holley*, if a married woman living separately and apart from her husband were given the capacity to acquire a separate domicile.

Fourth: Recognition should be given if the foreign decree was obtained in a country in which the wife was resident for three years immediately preceding the institution of proceedings. This would be a statutory enactment not based on a common law decision. It would recognize as valid the solution to the problem adopted by the United Kingdom and Australia.

Fifth: The divorce would be recognized as valid under the common law rules of the conflict of laws although not valid under paragraphs 1, 2, 3 or 4. Such a provision would permit the courts some flexibility in evolving new rules of conflict of laws relating to the recognition of foreign divorce decrees. It would enable the courts to work out the scope to be accorded to *Schwebel v. Ungar.* This was a recent Supreme Court of Canada decision.

Senator ASELTINE: Have you considered that these regulations might come within the provincial jurisdiction and not within our jurisdiction at all?

Professor BALE: I would think marriage and divorce would include the recognition of foreign divorce decrees.

Co-Chairman Senator ROEBUCK: I presume it would be covered by "peace, order and good government."

Senator ASELTINE: I have had some trouble with this in my own practice.

Professor BALE: That is the end of my submission.

Senator ASELTINE: There was a very fine article in the *Canadian Bar Review* covering the whole problem a short while ago.

Co-Chairman Senator ROEBUCK: We would now like to hear from Professor Adell, also from Queen's University.

Professor Bernard L. Adell, Queen's University: I realize the main terms of reference of this committee deal with the dissolution of marriage, and that the question of the annulment of marriage is not explicitly referred to. But inasmuch as the questions concerning annulment of marriage are within the jurisdiction of Parliament, except in so far as they relate to the solemnization of marriage, and because to some extent in actual practice although not in theory, annulment and divorce are alternate

remedies, I think it would be unfortunate if this committee did not give at least some consideration to the law of annulment of marriage, and of course a consideration of the law of annulment of marriage requires also a consideration of the law relating to marriage itself.

Co-Chairman Senator ROEBUCK: We consider it within our jurisdiction.

Professor ADELL: My colleague, Professor Ryan, whom you heard earlier, is a man of many parts. You heard him earlier with his ecclesiastical cap on; now you will hear him with his academic cap on.

The major portion of our submission dealing with the law of marriage and the law of annulment has been prepared by Professor Ryan. I have only one point I want to hammer home and I will do it as briefly as I can.

The area of the law of annulment which bothers me is the concept of the totally void marriage, the marriage known as void *ab initio*. For various historical reasons which I do not think we need go into at all there are two different kinds of marriage which our courts will annul; marriages which are totally void or void *ab initio*, and marriages which are merely voidable. Marriages which are void *ab initio* can be annulled by any court of competent jurisdiction at any time at the instance of any interested party. The action for the annulment of a totally void marriage need not be brought by one of the parties to that marriage, and in fact the action need not be brought during the lifetime of the parties to the marriage. It can be brought at any time. Now I feel there are grave dangers involved in the totally void marriage in that the doctrine of approbation which has been applied to voidable marriage does not apply to marriages which are totally void. The doctrine of approbation holds that if one of the parties to a voidable marriage has for a certain period of time so conducted himself to indicate he considers that marriage valid, then that party is not later allowed to come before the courts and have the marriage annulled.

Because void marriages are deemed by the courts never to come into existence at all, the doctrine of approbation is considered to be inapplicable. It applies to merely voidable marriages in that voidable marriages are deemed to exist until they are put an end to by the courts, but totally void marriages are deemed never to come into existence at all and, therefore, the principle of approbation or estoppal, as it is often referred to, is held not to apply.

I feel that the committee should consider recommending that the law of annulment be rationalized to the extent that marriages which are now void *ab initio* be made merely voidable.

My colleague Professor Ryan, in one brief entitled, "Summary of Present Canadian Law of Marriage" and in the other one entitled, "Suggested Basis for a Canadian Statute Governing Marriage" outlines the present grounds for the annulment of marriage, both grounds rendering a marriage void and those rendering a marriage voidable. He also suggests alterations in the present grounds of annulment. Therefore, I need not now go into the details of the grounds for annulment. I merely express my approval of most—not all, but most of the proposed amendments which Professor Ryan is going to suggest.

I will simply conclude by reiterating that my point relates solely to the abolition of the category of totally void marriages. Thank you.

Co-Chairman Senator ROEBUCK: Thank you, sir. Professor Ryan, are you prepared to take over now?

Professor RYAN: Thank you, Mr. Chairman. I have submitted two briefs. One of them is entitled, "Summary of Present Canadian Law of Marriage (excluding law of Quebec)." In looking over that one I find a rather embarrassing typing error on page 5. In paragraph (iii), if you look at the heading it reads, "Consent to enter into the martial relationship"—which was not what I intended at all. It should be "The marital

relationship". My previous submission indicates we have introduced too much of the martial quality into the present law of divorce.

The second brief is entitled, "Suggested Basis for a Canadian Statute Governing Marriage." In this submission I am not dealing at all with the question of dissolution of marriage. I have supported the brief of the House of Bishops of the Anglican Church, and I do not think I have anything to say further on that point, but I would like to emphasize the fact that the existing law of marriage in Canada, outside of the Province of Quebec, is in many areas uncertain, unclear and confused, and in others is unsatisfactory.

I strongly recommend that a study be introduced which would, I hope, lead to a rational law of marriage for the whole of Canada, at least excluding Quebec. The law of Quebec is, of course, a comprehensive and consistent law, not without its elements of uncertainty, but, nevertheless, it stands together. It was enacted before Confederation, so it covers both solemnization and substance, and it may be that no interference should be made with that law. However, my suggestions are at least put forward as a possible basis for a uniform law governing the whole of Canada.

At the present time there are some areas in which the law is not uniform throughout the whole of Canada, and I may mention those very briefly. I am not going to attempt to read either brief in full, but I might mention certain highlights of both of them I think should be drawn to your attention.

For example, on page 2, at the bottom, I note that under the law of all of Canada, except Quebec, the minimum age of capacity for marriage is seven years, but that a marriage entered into before either of the parties attains puberty requires ratification after attaining puberty by consummation or some other affirmative act of gratification. There is no actual definitive rule which defines puberty for these parties and, in fact, puberty is a fact and it is attained by different people at different ages, but it is presumed to be attained by males at 14 and females at 12. This old presumption goes back to Roman law but, in fact the age of puberty has been going downward in recent years, and I am not sure where it is now on the average, but it is lower than it was.

My suggestion is this is entirely too young an age to permit marriage, and I have put forward in my second brief a suggestion that the minimum age for marriage should be 16. In Quebec, under the Civil Code it is 14 for males and 12 for females. In Britain in 1929 the age was fixed at 16 years.

Senator FERGUSSON: May I ask Professor Ryan where he gets the seven years?

Professor RYAN: That is the old canon law rule which persists because it has never been changed. There are in some provinces statutes which say you cannot get a licence at this age, and it is possible for a province to say you cannot have a licence below a certain age, and you cannot marry without a licence. Therefore, in effect, you could set a minimum age for the celebration of marriage within that province.

In the first place, not every province has this right. In Ontario there is almost no provision of the Marriage Act which invalidates a marriage. Almost any marriage which is valid at common law or canon law is valid in Ontario even though almost all the provisions of the Marriage Act have been ignored or contravened.

Co-Chairman Senator ROEBUCK: That is, if they get a licence.

Professor RYAN: Even without a licence; it can be done by banns.

Senator BELISLE: The performer of the ceremony, the judge, priest or bishop, must first qualify in Ontario by being approved by the Provincial Secretary?

Professor RYAN: But even in Ontario it has been held in two cases that parties who go through a ceremony of marriage in the province with two witnesses and a celebrant, whom one of them in good faith believes to be qualified, if one of them intends to enter into a valid marriage it is valid in point of form, even without a licence, as long as they cohabit afterwards. This is the case of *Alspector and Alspector.*

Senator BELISLE: You said, "of whom one of them"—is that one of the candidates?

Professor RYAN: One of the parties to the marriage believes the person solemnizing the marriage was qualified to do so. As it happened in this case, he was not. It was a very unusual situation. The parties were Jewish. The husband had said, "We do not want to enter into a civil marriage because we are going to Israel." He told the cantor that, but not his wife to be. She believed she was entering into a valid civil marriage. The cantor went through the appropriate ceremony, they had witnesses, they cohabited and then he died, but they never went to Israel. The court held this was a valid marriage though the cantor was not licensed or registered, and there was no licence or anything of this nature. In Ontario, at least, you may dispense with almost all the formalities. The only formality that I think is required is that there be a celebrant who is, if not qualified, is at least believed to be qualified by one of the parties, and that there are two witnesses, and that words of present intent be exchanged, and that they co-habit.

Professor ADELL: If I might interject for a moment, I am not sure that it is accurate to say on the basis of the *Alspector* case that only one of the parties need have thought that the celebrant was qualified. In that case there was, I think, reasonably clear proof that one of the parties did think that the celebrant was qualified, but there was no proof that the other party, the husband, did not think he was unqualified. I think, if there were clear proof that one or other of the parties did not think that the celebrant was, in fact, unqualified, and the celebrant was really unqualified, that the marriage would be held valid.

Professor RYAN: Well, it may be that that is so, but that is an inference that is drawn. On the other hand, it has not been decided. In any case, my point is that there is nothing to prevent people from marrying at any age above seven in Ontario. The marriage remains inchoate or incomplete until both parties have attained puberty when it may be ratified by some act, usually consummation. My submission is, as a matter of fact, having regard to the state of intellectual, emotional and social development of our young people it may be doubtful whether even sixteen is a sufficient age for marriage. I suggest that Parliament should set a minimum age.

Co-Chairman Senator ROEBUCK: For marriage, or for the recognition of a marriage that has taken place?

Professor RYAN: For marriage.

Co-Chairman Senator ROEBUCK: But not for the recognition of a marriage?

Professor RYAN: No, I would not permit marriage to be entered into before sixteen, and then recognized afterwards.

Co-Chairman Senator ROEBUCK: I do not mean that. You can lay down procedural rules for marriage in which you instruct those who are authorized to celebrate it that they must not celebrate it under sixteen, but then if a marriage does take place under sixteen because of an error or misinformation or something of that kind, how late would you go for recognition of the marriage?

Professor RYAN: Well, I would not go below sixteen at all, for my purposes. That is my submission. I think that it is doubtful whether young people of even sixteen are sufficiently mature to marry in our society.

Co-Chairman Senator ROEBUCK: But what if they have married?

Professor RYAN: I think the marriage is null and void, and if they want to marry after sixteen then they can do so.

Co-Chairman Senator ROEBUCK: And the children are illegitimate?

Professor RYAN: This is true, although I think the distinction between legitimacy and illegitimacy should be abolished as far as possible. But, that is not within the scope

of the jurisdiction of this committee. In many cases of a pregnancy before sixteen, social good would be better done, and social harm would be better avoided, if there were no marriage and the illegitimacy were accepted, because such a marriage is usually unsuccessful. There is usually resentment, fear and everything else which tends to militate against these marriages, particularly those between younger teenagers. That is my submission, Mr. Chairman, with regard to age.

Now, I agree with Professor Adell's submission with regard to the proposal to eliminate the marriage which is void *ab initio* and which the parties may act upon without any—or, at least, may treat as void under the present law without any judgment of any court whatsoever.

If a man and woman go through a ceremony of marriage which by law is null and void—for example, it may be within the prohibited degrees—they may separate and act as though they had never gone through that ceremony. That is the present law. Each of them may go through a ceremony of marriage with another person. As a matter of fact, at the present time, this leads to a number of cases of people believing they were unmarried, because they believed the previous ceremony was null and void, and acting as unmarried, and going through a second marriage ceremony and finding that the first one was valid all the time and the second one is null and void. Therefore, there is the problem of bigamy.

But, I support Professor Adell in that suggestion, and in my proposed basis for a new marriage law I set out the rule that no person who is subject to the law of Canada with regard to capacity to marry may marry if he has gone through a previous marriage ceremony unless the previous marriage, if valid, had been legally terminated, or if invalid has been legally annulled. That is my submission in that particular.

Co-Chairman Senator ROEBUCK: That would be within provincial jurisdiction, would it not?

Professor RYAN: No.

Co-Chairman Senator ROEBUCK: The celebration of marriage?

Professor RYAN: No, this would go to capacity to marry. The proposals that you made with regard to instructing the celebrant not to celebrate certain marriages would be within provincial jurisdiction, but the question of capacity to marry is within the jurisdiction of Parliament and not within the provincial jurisdiction.

Now, the next point I should like to dwell on is the question of error, fraud and mistake. At the present time error, however induced—whether it be by fraud, mistake, accident and so on—does not invalidate a marriage unless it extends to either the nature of the contract being entered into, or the nature of the ceremony. There have been cases of parties believing they were going through betrothals and finding that the ceremony was a ceremony of marriage. There is this sort of thing—identity of the other party. This means in our law the physical identity so far as we can determine it. I am thinking of the case of where you think you are marrying Rachel and then lift the veil to find it is Leah. But, this does not happen any more.

On the other hand, there have been a number of cases where persons have fraudulently adopted false personalities, and it is very doubtful whether this type of deception is a ground of annulment, because the other party intends to marry the person who physically stands beside him or her. There are no decisions in Canada that I can find on this subject, but there are conflicting decisions in the Commonwealth, and the general statement of the text writers is that these marriages are valid. My suggestion is that this form of error should be a ground of annulment.

I suggest also, and here Professor Adell does not go along with me—at least, not all the way—that concealment of certain facts, or misrepresentation of certain facts, which are seriously detrimental to the establishment of the contract, should be a ground of annulment. I suggest some of these—pregnancy, except as a result of intercourse

between the parties; venereal disease except as a result of such intercourse; addiction to drugs or alcohol—

Co-Chairman Senator ROEBUCK: Unknown to the parties?

Professor RYAN: Yes, these would be concealed—prostitution. When I say "venereal disease except as a result of such intercourse" I really should say "not communicated by the other party" because obviously one party might innocently become infected by venereal disease by the other. I have mentioned prostitution of the other party, and then addiction to homosexual practice, sadistic conduct or other abnormal practice endangering the life or health of the other party. This conduct may be cruelty, and where cruelty is a ground for divorce it may be a justification for divorce on the ground of cruelty. It may also lead to incapacity to consummate in the normal fashion, in which case it might lead to an annulment. But, on the other hand, it might not amount to either of these, and there have been cases particularly of husbands imposing these practices on wives, and causing them great mental or physical harm. My suggestion is that addiction to these practices, if it is discovered, should be a ground for annulment.

The other point I wish to make there is that where marriage is intended to be a sham or mere form, under the law of Quebec this marriage can be annulled, but under the law of the rest of Canada, which I take it is the same as the law of England, this is not so—at least, not necessarily so.

In the case of *Silver v. Silver* reported in (1955) 2 All England Reports, at page 614, a woman resident in Germany went through a mock marriage with a man so that she could enter Britain. She did not intend to live with the man, and never did. Her intention was to enter into an adulterous liaison with another man. This marriage was held to be valid. It would appear that the attitude of the court is that the parties are to be punished by being left married to each other. I think it is degrading to marriage, and that in entering into a kind of ceremony like that, the parties should have been found not to have been married.

Co-Chairman Senator ROEBUCK: Usually the medicine is not hard to take.

Professor RYAN: Another point I would like to make is that there is no provision—or if there is it is an obscure one under the Judicature Act in Ontario, and I presume in parallel provisions in some other provinces—for bringing an action for declaration that a marriage is valid. There never was one in the canon law. The only thing you could do was to sue for annulment and hope that you lost. However, in Ontario, for example, in the *Alspector* case an action was brought for a declaration under the Judicature Act that the marriage had been valid, and the action succeeded. However, I think provision should be made by Parliament for such an action so that uniform procedure should be available throughout Canada.

I suggest also that an otherwise valid marriage not consummated within a reasonable time after its solemnization should be capable of being annulled. At the present time in this country incapacity to consummate is a ground of annulment. In England a wilful refusal has been ground for annulment. I would simplify it by saying that if the marriage has not been consumated within a reasonable time the marriage may be annulled.

I have some provisions that I propose with regard to proceedings. At what time do you propose to adjourn, Mr. Chairman?

Co-Chairman Senator ROEBUCK: It is now a quarter to six, and we must adjourn by six o'clock.

Professor RYAN: I will read out the procedural provisions except what may have been mentioned in your earlier *Minutes of Proceedings*.

At the present time there is no jurisdiction in Canada for a court to make a declaration of presumption of death, with the effect that acting on this a party to a

marriage who has obtained such a declaration may safely remarry free of the possibility that the second union will be nullified. If in fact the absent person whose death is presumed is alive, in other words, if Mrs. Arden, in this particular case, had gone say under the Ontario Marriage Act after the end of seven years and had obtained a declaration that you can get under that act, and also under the British Columbia act, and maybe elsewhere, to the effect that Enoch appeared to be dead, and then went through another ceremony of marriage with a man—whose name I have forgotten in this case—at any rate if Enoch had turned up after 20 years the second union would be found to be void, and any children proceeding under it, subject to any provision with regard to legitimation, would be illegitimate.

Now, the provincial legislation cannot validate the second marriage if the absentee is in fact alive and the marriage has not been dissolved, because the provincial legislation may only authorize the solemnization of a marriage. And in Ontario, at any rate, the party obtaining this declaration and getting a licence to remarry has to sign an acknowledge saying, in effect: "I realize that if my absent spouse is in fact alive this union will be invalid and bigamous."

My submission is that Parliament should provide procedure that is uniformly available across Canada for presumption of death of an absentee, and I suggest that it should be provided in three situations. The first is where the absentee is missing and has been continuously absent for at least seven years next preceding the application, and has not been heard of or from during the period of absence by the applicant and by other persons with whom the absentee would probably have been in communication if the absentee were alive.

Of course, that presumption exists only in so far as evidence to the contrary is not produced then or later, and presumption may be rebutted and overcome.

The second case is where the absentee has been reported missing and presumed dead by a military or other government service of which the absentee was a member at the time of commencement of the period of absence.

Here, of course, normally the spouse whose, say husband, is reported dead may safely remarry. But there were two cases not long ago in the United States in which the husband turned up, and the second union which the wife had entered into in each case was null and void. So I suggest in this situation that a judicial presumption of death should be available.

Co-Chairman Senator ROEBUCK: You read something from the law with regard to our own case, where did you get it from?

Professor RYAN: The first one I read states the ordinary common law presumption of death.

Co-Chairman Senator ROEBUCK: No, but you said—

Professor RYAN: The second one reads, if

> The absentee has been reported missing and presumed dead by an armed or other government service of which the absentee was a member at the time of commencement of the period of absence.

This is what I would like to see available. The word comes back from the next-of-kin that the person on active service is dead. In two cases he was dead. The second marriages were invalid. I would suggest that in these situations a judicial presumption of death should be made and then there should be remarriage.

Mr. AIKEN: Would you call that a decree of divorce?

Professor RYAN: Well, it is called a declaration of presumption of death in other jurisdictions. But it is provided in the legislation that if the absentee is in fact alive the declaration dissolves the marriage.

The third case where I would allow it would be where the absentee has disappeared and has remained absent in circumstances which make it probable that the absentee is dead.

I had a case referred to me the other day and the facts were that 12 years ago in British Columbia two fishing boats were out. One of them was disabled, and the other was trying to tow it in, but owing to the rough sea it disappeared with all hands. I had another case where a young man and a crew of three set out in an aircraft from Gander for Seven Islands and never arrived. I do not think the spouse should have to wait seven years in such cases. After a reasonable search you can reasonably infer death. In fact, in the second case we were able to take out letters of administration of the estate. But my suggestion is that in all of these cases there should be available a declaration of presumption of death and the other party may then safely remarry; but if in fact the absentee is alive, the declaration will have the effect of dissolving the marriage.

Co-Chairman Senator ROEBUCK: Are you telling us you cannot get such a declaration now from the courts?

Professor RYAN: Not to make it safe to remarry if the absentee is alive.

Now, with regard to jurisdiction of the courts in annulment cases, I have three suggestions. First, that the action for annulment or invalidation of a marriage should be capable of being brought in a superior, territorial, county or district court in any province or territory, if either party to the marriage is, to would be if unmarried and of full age, domiciled within the province or territory.

This would allow for the separate domicile of the woman.

Secondly, if the defendant resides in the province or territory.

Normally jurisdiction is given in annulment proceedings subject to the question whether it will be accepted whether the marriage is only voidable.

The third is an innovation, that the court could have jurisdiction, if the defendant, being domiciled in Canada, appears and recognizes the jurisdiction of the court. And that an application for presumption of death may be brought in any such court in the province or territory in which the applicant resides.

Those are the points I would like to make. Other points in the brief are perhaps not as important. I am not suggesting that what I have said would in this present form be suitable to become a statute.

I am suggesting that it might be the basis on which study could be instituted, and I do recommend study of the marriage law and the social nature of marriage, marriage as an institution and marriage as a legal institution.

If you go through the submissions you have received, you will find that they are made on the basis of a profound ignorance of many of the facts—because no studies have been made in this ares in Canada.

Co-Chairman Senator ROEBUCK: Gentlemen, it is difficult for me to phrase the thanks of this committee, under these circumstances. You have come a considerable distance and you have given us the benefit of your thought, of your investigation, and of your entreprise.

I think we should send thanks to Queen's University for having sent us its three wise men. We will read all of your briefs with care and attention.

The committee adjourned.

APPENDIX "60"

BRIEF
OF THE CANADIAN HOUSE OF BISHOPS
OF
THE ANGLICAN CHURCH OF CANADA

TO

THE SPECIAL JOINT COMMITTEE OF
THE SENATE AND HOUSE OF COMMONS
ON
DIVORCE

PRESENTED ON THURSDAY, FRBRUARY 23, 1967

INTRODUCTION

1. On behalf of the Canadian House of Bishops of The Anglican Church of Canada, we appreciate the opportunity of presenting a brief to this Joint Parliamentary Committee on Divorce. In its preparation we have been assisted by other clergy and laymen specially qualified in moral theology, civil law and pastoral care. Normally the General Synod of The Anglican Church of Canada, composed of the bishops and representative clergy and laity from its twenty-eight dioceses, determines policy at its biennial meetings. As there has been no meeting of the General Synod since this Joint Parliamentary Committee was set up, no action by General Synod has been possible. In view of this situation the House of Bishops at its last annual meeting passed the following resolution:

> "That this House of Bishops authorizes the preparation of a Brief to be presented to the Joint Parliamentary Committee on Divorce and requests the Primate to set up a Committee of this House with invited representatives from the Department of Christian Social Service and the General Synod Commission on Marriage and Related Matters to prepare and present such a Brief on our behalf."

This Brief has been prepared and is presented on the authority of this resolution of the House of Bishops.

2. We first record the view of marriage held by The Anglican Church of Canada. This may best be expressed by quoting the following short excerpt from the proposed Canon "On Marriage in the Church" which was passed by the General Synod of The Anglican Church of Canada in 1965 and which will be presented for ratification at the 1967 session:

> "The Anglican Church of Canada affirms, according to our Lord's teaching as found in Holy Scripture and expressed in the Form of Solemnization of Matrimony in the Book of Common Prayer, that marriage is a lifelong union in faithful love, for better or for worse, to the exclusion of all others on either side. This union is established by God's grace when two duly qualified persons enter into a contract of marriage in which they declare their intention of fulfilling its purposes and exchange vows to be faithful to one another until they are separated by death. The purposes of marriage are mutual fellowship, support, and comfort, the procreation (if it may be) and nurture of children,

and the creation of a relationship in which sexuality may serve personal fulfilment in a community of faithful love. This contract is made in the presence of witnesses and of an authorized minister."

3. In view of the fact that The Anglican Church of Canada affirms the lifelong nature of marriage, why is it presenting a Brief on the subject of Divorce? Several reasons may be noted.

(a) The Church legislates for its own members and claims no right to impose its canonical legislation on others.

(b) Pastoral experience with our own members leads us to recognize that while it is the Church's responsibility to do all it can to help and support its members so that they may live in accordance with the principles of marriage as we conceive them, nevertheless failure sometimes occurs. What to do in such circumstances must constantly engage the attention of pastors, counsellors, the Church's membership, and the community as a whole.

(c) The experience of the Church in ministering to those whose marriages are threatened or have actually broken down indicates that the present divorce law of Canada is inadequate, that it is the cause of unreasonable hardship and that in some cases it is even a factor contributing to the hastening of marriage breakdown.

(d) The Church conceives its legislative function as being restricted to its own membership as described in (a) above. In fulfilling its responsibility to its members The Anglican Church of Canada is considering a change in its canon law which in certain circumstances would permit the re-marriage of divorced persons within the Church during the lifetime of a former spouse. The grounds for such possible permission are set forth in the proposed Canon to which we have made reference. Briefly summarized, the decisions of the Church regarding permission for re-marriage will be determined not on the basis of the parties concerned being judged innocent or guilty of a matrimonial offence but on recognition of the breakdown of a first marriage and a belief on substantial grounds that a second marriage as far as possible in keeping with the Church's view of the nature of marriage is now possible.

(e) In addition to this legislative function for its own members the Church recognizes its obligation to work with other private and public bodies in Canada in promoting the enactment of civil and criminal laws designed to give justice to all citizens, irrespective of their religious affiliation, race or economic status. Such a concept of the Church's role in society precludes us from being silent on such an issue as the one before this Joint Committee. Thus for its own members who have failed in marriage as well as for other citizens in similar plight, The Anglican Church of Canada, through this committee of the Bishops, makes its submission regarding a new divorce law for Canada.

4. There have been available to us many previous studies on the subject of divorce including notably the book, *Putting Asunder—A Divorce Law for Contemporary Society* (London, S.P.C.K., 1966), being the report of a group appointed by the Archbishop of Canterbury for the Church of England in January, 1964.

5. In addition to such studies, our committee has the advantage of appearing before you towards the end of your hearings and thus having available the previous briefs presented to this Joint Parliamentary Committee. We are particularly indebted to the brief presented after many years of study, by the United Church of Canada on November 22, 1966. By reason of the ground already covered we feel free to focus our attention on a few central principles.

SOME PRINCIPLES WHICH SHOULD UNDERLIE CHANGES IN LAW CONCERNING MARRIAGE AND DIVORCE

6. Any changes made should:

(a) continue to uphold the ideal intent of marriage as a lifelong union.

(b) respect the integrity of human personality.

(c) help to strengthen family life.

(d) provide for custody anf care of children and the protection of any other defenceless victims of divorce.

WHY WE FAVOUR A NEW APPROACH

7. The present divorce law is based on the principle that a matrimonial offence, for example, adultery, should determine the granting of dissolution. This assumes that a "matrimonial offence" should be unforgivable, whereas we believe that forgiveness is a constant element in marriage relationships. "Matrimonial offence" is often a symptom of deeper trouble rather than a cause of failure in marriage. By adhering to this principle the present law encourages disrespect for honesty and integrity. This is graphically described in the following statement by a person involved in a divorce suit:

> "Then my lawyer asked the question which must be asked: "Do you forgive your husband this adultery?" and I answered, as I must answer before the law, "No." . . .
>
> It was first of all and basically the *irrelevancy* of the whole business. Adultery was not the cause of our marriage breakup, and therefore all the questions and answers were off the point. The lawyer and judge had to ask and we had to answer questions that had nothing whatsoever to do with why we were there. We denied the possibility of truth and honesty by our very actions in being there. And yet this is what society demands." (quoted from a private communication)

8. For this reason, we do not favour the addition of new grounds for divorce to the present law, but we consider that marriage breakdown should be substituted for matrimonial offence as the basis for divorce in any new legislation.

THE CONCEPT OF MARRIAGE BREAKDOWN

9. Since this concept has already been ably set forth in the briefs of The United Church of Canada (Minutes pp. 408-420) and of Messrs. McDonald and Ferrier (Minutes pp. 499-573) as well as in the English Report, *Putting Asunder*, our comments will be brief.

10. It is our opinion that this concept provides a better basis for dealing effectively with the needs of people whose marriages have failed because it requires that a marriage be dealt with in its total social and moral context.

11. We therefore recommend that in dealing with divorce petitions the breakdown of marriage should be recognized as a question of fact and that no rules of law defining marriage breakdown should be established, lest the present recriminatory attitudes and procedures continue to be fostered.

12. We are aware of the objections raised against the principle of marriage breakdown as a basis for divorce. They are discussed on pages 41-56 of *Putting Asunder*. We are in agreement with the answers there set forth.

13. Our conclusion is that the principle of marriage breakdown and the methods necessary to determine it as a matter of fact are basically incompatible with the principle of the matrimonial offence, and that marriage breakdown should replace the existing grounds rather than be added as a further ground for divorce.

FURTHER CONSIDERATIONS

14. Before proceeding with hearing for divorce on the grounds of marriage breakdown the court should be assured that every effort had been made to achieve reconciliation and that further attempts would be in vain. This would require exploration concerning the availability and use of professional services and the provision of the same when they do not at present exists.

15. We recognize that the adoption of the principle of marriage breakdown as the sole ground for divorce would necessitate procedural changes. The court will be concerned with investigation of the state of the marriage rather than with determination of guilt.

16. Every possible means should be explored to ensure that the cost of divorce is not beyond the financial capabilities of those requiring it. It may be possible to deal with divorce cases in lower courts.

17. While we appreciate that your Committee's instructions are specifically related to dissolution of marriage, we suggest that no adequate examination of this subject can omit a study of the nature of marriage as a social and legal institution, the requisites of valid marriages and the defects causing nullity of purported marriages.

18. As in many areas of social concern, research heretofore conducted into these aspects of marriage in Canadian society and law has been insignificant. We urge therefore that your Committee recommend that as soon as possible properly organized and adequately staffed and financed studies in this area be undertaken with governmental authority and support, with a view to establishing a body of knowledge on which a statute embodying a Canadian law of marriage can be based. Such research should include attempts to ascertain the causes and consequences of marriage breakdown.

19. When we consider the present law of marriage, outside the Province of Quebec, and omitting from consideration solemnization of marriage which is within provincial legislative jurisdiction, we find that some aspects of that law are obscure and others are unsatisfactory. For example, the following areas call for investigation:

(a) The intention of marriage. At its inception it should be defined clearly as a life-long union. This does not seem to be explicit at present.

(b) The minimum age for capacity to marry. The study we propose would indicate what the minimum age should be.

(c) The scope of coercion, duress or fear should be studied and clearly defined.

(d) The definition of fraud, misrepresentation or concealment should be studied with a view to their extension as grounds of nullity.

(e) The territorial jurisdiction of the courts should be examined with a view to eliminating some of the hardship caused by the law of domicile.

The following is the Committee appointed by the Primate of the Anglican Church of Canada, Most Reverend H. H. Clark:

From the House of Bishops:

The Right Reverend G. N. Luxton, Bishop of Huron
The Right Reverend R. K. Maguire, Bishop of Montreal
The Right Reverend E. S. Reed, Bishop of Ottawa, Chairman
The Right Reverend E. W. Scott, Bishop of Kootenay
The Right Reverend S. C. Steer, Bishop of Saskatoon

From the Commission on Marriage and Related Matters:

The Revered Dr. C. R. Feilding
Professor S. Ryan

From the Department of Christian Social Service
Reverend A. R. Cuyler
Reverend Canon Maurice P. Wilkinson, Secretary

The Right Reverend G. N. Luxton, Bishop of Huron requests the following to be attached herewith:

"This member of the Committee records his dissent from the report of this Committee because it has not been submitted to the House of Bishops and has not had sufficient reference and study in the life of the Church to be considered as an authoritative opinion of the Anglican Church of Canada."

APPENDIX "61"

Brief submitted to the Special Joint Committee
of the Senate and House of Commons on Divorce

by

Professor C. Gordon Bale, Faculty of Law, Queen's University,
Kingston, Ontario.

1. Jurisdiction Of The Courts In Relation To Divorce

a) *Common Law Position*

The basis upon which courts in Canada, having the power to grant a divorce "a vinculo matrimonii", assume jurisdiction to grant a divorce is the domicile of the petitioner. The domicile of a man has been defined as the place "in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home."[1]

The domicile of a married woman is that of her husband. This is so even though the husband and wife are living separately and apart and even though they may have been judicially separated.[2] This was authoritatively established by the Privy Council in *Attorney-General of Alberta* v. *Cook*.[3] The Privy Council with remorseless logic utilized the medieval conception of the unity of husband and wife to hold that married persons could have but one domicile and that was the husband's domicile. Lord Denning has described the attributing of the husband's domicile to the wife as "the last barbarous relic of a wife's servitude."[4]

One of the factors which influenced the Privy Council in deciding that a married woman could not have a separate domicile was that it would avoid confusion. There would be only one jurisdiction which was competent to dissolve a marriage. The situation in which a man and a woman are considered to be married in one country and divorced in another is avoided. However, equating the domicile of a married woman to that of her husband has given rise to intolerable hardship and injustice for the married woman with grounds for divorce. An example of this hardship is the case of an adulterous husband who deserts his wife by leaving the country of his domicile. Before the Divorce Jurisdiction Act, 1930, the wife could only obtain a divorce in the courts of the husband's new domicile. This would be impossible if the husband's new domicile was in a jurisdiction such as Erie or Italy where divorce is unobtainable. As a practical matter the deserted wife might find that she could not obtain a divorce because she lacked funds necessary to go to the husband's new domicile and commence an action for divorce there.

b) *Divorce Jurisdiction Act of 1930*

To alleviate the difficult position of a deserted wife who had grounds for divorce, the Divorce Jurisdiction Act of 1930, was passed. This Act provides that a married woman who has been deserted and has been living separately and apart from her husband for two years may commence an action for divorce in the Canadian province in which the husband was domiciled immediately prior to the desertion if the court of that province has jurisdiction to grant a divorce "a vinculo matrimonii."

This Act has been described as a "gruding palliative rather than an effectual remedy."[5] Why should a deserted wife whose husband has committed adultery have to wait two years if her husband after deserting her acquires a different domicile before she can commence an action in the former domicile. If a husband domiciled, for example, in Ontario, commits adultery and deserts his wife but remains domiciled in

Ontario, the married woman may commence divorce proceedings immediately. It would seem preferable to provide that a deserted wife who was domiciled in a province of Canada immediately prior to the desertion shall for the purposes of divorce jurisdiction be deemed to continue to be domiciled in that province. This would mean that the wife with grounds for divorce who was domiciled in Ontario immediately prior to the desertion would be able to commence divorce proceedings immediately whether or not her husband remained domiciled in Ontario after the desertion.

Such an amendment would only amount to patching a palliative. There are too many cases in which the Divorce Jurisdiction Act does not provide a remedy. To illustrate this contention two examples can be given.

Firstly, a woman domiciled in Ontario immediately prior to her marriage might marry a foreign domiciliary. Although they might reside in Ontario, if the husband did not intend to continue to reside in Ontario, he would not acquire an Ontario domicile. If her husband committed adultery and deserted her, the woman could not obtain a divorce in Ontario as on marriage she acquires his domicile. She would have to obtain the divorce from the jurisdiction in which her husband is comiciled. This might be impossible if the husband's domicile is in a jurisdiction where divorces are not granted. It might also be impossible if the courts of the husband's domicile refuse to assume jurisdiction solely on the basis of the domicile of the husband. Even if the foreign court would assume jurisdiction on the basis of the husband's domicile, the foreign court might define domicile differently. Although an Ontario court might say the husband was domiciled in the foreign jurisdiction, the courts of the foreign jurisdiction might decide otherwise and refuse to assume jurisdiction. Even if the foreign court would assume jurisdiction, it might as a practical matter be impossible for the wife to travel to the husband's jurisdiction to undertake divorce proceedings there.

Secondly, a woman domiciled in Ontario immediately prior to her marriage might marry a foreign domiciliary and reside with him in the foreign country. If her husband committed adultery and deserted her, she might return to Ontario. She could not obtain a divorce in Ontario and would have to return to the foreign domicile where it might be difficult or impossible to obtain a divorce.

(c) *Effective Reform of the Jurisdictional Rules*

To provide a married woman with an effectual remedy in the matter of divorce it is necessary that either the wife should be permitted to acquire a separate domicile for the purpose of divorce jurisdiction or the courts should be empowered to assume divorce jurisdiction on the basis of the wife's residence within the province for a stipulated period of time. In the United States, the courts themselves have been able to redefine the concept of domicile in relation to the married woman so that intolerable hardship is avoided. As early as 1869, Justice Swayne, in delivering the opinion of the Supreme Court of the United States, in *Cheever* v. *Wilson*, refuted the contention that the wife's domicile must be that of her husband's. He said, "The rule is that she may acquire a separate domicile whenever it is necessary or proper that she should do so. The right springs from the necessity for its exercise, and endures as long as the necessity continues."[6] In the United States, the married woman with grounds for divorce has not encountered difficulty with respect to divorce jurisdiction because of judicial reinterpretation of the concept of domicile.

The solution to this problem has been the same in New Zealand. The mode of achieving the solution to the problem has been different. Instead of a judicial reinterpretation of domicile, the New Zealand parliament enacted:

> 3. Domicile—(1) For the purposes of this Act, the domicile of a married woman, wherever she was married, shall be determined as if she were unmarried and (if she is a minor) as if she were adult.[7]

The English Royal Commission on Marriage and Divorce appointed in 1951, has recommended that a married woman living separately and apart should have the

capacity to acquire a separate domicile for the purpose of divorce jurisdiction. The Report of the Royal Commission states:

> We recommend, therefore, that a wife who is living separate and apart from her husband should be entitled to claim a separate English or Scottish domicile for the purpose of establishing the jurisdiction of the English or Scottish court to entertain divorce proceedings by her, notwithstanding that her husband is not domiciled in England or Scotland, as the case may be. The burden of proof should be on the wife to establish that the circumstances are such that, had she been a single woman, she would be held to have acquired an English or Scottish domicile. Where, however, the wife was domiciled in England or Scotland immediately before the marriage, or immediately before the separation, and is resident in England or Scotland at the commencement of the proceedings, she should be deemed to have acquired an English or Scottish domicile, unless there is evidence to the contrary.[8]

It is my submission that the best way to provide an effectual remedy for the hardship which a married woman encounters with respect to divorce jurisdiction is to give her the capacity to acquire a separate domicile for that purpose. This solution is, I think, preferable in that it attacks the problem at its root. It is also in accord with modern ideas with respect to sex equality.

(d) *Canadian Domicile for Purposes of Divorce*

If a uniform Divorce Act is passed for Canada, it is submitted that the concept of a Canadian domicile should be created for divorce matters in substitution for a domicile in a Canadian province. It is often categorically stated that a person can have only one domicile. This is certainly true if the person is domiciled in a unitary state. However, in a federal state the principle should be stated in the form that for a particular legal question, a person can have only one domicile. For instance, the Australian Parliament in 1959 passed the Martimonial Causes Act, a uniform Act for all of Australia. It substituted an Australian domicile for a domicile in a state for the purpose of matrimonial causes. This means that although a person might be domiciled in Western Australia for some legal questions, such as succession, for the purpose of divorce he is considered to be domiciled in Australia. Consequently, if he were resident in New South Wales he could bring an action for divorce in New South Wales because for the purpose of divorce he is domiciled in Australia although for other legal questions he is domiciled in Western Australia.

The concept of a Canadian domicile for divorce matters provided that there was uniform divorce legislation would be very advantageous. With the vast geographical distance between some of the provinces and the considerable amount of mobility of persons between provinces, it would be of much convenience to be able to bring a divorce action based on a Canadian domicile for divorce in the province in which you are resident even though you are domiciled in another province for matters other than divorce.

e) *Reform of the Concept of Domicile*

If Canada is to rely on domicile as the sole basis for divorce jurisdiction, serious consideration should be given to modifying the concept of domicile, at least for the purposes of divorce. This would be particularly important if uniform divorce legislation for all of Canada were not passed and a concept of a Canadian domicile were not adopted. The concept of domicile as a result of a series of English decisions has tended to become technical, rigid and artificial. The intention required in order to acquire a new domicile and thereby to displace the domicile of origin has at times been an intention to remain in the jurisdiction forever. As a result of the tenacity of the domicile of origin, a person's domicile may not be the country in which he is resident for an extended period of time. The House of Lords in *Vinans* v. *Attorney-General*[9] and in *Ramsay* v. *Liverpool Royal Infirmary*[10] held that persons who had resided in England

for thiry-seven years and thirty-five years respectively were not domiciled in England. Canadian courts have generally not required such a high degree of proof of intention in order to find that the person has acquired a domicile of choice. The intention required appears to be the intention of remaining in jurisdiction indefinitely rather than forever.

The Commissioners on Uniformity of Legislation in Canada drew up a Draft Model Act to Reform and Codify the Law of Domicile. I submit that the provisions in this Draft Act might be utilized to reform the concept of domicile for the purposes of divorce jurisdiction. The Draft Act provides: Section 5 (1).....a person acquires and has a domicile in the state.....in which he has his principal home and in which he intends to reside indefinitely. 5 (2) Unless a contrary intention appears, (a) a person shall be presumed to intend to reside indefinitely in the state..... where his principal home is situate.

This definition and this presumption would have the effect of making the concept of domicile less rigid and artificial. Domicile would more often indicate the jurisdiction in which the married persons live and the jurisdiction which has the greatest interest in their status. Fewer persons would find themselves in the situation of having been resident in a jurisdiction for some time but considered to be domiciled elsewhere. This can be a very inconvenient situation for persons seeking a divorce particularly if the domicile is geographically distant from the jurisdiction in which they reside.

f) *Alternative Reform of the Jurisdictional Rules*

In the United Kingdom and in Australia, the wife who has been living separately and apart has not been given the capacity to acquire a separate domicile. To cope with the problem, the U. K. Parliament has provided additional bases for jurisdiction in proceedings instituted by a wife. Section 18 (1) (a) of the Matrimonial Causes Act 1950, provides that where the wife has been deserted or the husband deported, the wife can bring an action if immediately before the desertion or deportation the husband was domiciled in England. This is analogous to our Divorce Jurisdiction Act. There are two basic differences. There is no requirement in the U.K. provision that the wife should live separtely and apart for two years after the descertion. In addition, the U.K. provision covers deportation and not just desertion. The major way in which the U.K. has coped with the problem is found in Section 18 (1) (b) of the Matrimonial Causes Act, 1950. This section provides that the court has jurisdiction:

> (b) in the case of proceedings for divorce or nullity of marriage, if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man.

The Parliament of Australia has dealt with the problem in basically the same way. However, the Australian Matrimonial Causes Act, 1959, has resorted to staturory fictions. Section 24 (4) of the Act provides that proceedings for divorce shall not be instituted except by a person domiciled in Australia. This is simply a statement of the basic common law position. The problem which would result from the exclusive jursidiction based on domicile is solved by statutory fiction contained in section 24. It provides:

> (1) For the purposes of this Act, a deserted wife who was domiciled in Australia either immediately before her marriage or immediately before desertion shall be deemed to be domiciled in Australia.
>
> (2) For the purpose of this Act, a wife who is resident in Australia at the date of instituting proceedings under this Act and has been so resident for the period of three years immediately preceding that date shall be deemed to be domiciled in Australia at that date.

Section 24 does not give a married woman the capacity to acquire a separate domicile for the purpose of divorce jurisdiction. Instead it deems the married woman to

be domiciled in Australia in certain situations. Section 24 (1) goes much beyond our Divorce Jurisdiction Act and Section 18 (1) (a) of the English Matrimonial Causes Act, 1950. If the ante-nuptial domicile of the deserted wife was in Australia, no matter where she was domiciled at the time of the desertion she is deemed to be domiciled in Australia. Section 24 (1) would provide a remedy for the two examples cited above to indicate situations in which the Divorce Jurisdiction Act does not provide a remedy. Section 24 (2) of the Australian Act has the same effect as Section 18 (1) (b) of the United Kingdom Act. The court has jurisdiction to hear a wife's petition for divorce on the basis of three years residence immediately preceding the instituting of proceedings. The United Kingdom and Australian provision do much to alleviate the difficulties imposed on the wife by the concept of the unity of the domicile of married persons. However, it is submitted that the New Zealand approach of giving the married woman the capacity to acquire a separate domicile is superior. It goes to the root of the problem and is in greater accord with social realities.

II. Recognition of Foreign Divorce Decrees

(a) *Common Law Position*

The basic rule with regard to a foreign divorce decree is that if it is granted by the law of the domicile of parties, it will be recognized by our courts. After the Privy Council decision in *Le Mesurier* v. *Le Mesurier*[11], it was thought that the courts of the domicile had exclusive jurisdiction and that a divorce decree granted by any other court would not be recognized. However, a number of exceptions to the basic rule have been developed by the courts. In *Armitage* v. *Attorney-General*[12], a South Dakota divorce decree was recognized in England although the husband was not domiciled in South Dakota. The divorce decree was recognized on the basis that the decree would be recognized by the law of New York, the domicile of the husband at the date of granting of the decree. This exception to the general rule is in accord with the principle that the status of persons should be determined by the law of the domicile. If the law of domicile recognized the decree as dissolving the marriage, other jurisdictions should also recognize the divorce.

After the Privy Council decision in *A-G for Alberta* v. *Cook*, the Divorce Jurisdiction Act 1930 was passed in Canada and a somewhat similar provision was enacted in England in 1937. These statutes extended the jurisdiction of divorce courts but did not deal with the problem of the recognition of foreign decrees granted by other jurisdictions on similiar grounds. Until *Travers* v. *Holley*[13], an English Court of Appeal decision in 1953, most writers considered that divorces granted under such statutes would not receive recognition outside the country in which they were granted unless they could be recognized under the exception enunciated in *Armitage* v. *Attorney-General*. In *Travers* v. *Holley*, the English Court of Appeal was confronted with the problem of whether a divorce granted by the courts of New South Wales under legislation similar to our Divorce Jurisdiction Act should be recognized. England had similar legislation and Hodson, J.A. held that it would be "contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognize a jurisdiction which "mutatis mutandis" they claim for themselves."[14] *Travers* v. *Holley* did not make it clear whether it was essential that the statute conferring jurisdiction on the foreign court should be substantially similar to the legislation of the forum or whether it was sufficient that the facts were such that the court of the forum could have assumed jurisdiction. In *Robinson-Scott* v. *Robinson-Scott*, Karminski, J., held that, "It is sufficient that facts exist which would enable the English courts to assume jurisdiction."[15]

Canadian courts have, in general, followed the English approach to the recognition of foreign divorces. The general rule is that only decrees granted by the domicile of the parties will be recognized. With only one possible exception, *Armitage* v. *Attorney-General*, has been consistently applied in Canada so that a non-domiciliary divorce

decree is recognized if it is valid according to the law of the domicile of the husband at the date of the granting of the decree.[16] The status of the exception established by *Travers* v. *Holley* and *Robinson-Scott v. Robinson-Scott* is not yet as firmly settled as is *Armitage* v. *Attorney-General. Travers* v. *Holley* has been agreed with and applied in *Re Solemnization of Marriage Act, B. and B.* v. *Deputy Registrar General of Vital Statistics*,[17] *Re Allarie's Marriage Licence Application, Allairie* v. *Director of Vital Statistics* and *Januszkiewicz* v. *Januszkiewicz*[19]. It was mentioned with apparent approval in *Buehler* v. *Buehler*[20]. However, in *La Pierre* v. *Walter*[21], Mr. J. Riley disapproved of *Travers* v. *Holley* and said he preferred the reasoning in *Fenton* v. *Fenton,* a decision of the Victorian Full Court and *Warden* v. *Warden,* a decision of the Court of Session of Scotland. This was, however, obiter dictum in that the doctrine of *Travers* v. *Holley* was inapplicable to the facts of the case. *Travers* v. *Holley* was also considered in *Re Needham* v. *Needham.* M. J. Moorehouse noted that in *La Pierre* v. *Walter* the reasoning in *Fenton* v. *Fenton* was preferred to that in *Travers* v. *Holley.* Again, however, the doctrine of *Travers* v. *Holley* was inapplicable. These were all trial court decisions. The first and to date only appellate court to consider the doctrine of *Travers* v. *Holley* is the Ontario Court of Appeal. The case did not deal with the recognition of a foreign divorce but with a foreign nullity decree. Schroeder, J.A., in *Re Capon* said:

> "I have formed the view that the Courts of Ontario would be entitled to assume jurisdiction on the ground that the petitioner alone is domiciled in this Province whether the marriage was celebrated here or not. To deny the equivalent right to a foreign Court would be inconsistent and contrary to well-recognized principles. In *Travers* v. *Holley* [1953] P. 246, the Court of Appeal gave effect to the rule that what entitles an English Court to assume jurisdiction is equally effective in the case of a foreign court."[23]

It would appear that the doctrine of *Travers* v. *Holley* and *Robinson-Scott* v. *Robinson-Scott* will probably be accepted by Canadian courts.

A new exception to the general rule regarding the recognition of foreign divorce decrees may have been evolved by the courts in *Schwebel v. Ungar.*[24] One writer, although admitting that his conclusion must remain tentative, says that *Schwebel* v. *Ungar* establishes that "a divorce will be recognized by our law if it is recognized by the law of a country in which the parties (or, probably, the husband alone) become domiciled at any subsequent time."[25] This is an extension of the doctrine in *Armitage* v. *Attorney-General* and its precise scope has not yet been clearly defined.

(b) *Statutory Enactment of the Common Law Rules*

It might be argued that the problem about recognition of foreign divorce decrees has been solved by the doctrine of *Travers* v. *Holley*. If, for instance, a married woman living separately and apart is given the capacity to acquire a separate domicile for the purpose of divorce jurisdiction, then on the basis of *Travers* v. *Holley,* our courts should recognize a decree granted by the domicile of the wife. Our courts should recognize that what entitles a Canadian court to assume jurisdiction should be equally effective in the case of a foreign court. What constitutes domicile would of course, be determined solely by reference to our own law and not the foreign law. If there were no doubt that *Travers* v. *Holley* would be applied, little would be gained by giving statutory effect to this case. However, in order to eliminate any doubt, it would appear desirable to legislate with respect to the recognition of foreign divorce decrees. Australia and New Zealand have both given statutory effect to *Armitage* v. *Attorney-General* and *Travers* v. *Holley*.[26]

Giving the married woman who is living separately and apart from her husband the capacity to acquire a domicile for the purpose of divorce jurisdiction is merely an alternative to providing that the court has jurisdiction on the basis of the wife's three years residence. For this reason, it would seem that our courts should recognize a divorce decree granted by either the domicile of the wife or by the residence of the wife for three years. Domicile is a concept which is always defined by the law of the forum. Consequently, it would appear that if a married woman is permitted to acquire a separate domicile, our courts would on the basis of *Travers* v. *Holley* and *Robinson-Scott* v. *Robinson-Scott* recognize divorces granted by the residence of the wife for three years provided that in the view of our courts the wife was herself domiciled where she was resident. In most cases, therefore, although the foreign court assumed jurisdiction on the basis of the wife's three years residence, our courts would recognize the divorce decree as one granted by what is regarded as the separate domicile of the wife. In order to eliminate any doubt and to cover those cases where the wife's three years residence is not considered by our courts as being her domicile, it is submitted that a specific provision should be enacted stipulating that a decree granted by a court which assumed jurisdiction on the basis of the wife's three years residence be recognized.

It is submitted that recognition should be given if

1. the foreign divorce was obtained in a country in which the husband was domiciled at the institution of proceedings. (This would be a statutory enactment of the basic common law rule.)
2. the foreign divorce, although not obtained in the country in which the husband was domiciled was recognized as valid by the law of that country at the date the decree was granted. (This would be a statutory enactment of *Armitage* v. *Attorney-General.*)
3. the foreign divorce was obtained in a country in which the wife, but not the husband, was domiciled at the institution of proceedings. (This would be a statutory enactment of *Travers* v. *Holley*, if a married woman living separately and apart from her husband were given the capacity to acquire a separate domicile.)
4. the foreign decree was obtained in a country in which the wife was resident for three years immediately preceding the institution of proceedings. (This would be a statutory enactment not based on a common law decision. It would recognize as valid the solution to the problem adopted by the United Kingdom and Australia.)
5. the divorce would be recognized as valid under the common law rules of the conflict of laws although not valid under Para. 1, 2, 3 or 4. (Such a provision would permit the courts some flexibility in evolving new rules of conflict of laws relating to the recognition of foreign divorce decrees. It would enable the courts to work out the scope to be accorded to *Schwebel* v. *Ungar.*)

1. (1859), 4 Drew 366, at p. 376.
2. The Domestic Relations Act, 1927, S.A. 1927, c. 5, s. 10, now R.S.A. 1955, c. 89, s. 11, purported to reverse the decision in *Attorney-General of Alberta* v. *Cook* and to give the judicially separated married woman the capacity to acquire a separate domicile. This section might be ultra vires the Alberta legislature to the extent that it attempts to alter the jurisdiction of the Alberta courts in the matter of divorce jurisdiction.
3. [1926] A.C. 444. [1926] 2 D.L.R. 762 (P.C.).
4. *Gray* (*orse. Formosa*) v. *Formosa* [1962] 3 All E.R. 419 at p. 422; [1962] 3 W.L.R. 1246 at p. 1250 (C.A.)
5. Raphael Tuck, Let no Court Put Asunder (1944), 22 Can. Bar Rev. 681 at p. 683.
6. 9 Wall. (U.S.) 108 at p. 123-124. It is quoted in H. E. Read, Recognition and Enforcement of Foreign Judgments (1938) at p. 204.
7. Matrimonial Proceedings Act 1963, S.N.Z. 1963, No. 71.
8. Royal Commission on Marriage and Divorce, Report 1951-1955, Cmnd. 9678, p. 218.
9. [1904] A.C. 287. 73 L.J.K.B. 613 (H.L.).
10. [1930] A.C. 588; 99 L.J.P.C. 134 (H.L.).
11. [1895] A.C. 517; 64 L.J.P.C. 97 (P.C.).
12. [1906] P. 135; 75 L.J.P. 42 (C.A.).
13. [1953] P. 246; [1953] 2 All E.R. 794 (C.A.).
14. *Ibid.*, p. 257 (P.); p. 300 (All, E.R.).
15. [1958] P. 71 at p. 88; [1957] 3 All E.R. 473 at p. 478 (P.A.D. Div.).
16. Power on Divorce, (2nd ed. by J. D. Payne 1964) at p. 173.
17. (1960), 31 W.W.R. 40; (1960), 24 D.L.R. (2d) 238 (Alta. S.C.).
18. (1963), 44 W.W.R. 568; (1964), 41 D.L.R. (2d) 553 (Alta. S.C.).
19. (1966), 55 W.W.R. 73; (1966), 55 D.L.R. (2d) 727 (Man. Q.B.).
20. (1956), 18 W.W.R. 97; (1956), 4 D.L.R. (2d) 326 (Sask. Q.B.).
21. (1960), 31 W.W.R. 26; (1960), 24 D.L.R. (2d) 483 (Alta. S.C.).
22. [1964] 1 O.R. 645; (1964), 43 D.L.R. (2d) 405, (Ont. H.C.).
23. [1965] 2 O.R. 83 at p. 96; (1965), 49 D.L.R. (2d) 675 at p. 688 (Ont. C.A.).
24. [1964] 1 O.R. 430; (1964), 42 D.L.R. (2d) (Ont. C.A.). It was affirmed on appeal by the Supreme Court of Canada [1965] S.C.R. 148; (1965), 48 D.L.R. (2d) 644.
25. T. C. Hartley, The Recognition of Foreign Divorce: *Schwebel* v. *Ungar* (Or Schwebel) (1965), 4 West. L. Rev. 99 at p. 111.
26. Matrimonial Causes Act 1959, S.A. 1959, No. 104, s. 95. Matrimonial Proceedings Act 1963, S.N.Z. 1963, No. 71, s. 82.

APPENDIX "62"

"VOID" MARRIAGES

Submission to the Special Joint Committee of the Senate and House of Commons on Divorce by

Professor Bernard L. Adell, Faculty of Law, Queens University, Kingston, Ontario.

It is to be hoped that an overhaul of the grounds for divorce will, in itself, make it less necessary for Canadian courts to resort to the use of annulment and to the accompanying fiction that a particular marriage never existed. However, because the grounds for annulment, except insofar as they relate to defects in the solemnization of marriage, are within the legislative competence of Parliament, it would be unfortunate if the Committee did not give some consideration to recommending the abandonment of what is perhaps the most anachronistic concept still to be found in the law of annulment—the concept of the absolutely void marriage.

For historical reasons which need not be discussed here, Canadian and English courts recognize two types of invalid marriages—those which are void (or absolutely void, or void *ab initio*), on the one hand, and those which are merely voidable, on the other hand. The grounds upon which marriages will be held void or voidable in the various Canadian jurisdictions are set out in some detail in the "Summary of Present Canadian Law of Marriage" prepared for the Committee by Professor H. R. S. Ryan. The classic statement of the distinction between void and voidable marriages is that of Lord Greene M.R. in *De Reneville* v. *de Reneville*:

> ...(A) void marriage is one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessity of any decree annulling it: a voidable marriage is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it has been prononced by a court of competent jurisdiction.[1]

A voidable marriage must be treated by everyone, including the two parties to it, as completely valid unless and until one of those two parties goes before the court of the matrimonial domicile and secures a decree of nullity. That decree, if granted, does provide that the marriage was void from its inception and has never existed, but such a provision is now correctly looked upon by the courts as little more than a matter of form. The courts do not generally consider transactions completed during the currency of a voidable marriage to be wiped out by the decree of nullity,[2] nor (and this is even more significant) do they allow a party who, through his conduct after the marriage ceremony, has shown a certain degree of acceptance (or "approbation") of a voidable marriage, to later impugn the validity of that marriage.[3] As a result, a party to a voidable marriage who has been led by the other party's conduct to stake his future on the continuance of the marriage cannot later have his expectations destroyed, either through a change of heart by the other party or through intervention by an outsider. In the case of voidable marriages, the law has thus achieved something of a rough balance between the interest of one of the parties to a defective marriage in having that marriage ended and the contrary interest of one of the parties (and conceivably, in particular cases, of society as a whole) in the continuance of the marriage.

No such balance has, however, been achieved in the case of absolutely void marriages.[4] If a marriage is defective in any of the respects which lead to absolute nullity, no degree of ostensible acceptance by either party appears sufficient to prevent anyone with any interest whatever in the marriage from treating that marriage as totally non-existent and from obtaining a judicial declaration of such non-existence. In the case of a void marriage, the courts take virtually no account of any interests in the

continuance of the marriage which may have arisen through the effluxion of time or through the conduct of one or both of the parties to the marriage; they look only to the legal forms, and will declare the marriage a nullity even after the death of the parties to it. Severe injustice can result, and undoubtedly has resulted, from the attitude of the courts toward void marriages.

The simplest and most practical remedy would appear to be the enactment of a statutory provision imposing upon absolutely void marriages what is referred to above as the rough balance of interests worked out by the courts in their handling of voidable marriages. Such statutory provision would have to do little more than to decree that most of the categories of absolutely void marriages would thenceforth be voidable.[5] By according significant legal effect to *de facto* marriages, it would bring our law of annulment more closely into accord with the expectations of the parties, and would be an appropriate complement to enlightened divorce legislation.

NOTES

1. [1948] p. 100, at 111.
2. See, *e.g. Re Eaves*, [1940] 1 Ch. 109 (U.K.C.A.).
3. *B.* v. *B.*, [1935] S.C.R. 23; *Pettit* v. *Pettit*, [1962] 3 All E.R. 37 (U.K.C.A.). For a critical appraisal of the attitude of English courts toward approbation, see, Lasok, "Approbation of Marriage in English Law and the Doctrine of Validation," (1963) 26 Mod L. Rev. 249.
4. The only significant statutory reform in this area involves the legitimation of the children of void marriages, a matter within provincial jurisdiction. See The Legitimacy Act, S. Ont. 1961-62, c. 71, s. 4
5. Such a provision would obviously be incapable of application to bigamous marriages, and should probably not be applied to certain categories of consanguineous marriages.

APPENDIX "63"

Submission to the Special Joint Committee of the Senate and House of Commons on Divorce by

Professor H. R. Stuart Ryan, Faculty of Law, Queen's University, Kingston, Ontario.

Summary of Present Canadian Law of Marriage
(excluding Law of Quebec)

1. *Sources of Present Law*

(a) Canon Law of Western (Roman Catholic) Church as developed to 1532 but modified in later development in the English Ecclesiastical Courts by influence of Common Law thinking.

(b) English Statutes, commencing in 1532, and up to the years below mentioned:

N.S. N.B. P.E.I.	1758
Nfld.	1832
B.C.	1858
Remainder of Canada	1870.

The most important of these statutes from our point of view are these of HENRY VIII, Edward VI, Elizabeth I, Lord Hardwicke's Act, 1735, Lord Lyndhurst's Act, 1835, and the Matrimonial Causes Acts, 1857-1868.

(c) English Common Law court decisions relating to marriage
(i) a Common Law
(ii) under statutes relating to marriage and annulment.

(d) Pre-confederation provincial legislation, where applicable.

(e) Post-confederation Canadian national legislation relating to marriage and annulment.

(f) Post-confederation provincial legislation relating to solemnization of marriage.

(g) Canadian court decisions.

(h) This note does not discuss dissolution of valid marriages.

2. *Marriage defined*

("Christian marriage", so called but not specifically Christian)

The censensual union of one man and one woman as husband and wife for life to the exclusion of all others, for the society, comfort and services that each may afford to the other, for sexual relations and the procreation of children, but marriage may be validly entered into upon condition that there shall be no children, or that there shall be no intercourse without contraceptives, or that, for reasons of age or health, there shall be no intercourse (the *tamquam soror* rule). The fact that marriage may be terminated by divorce does not deprive it of its potentially lifelong character. A condition that marriage shall be for a trial period or last for a certain time or shall be terminated on consent or on a certain condition is void, and the marriage is generally considered to be valid, but solutions to the problems raised by such conditions have not been worked out. Marriage is completed by consent, even without consummation.

3. *Capacity to marry* requires

(a) *Minimum age*—7 years, but marriage before puberty requires ratification after attaining puberty by consummation or other act of affirmation. Puberty is a fact and its occurrence may be proved, but it is presumed to be reached by males at 14 and females at 12. The actual age of puberty has moved downward in recent years.

(b) *Capacity to consummate*—fertility is not required; nor is emission of semen; penetration of the female organ by the male organ is sufficient. Incapacity may be physical or psychological, and *quoad hunc* (*hanc*) or general. Refusal to consummate *may* raise an inference of incapacity, but is not in itself a defect. Sodomistic or other deviant acts may raise such an inference if "normal" consummation is refused. Marriages of aged persons do not require such capacity.

(c) *Mental capacity*—ability to understand the nature of the union and the rights and obligations arising from it. No very high standard of intelligence or understanding is required—if it were, few marriages would be valid. Mental illness, gross drunkenness or the effect of a drug may deprive an otherwise capable person of such capacity, either permanently or temporarily.

(d) *Being unmarried*—not being a party to a valid, subsisting marriage. Annulment by a court of a previous purported marriage which can be proved later to be "null and void *ab initio* and *ipso jure*" (see below) is not required. Death of a former spouse need not be formally certified, declared or proved before remarriage if it can be proved later as a fact by direct evidence, inference or presumption based on long absence. No procedure for judicial declaration of presumption of death of an absentee exists under the law of Canada. Provincial legislation authorizing such declarations cannot assure validity of remarriage of the other partner if the absentee is in fact alive. A previous purported marriage that is "voidable" (see below) must, it seems, be annulled by a court before remarriage. It is possible that if annulled *after* a second ceremony, it may have retroactive effect and validate the second union ex post facto, but the trend of decisions is in the other direction. Dissolution of a prior marriage by legislative, judicial or other appropriate procedure must be final before the second ceremony.

(e) *Consent to marry*, which requires

(i) *Free will*—absence of coercion, duress, threats, "force and fear", or similar undue influence. The pressure must be improper. It must go beyond persuasion or even strong persuasion. Prosecution or threats of prosecution may be coercive. The will must be overcome. Age, health, filial respect and similar factors may render a party particularly vulnerable to coercion. Fear of extraneous harm has been regarded as vitiating consent, as where a Hungarian girl went through a form of marriage with an alien in order to escape from Hungary, for fear of Russian soldiers, but this is not a precedent of wide application.

(ii) *Understanding the nature of the contract*—including absence of fraud or mistake. Error, however, induced, is not a defect unless it extends to the nature of the ceremony (e.g. mistaking marriage for betrothal) or the identity of the other party (e.g. mistaking Leah for Rachel). It is doubtful whether fraudulent adoption of a false personality or concealment of real identity or history is a defect as long as there is no error concerning the physical person. Concealment of imprisonment, crime, prostitution, disease, pregnancy, bankruptcy, citizenship, race, family, etc., does not create a defect.

(iii) *Consent to enter into the marital relationship*—The intention to marry must be expressed. However, sham marriages, not brought about by duress or fear, with intent to gain admission to a country or avoid deportation, or for similar purposes, are held valid. Secret or subjective and unexpressed withholding of consent (the "internal forum") is ineffective. (e.g. Henry VIII's alleged withholding of consent to marry Ann of Cleves).

The consent may be expressed to be subject to a condition precedent (e.g. that the man does not suffer from V.D. or that the woman is not pregnant), and if this is proved and if the condition is not satisfied the marriage should be held void. Such conditions are rare. A condition subsequent, (e.g. that the man will change his religion after marriage or allow the woman to bring up any children in hers), will not be a defect if it is not satisfied.

5. Marriage within the prohibited degrees is generally regarded as defective fo "incapacity", but this categorization does not seem accurate. The parties are not incapable of marrying; they are forbidden by law to marry each other. "Illegality" would be a better category of defect.

No Canadian statute authoritatively defines the prohibited degrees. Provincial statutes may purport to do so, but if they are intended to do more than convey information they are to that extent invalid. Our prohibited degrees are those recognized by the English courts on the basis of lists published in the Canons of 1604 of the Church of England, as amended or clarified by Lord Hardwicke's Act of 1735 and by R.S.C. 1952, c. 176, secs. 2 and 3.

The list appears to be as follows:

— Parent and child
— Step-parent and step-child
— Parent-in-law and child-in-law
— Grandparent and grandchild
— Grandparent and grandchild's wife or husband
— Grandchild and grandparent's wife or husband
— Party and husband's or wife's grandchild
— Party and husband's or wife's grandparent
— Brother and sister
— Uncle or aunt and niece or nephew, by blood or marriage
— Party and wife's aunt or husband's uncle (by blood) (Apparently retained by inadvertence when marriages with deceased wife's niece and deceased husband's nephew were being authorized.)

Relationship of the half blood has the same effect as of the whole blood. "Natural" or illegitimate relationship by blood has the same effect as legitimate relationship. Betrothal ("precontract") no longer creates an impediment.

In Ontario, it has been held that a man may marry his divorced wife's sister, during the lifetime of his divorced wife, as if his divorced wife were dead. Not doubt the same rule would apply to other relationships mentioned in secs. 2 and 3 of R.S.C. 1952 c. 176. In British Columbia, the Court has held that a man and his divorced wife's sister are still within the prohibited degrees, and the same would probably be held in respect of the other relationship mentioned in those sections. It is not clear what rule will be followed in other provinces.

6. *Solemnization*

(a) Except in Quebec, it is *probable* that so much of Lord Hardwicke's Act, 1735, as requires a marriage to be solemnized in the presence of an authorized (or in some provinces, apparently authorized) officiant, other than one of the parties, and of two other witnesses, is in effect *proprio*

vigore, and that a purported "common law marriage" *per verba de praesenti*, without that minimum formality, is null and void *ab initio* and *ipso jure*. The rule in Ontario seems clear. Otherwise, procedures and formalities are primarily governed by provincial pre- or post-confederation statutes of the province where solemnization occurs. In our theory, the *lex loci celebrationis* governs formalities (solemnization), and these include preliminary matters such as consent of parents, when required, medical examination where demanded and licence or banns, as well as qualification and civil authority of the officiant, witnesses, and time and place of solemnization, as well as the ceremony, registration, and so on. The law of each province determines not only the required procedure but also its effect, i.e., whether a marriage is valid if some prescribed formality has been omitted or improperly carried out. E.g. in Ontario, as long as one party in good faith believes he or she is entering into a valid marriage and that the officiant is qualified, a marriage ceremony in the presence of a purported officiant and two other witnesses is valid in point of formalities, at least if the parties cohabit afterwards. Other provinces have different rules, and, in some, non-compliance with certain formalities leads to nullity. In Quebec, it appears that want of consent of a parent or other authorized person deprives a person under 21 of capacity to marry. Hence, a marriage of a person under that age domiciled in Quebec, celebrated out of the province, without consent, is voidable.

(b) A post-confederation provincial statute may fix a minimum age for obtaining a licence to marry and may make marriage without a licence or under a licence obtained by fraud or perjury invalid. In that way, a minimum age for marriages celebrated within the province may be set. The parties may, however, marry in some place outside the province where these rules do not apply and there is no similar local rule. If so, (unless a party domiciled in Quebec is below the minimum age set by the Civil Code), the marriage is valid in respect of age. A post-confederation provincial statute purporting to create incapacity to marry below a given age is invalid.

7. *Void and voidable marriages*

(Note—this distinction seems to be unknown to the law of Quebec by which all invalid marriages appear to be voidable in our use of the term.)

(a) A "void marriage" (null and void *ab initio* and *ipso jure*) can for most purposes be treated by anybody, one of the parties or third person, as never having occurred, without any legislative or judicial act. A court may declare it to be null and void, either in annulment proceedings or in other civil or ciminal litigation in which its validity is called in question, but no annulment is required to set it aside.

(b) A "voidable" marriage is one which must be treated by the parties and everybody else as valid until it is annulled by a competent court, and then, except in N.S., N.B. and P.E.I., it must be treated for most purposes as if it had never occurred. In these three provinces, the court may or may not make annulment retroactive; if not made retroactive, the so-called annulment resembles a divorce.

(c) Marriages invalid for impotence (incapacity to consummate) are voidable throughout Canada. (Mere non-consummation or even wilful refusal to consummate are not grounds of nullity.). Marriages within the prohibited degrees appear to be voidable in Nfld., N.S. N.B. and P.E.I. Elsewhere in Canada, they are void. Other defects are generally regarded as rendering marriages void. There is some uncertainty with respect to the consequences of coercion, fraud or mistake. Where one party to a marriage is impotent, the other may "approbate" the marriage by affirmatively deciding to treat it

as valid. There is some suggestion that a similar rule might apply where the defect is coercion, fraud or error, but the current view appears to be that the marriage in such a case is simply void. Lapse of a long time or what is called "insincerity" are described as bars to annulment of voidable marriages, but the real bar appears to be "approbation". A voidable marriage may not be questioned after the death of one of the parties. It is not clear whether one can be attacked by any third person during the lifetime of both. The general opinion is to the effect that only a party to the marriage may question it for impotence. A void marriage may be questioned by any person who has an interest, such as being a party to a second ceremony involving a party to the first, or a claim to property, and so on, in showing the marriage to be invalid.

8. *Jurisdiction of Courts*

(a) Superior Courts of all provinces and territories have jurisdiction to "annul" marriages or declare marriages void, where the parties in each case are subject to the jurisdiction of the court.

(b) The domicile of either party within the province or territory is generally regarded as enough to support jurisdiction, where the marriage is alleged to be void. Where it is attacked as voidable, the domicile of the "husband" within the jurisdiction is enough.

(c) The residence of the respondent within the jurisdiction appears to be enough for this purpose.

(d) Perhaps, celebration of the marriage within the jurisdiction will be enough in some cases—at any rate, in B.C.

9. *Recognition of foreign judgments*

Canadian courts, in general, recognize foreign annulments where foreign court exercised jurisdiction on a basis on which a Canadian court would do so, and refuse to recognize other foreign judgments in this area.

10. Alimony, maintenance, custody of children and judicial separation, are generally dealt with under provincial laws.

11. The Committee will, of course, understand that what is commonly called a "common law" marriage is not a marriage at all, in substance, form or intent. It is simply concubinage, often but not necessarily adulterous. The numbers of such unions is uncertain, but is undoubtedly large.

12. A considerable number of "limping marriages" exist, as the result of the practice of slipping across the border to Idaho, Nevada or Alabama or a Mexican state, and going through the formality of a quick and easy "divorce" and "remarriage", after complying with the easy residential rules of the foreign state. Since the parties to these junkets do not, as a rule, give up domicile in Canada, the new unions, while valid where celebrated and sometimes throughout the United States, are usually invalid in Canada. In some cases, the crime of bigamy is committed, although few people are prosecuted for it. These people do not wish to live in concubinage or adultery. They wish to be married to their new partners and to continue to be Canadians. They seek "respectability" and are usually acknowledged in Canadian society as "respectable". Their unions are regarded by their neighbours as marital, or at least "quasimarital". It is not easy to devise a formula that will make their positions regular unless all control over marriage is surrendered. A national divorce law will, however, reduce the number of persons who believe themselves to be obliged to seek relief from intolerable situations in this irregular fashion.

APPENDIX "64"

Submission to the Special Joint Committee of the Senate and House of Commons on Divorce

by

Professor H. R. Stuart Ryan, Faculty of Law,
Queen's University, Kingston, Ontario.

Suggested Basis for a Canadian Statute Governing Marriage

1. *Definition*

(1) Marriage is the consensual union of one man and one woman, as husband and wife, to the exclusion of all others, for mutual fellowship, support and comfort, for sexual relations, and for the procreation, if it may be, and nurture of children.

(2) At the time of inception, and until legal termination, marriage is potentially a lifelong union. A condition that marriage shall be for a trial period or shall last for a certain time or until the happening of a certain event, or shall be terminable on consent, is void, but a marriage entered into upon such a condition is valid. A marriage may, however, be terminated by dissolution according to the law properly applicable thereto at the time of dissolution.

(3) Marriage is effected by consent but is completed by consummation, subject to the following provisions. Consummation is effected by sexual intercourse which for this purpose is completed by penetration of the female sexual organ by the male sexual organ, with or without the employment of a contraceptive device or agency, and with or without the emission of semen.

(4) A marriage may be entered into upon a condition restricting or providing against sexual intercourse or the procreation of children.

2. *Capacity to Marry*

The following provisions apply to all persons who by reason of domicile in Canada are subject to the law of Canada in respect of capacity to marry and to all persons who go through ceremonies of marriage in Canada.

(1) A person under the age of 16 years is incapable of marrying.

(2) A person who is not capable of consummating a marriage is incapable of marrying. Incapacity for this purpose may be physical or psychological and may be general or confined to with reference to an individual.

(3) A person who by reason of mental defect or disease, alcoholic intoxication or the effect of a drug is substantially incapable at the time of the ceremony of understanding the nature of the ceremony, or the nature of marriage and the mutual rights and obligations of the parties, is incapable of marrying.

(4) A person who is a party to a marriage or has gone through a ceremony of marriage with a person still living is incapable of marrying unless the former marriage, if valid, has been legally terminated by dissolution, or, if invalid has been legally annulled or declared to be null and void.

3. *Forbidden Marriages*

The following provisions apply to all persons who by reason of Canadian domicile are subject to the law of Canada in respect to marriage and to all persons who go through ceremonies of marriage in Canada.

(1) Marriages between persons related in the following blood relationships with each other, in whole blood or half blood, whether legitimate or illegitimate (or natural), and in the following relationships by marriage with each other, respectively, are prohibited:

— Parent and child
— Step-parent and step-child
— Parent-in-law and child-in-law
— Grandparent and grandchild
— Grandparent and grandchild's wife or husband
— Grandchild and grandparent's wife or husband
— Brother and sister, by blood
— Uncle or aunt and niece or nephew, by blood

(2) No other relationships create or constitute impediments to marriage of persons who by reason of domicile are subject to the law of Canada.

(3) Nothing herein contained shall validate a marriage of a person by whose personal law the marriage is forbidden by reason of kindred or affinity.

4. *Consent*

(1) The contract of marriage requires the free and voluntary consent of the parties to enter into the union described in section 1, based upon adequate understanding by each of them of the nature of the contract.

(2) Consent to marry is not present where:—

(a) One of the parties is at the time of the contract of marriage incapable by reason of mental defect, mental desease, alcoholic intoxication or the influence of a drug incapable of having the necessary understanding or giving the necessary consent.

(b) One of the parties has been induced to consent by coercion or by fear.

(c) One of the parties is at the time of the contract of marriage mistaken with respect of the nature of the contract or of the union, or with respect to the identity of the other party.

(d) One of the parties is at the time of the contract of marriage deceived by misrepresentation or concealment of facts seriously detrimental to the establishment of the contract, including among other things misrepresentation or concealment of:—

(i) Pregnancy, except as a result of intercourse between the parties.
(ii) Venereal disease, except as a result of such intercourse.
(iii) Addiction to drugs or alcohol.
(iv) Prostitution
(v) Addiction to homosexual practice, sadistic conduct or other abnormal practice endangering the life or health of the other party.

(e) The marriage is intended to be a sham or mere form.

(f) Consent is given subject to a condition precedent relating to a grave matter, if the condition is not satisfied

(3) A party coerced, mistaken, deceived or otherwise imposed upon by an act referred to in subsection (2) paragraphs (b), (c), (d) or (f), may by an affirmative act of will approbate the marriage and continue to cohabit with the other party when free to cease cohabitation after being freed from coercion or fear or after learning of the mistake, deception, concealment or other circumstance constituting the defect. What constitutes approbation is a question of fact in each case. The effect of approbation is to validate the marriage.

5. *Proceedings with respect to validity or nullity of marriage*

(1) The following proceedings may be brought under this Act in respect of a marriage or purported marriage:

(a) An action for declaration of its validity,

(b) An action for declaration of its nullity,

(c) An action for annulment of an otherwise valid marriage which has not been consummated within a reasonable time after its solemnization.

(2) (a) Where the alleged defect in a marriage relates to incapacity to marry of the prohibited degrees, an action under subsection (1), paragraph (a) or (b), may be brought by a party to the marriage against the other party, or by another person who has a legal interest that is dependent on the validity or nullity of the marriage.

(b) Where the action is brought by a person who is not a party to the marriage, the parties thereto or the survivor of them shall be made defendants or a defendant but shall not be ordered to pay costs.

(c) In cases not mentioned in paragraph (a), an action under subsection (1) may be brought by a party to the marriage against the other party.

(d) Where the defect relates to consent, the action shall be brought within one year after solemnization of the marriage.

6. (1) An application for declaration of presumption of death of an absent party to a marriage may be made by the other party thereto, where:—

(a) The absentee is missing and has been continuously absent for at least seven years next preceding the application and has not been heard of or from during the period of absence by the applicant and by other persons with whom the absentee would probably have been in communication if the absentee were alive, or

(b) The absentee has been reported missing and presumed dead by an armed or other government service of which the absentee was a member at the time of commencement of the period of absence, or

(c) The absentee has disappeared and has remained absent in circumstances which make it probable that the absentee is dead.

(2) Notice of the application shall be given by advertisement or otherwise as directed by the court, unless notice is dispensed with by the court as unnecessary in the circumstances.

(3) On being satisfied that death of the absentee is the most probable explanation of the circumstances, the court shall make a declaration of presumption of death of the absentee.

(4) On such declaration being made the other party to the marriage may marry or otherwise act as if death of the absentee had been conclusively proved. If the absentee is alive at the time of the making of the declaration, the marriage is dissolved by the declaration.

7. *Jurisdiction of Courts*

(1) An action under section 5 may be brought in a superior, territorial, county or district court in any province or territory, if:—

(a) Either party to the marriage is, or would be if unmarried and of full age, domiciled within the province or territory, or

(b) The defendant resides in the province or territory, or

(c) The defendant, being domiciled in Canada, appears and recognizes the jurisdiction of the court.

(2) An application under section 6 may be brought in a provincial, territorial, county or district court in the province or territory in which the applicant resides.

8. *Incidental Powers of the Court*

The court in which an action under section 5 is brought may make provision for the maintenance of a female partner to a marriage or purported marriage, by way of settlement of property, alimony or maintenance, and for the custody and maintenance of children, as could be made in or in conjunction with an action for the dissolution of marriage.

First Session—Twenty-seventh Parliament
1966-67

PROCEEDINGS OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON

DIVORCE

No. 19

TUESDAY, FEBRUARY 28, 1967

Joint Chairmen

The Honourable A. W. Roebuck, Q.C.

and

A. J. P. Cameron, Q.C., M.P.

WITNESS:

Howard Hilton Spellman, Attorney and Counsellor at Law, New York, U.S.A.

APPENDICES:

65.—Committee report of the Special Committee on Matrimonial Law—(*Statement of Howard Hilton Spellman, Chairman, before the New York State Joint Legislative Committee on Matrimonial and Family Law*).

66.—Chapter 254 of the Laws of 1966.—(*Domestic Relations—Matrimonial Actions*) (State of New York, U.S.A.)

67.—Report on Recommended Amendments to the Divorce Reform Law of 1966 (*Chapter 254 of the Laws of 1966*). (State of New York, U.S.A.)

68.—Proposed Act to amend *Chapter 254 of the Laws of 1966*. (State of New York, U.S.A.)

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1967

First Session—Twenty-seventh Parliament
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ROGER DUHAMEL, F.R.S.C.
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MEMBERS OF THE
SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS
ON DIVORCE

FOR THE SENATE

Hon. A. W. Roebuck, Q.C., Joint Chairman

The Honourable Senators

Aseltine	Connolly (*Halifax North*)	Flynn
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A. J. P. Cameron, Q.C. (*High Park*), Joint Chairman

Members of the House of Commons

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Cantin	Langlois (*Mégantic*)	Stanbury
Choquette	MacEwan	Trudeau
Chrétien	Mandziuk	Wahn
Fairweather	McCleave	Woolliams—(24).

(Quorum 7)

ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the House of Commons:

March 15, 1966:

"On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—that a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee."

"By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19, an Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bil C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bills be referred to the Joint Committee of the Senate and the House of Commons on Divorce".

March 16, 1966:

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce".

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce."

26035—1½

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Goyer, Honey, Laflamme, Langlois (*Mégantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams."

February 24, 1967:

By unanimous consent, it was ordered—That the subject-matter of Bill C-264, Divorce Act 1967, be referred to the Special Joint Committee on Divorce.

LÉON-J. RAYMOND,
Clerk of the House of Commons

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate and the House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

March 29, 1966:

"With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into and

report upon divorce in Canada and the social and legal problems relating thereto, namely, the Honourable Senators Aseltine, Baird, Belisle, Bourget, Burchill, Connollv (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig, and Roebuck; and

That a message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—

Resolved in the affirmative."

May 10, 1966:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19 intituled: "An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief".

The question being put on the motion—

In amendment, the Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

J. F. MACNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

TUESDAY, February 28, 1967.

Pursuant to adjournment and notice, the Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3:30 p.m.

Present: *For the Senate*: The Honourable Senators Roebuck (*Joint Chairman*), Aseltine, Belisle, Burchill, Fergusson, Gershaw and Haig—7.

For the House of Commons: Messrs. Cameron (*High Park*) (*Joint Chairman*), Baldwin, MacEwan, McCleave, Peters, Ryan, Stanbury and Wahn—8.

In attendance: E. Russell Hopkins, Law Clerk and Parliamentary Counsel, and Peter J. King, Ph.D., Special Assistant.

The Following witness was heard:
Howard Hilton Spellman, Attorney and Counsellor at law, New York, U.S.A.

The Following are printed as Appendices:

65. Committee report of the Special Committee on Matrimonial Law—(*Statement of Howard Hilton Spellman, Chairman, before the New York State Joint Legislative Committee on Matrimonial and Family Law*).

66. Chapter 254 of the Laws of 1966—(*Domestic Relations-Matrimonial Actions*). (State of New York, U.S.A.).

67. Report on Recommended Amendments to the Divorce Reform Law of 1966 (*Chapter 254 of the Laws of 1966*). (State of New York, U.S.A.).

68. Proposed Act to amend (*Chapter 254 of the Laws of 1966*). (State of New York, U.S.A.).

At 5.10 p.m. the Committee adjourned until Thursday next, March 2, 1967 at 3:30 p.m.

Attest:

Patrick J. Savoie,
Clerk of the Committee.

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THE SENATE

SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

EVIDENCE

OTTAWA, Tuesday, February 28, 1967.

The Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3.30 p.m.

Co-Chairman Mr. CAMERON: The committee will come to order.

Senator HAIG: Mr. Chairman, before you commence the proceedings today, I wish to speak on behalf of all members of the committee in extending our very best wishes and congratulations to your co-chairman, Senator Roebuck.

MEMBERS OF THE COMMITTEE: Hear, hear.

Senator HAIG: He is entering his ninetieth year today. He seems to be as bright and as cheery as when I met him six or seven years ago. The reports he presents in the Senate and the work he does on the several committees certainly speak well for his health, vigour and vitality. We extend to you, sir, our heartiest congratulations on entering your ninetieth year.

MEMBERS OF THE COMMITTEE: Hear, hear.

Mr. MCCLEAVE: Mr. Chairman, before Senator Roebuck replies, the junior side of Parliament would also like to express its best wishes—although we are not supposed to refer to "the other place" by name, shape or deed. One of our members, Mr. Howard of Skeena, who has had a certain amount to say on Parliament Hill about the Senate, was good enough to extend our congratulations. Mr. Hellyer followed, and this was warmly echoed by all members of the House of Commons. I thought I would pass this message along to this particular meeting. I promise I will not sing "Happy Birthday To You," although I did show up at the senator's door earlier this morning to do so, but my voice was perhaps better then than it is now. Happy Birthday, senator!

Co-Chairman Senator ROEBUCK: I have a stock reply to anybody who asks me how I have got to be this old, and how I have kept such good health over the years, and it is always that it is because of the nice company I keep. That applies to this occasion as well as the others.

I thank you all for your good wishes. We have spent many an hour together. Everyone present has been with me for a long time on either the Standing Committee of the Senate on Divorce or on this Joint Committee of both Houses. We have never had any differences of opinion that we could not resolve, and it has all been very pleasant. I thank you all for your good wishes, your kindness and your friendship.

Co-Chairman Mr. CAMERON: Members of the committee, I really did not get an opportunity of saying anything. However, I do want to say that having known Senator Roebuck for a great many years I can endorse the sentiments that have been so ably expressed today. Indeed, I am deeply indebted to him in one respect. During a certain game of golf he explained to me the technique of properly putting the ball. The senator's instruction was: "Line up the ball with the cup, make your stroke, and do not lift your head until you hear the ball drop into the cup". I found that to be very, very effective.

I am, of course, indebted to him for many other things, and I join with you all in expressing my best wishes to Senator Roebuck on this very happy occasion.

Co-Chairman Senator ROEBUCK: Thank you. I have a short announcement to make, if we can come back to earth.

I want to tell you that the presence of our distinguished witness at this session of the committee was arranged by Mr. Jarvis, the secretary of the Benchers of the Law Society of Upper Canada. I am a Bencher. I asked him if he could put me in touch with somebody who could bring us the news from the state of New York. I need go no further in that respect, because we have somebody present who can tell us what that news is. We have had a good deal of correspondence, and the result is that we have before us today a very distinguished member of the bar of the State of New York who will tell us the history of what has happened down there.

I asked Mr. Jarvis to be present this afternoon. I saw the Treasurer of the Law Society—he is, by the way, the president although he is called the Treasurer—and asked that Mr. Jarvis be given freedom to come. That was agreed on. Mr. Jarvis has written me, as one of the Benchers, saying that he has been instructed to summon a special meeting of Convocation to be held on Tuesday, February 28, 1967, at the hour of 10:30 in the forenoon, and consequently he is not here today.

However, I should like to acknowledge the assistance I have received from Mr. Jarvis, and express my thanks to him and to the Law Society for their co-operation.

Co-Chairman Mr. CAMERON: Members of the committee, it is now my pleasure and honour to introduce our witness today in the person of Mr. Howard Hilton Spellman. He is an attorney and counselor at law of the State of New York since November, 1922, and has actively practised his profession in New York City from that date to the present time. He was graduated from Yale College in 1920 with the degree of Bachelor of Arts, and from Columbia University Law School in 1922 with the degree of Bachelor of Laws.

He has served as an assistant district attorney of New York County, as an elected member of the New York City Council, and as special counsel to the Governor of the State of New York.

He is the author of eight standard legal text books, including *Successful Management of Matrimonial Cases.*

He has been active in the divorce reform effort since 1925, and has been referred to in the press as "the father of divorce reform."

Mr. Spellman is presently chairman of the Special Committee on Matrimonial Law of the Association of the Bar of the City of New York, through the efforts of which Committee, to a major degree, the New York State Divorce Reform Law of 1966 was enacted.

He was appointed by the New York State Legislature in 1966 as a member of the Council to assist the Joint Legislative Committee on Matrimonial Laws of the Senate and Assembly of the State of New York.

He has served on every committee of the Association of the Bar of the City of New York concerned with matrimonial law for the last three decades, including the Committee on the Domestic Relations Court, the Committee on the Family Court and the Special Committee on Divorce Reform (a predecessor to the existing Special committee on Matrimonial Law.) He has been a member of the board of directors of the New York County Lawyers Association (the largest local bar association in the United States) and, while serving as such director, has been liaison officer from the board of directors to the Special Committee on Matrimonial Law of the New York County Lawyers Association.

Mr. Spellman was chairman of the Joint Committee of the Association of the Bar of the City of New York and, the Community Service Society of New York in the preparation of the Family Court Act of the State of New York and, subsequently, of the rules of that newly-created court.

Members of the committee, I have great pleasure in introducing to you Howard Hilton Spellman, our guest this afternoon.

Mr. Howard Hilton Spellman, Attorney and Counselor at Law, New York City, U.S.A.: Mr. Chairman, in reading the Minutes—in New York we would call them the transcript—of your earlier hearings I noticed that the first witness said that as he was the lead-off witness it was his duty only to get on base; he did not have any other function. Now, that is a reference to the national pastime in the United States, and something at which you people so often beat us. You are now nearing the end of your inquiry and, judging from your previous hearings, I would think that your bases are full right now. I am somewhat in the position of a person, such as a player from one of the southern minor leagues, who is brought up in the hope that he will make a sacrifice hit and thus bring someone else in. I hope the sacrifice will not be entirely mine.

I have prepared no brief because I am not here to urge that you do anything. If I may say so, with great respect, having regard to the fact that I have no vote, you, acting in common with our national legislators in the United States, would not care what I urged you to do anyway. What I hope to do is to lay myself open to questions so that you may get from me anything you might wish to know about the law in the United States, and, particularly, about the most recent study of matrimonial law in the United States that we went through in the State of New York, and through which you are going today.

My I make a few things clear? In the United States the federal government has absolutely no jurisdiction over divorce. Under our constitution there is reserved to the fifty individual states all powers that are not by our constitution specifically entrusted to the national government.

Now, the power with respect to divorce, separation and annulment has never been specifically entrusted to our national government; so that (a) we have no power to grant divorces in the national government, and (b) no federal court can do anything about changing status in matrimonial matter. A federal court in the United States, and by that I mean a United States court, cannot even decide whether it will recognize a foreign divorce. Just mention divorce, separation or annulment in a federal court, and the judge immediately lets you know he is not appointed by the President of the United States for the purpose of considering such status matters, but is bound by the determination of the state courts.

Co-Chairman Senator ROEBUCK: And is there no appeal from the state courts?

Mr. SPELLMAN: There are appeals within the state courts, and there could be an appeal to the Supreme Court of the United States by an individual to protect his personal constitutional rights. We do not require, for example, denial under oath of an allegation of adultery made in a complaint. If we struck out an answer because it was not under oath the matter could go to a federal court. Not in connection with the matrimonial matter, itself, but in connection with the requirement that a defendant was being penalized for refusing to incriminate himself.

The next thing I should like to tell you here, because I want us to speak, so far as it is within my power in a common language, there is no parliamentary divorce in the United States, none whatsoever. No state legislative body can exercise any of the powers that your senators now have had since the 1963 act. The legislatures have no such powers.

Finally, I think I should tell you that we have only three words in the United States for a matrimonial decree, namely: "divorce," which you call divorce; "separation," which you sometimes call limited divorce; and "annulment," which you sometimes call nullification and sometimes annulment.

We do have two other ways in which matrimonial situations can be dealt with. One is the so-called Enoch Arden decree, where a man has been absent for a certain number

of years and the marriage may be declared for all practical purposes at an end. In answer to one of the questions that was put to this committee at an earlier hearing, if such a declaration is made and the absent party shows up later, it does not do him any good, because he is not declared civilly dead; the reciprocal marriage rights have been dissolved because he has been missing, say five or seven years, but this is not a declaration that he is presumed dead.

Another thing we have is a series of local courts which take care of incidents of the marriage without having anything to do with the status. These are, for example, the family court in the State of New York, the special family court in the State of California, and a few others. They do not pass on the status of the marriage, they have nothing to do with divorce, separation or annulment, but they do pass on certain incidents that come to light. No one is seeking to change the status. For example, non-support not connected with a matrimonial case.

When I speak of a matrimonial case, forgive me if I repeat, I am speaking of divorce, separation and annulment.

Co-Chairman Senator ROEBUCK: May I ask in passing if the Enoch Arden law is in all states of the union?

Mr. SPELLMAN: No, it is in over two-thirds of the states. In some of the states it is regarded as ground for annulment, but in two-thirds as dissolution of the marriage on the ground of permanent disappearance. That is the best way I can state it. It is not abandonment, not divorce, it is simply that this man disappeared on a certain day and after a certain number of years his wife believes he is dead, and then the court can declare that, as far as the law is concerned, he does not exist any more. It is usually sufficient for the wife to believe that he is dead but even if she does not, he does not exist any more in law, provided she makes proof of diligent inquiry satisfactory to the court.

Of course, we have other things. For example, if a man is sentenced to life imprisonment in New York, or in the old days to capital punishment, he was simply dead from that moment. In fact, one of our courts once held that where a wife had remarried on the theory that the husband was dead because he was sentenced to death, even though the case was reversed, and the wife had remarried, the man was still "dead." I thought she was in quite a hurry, because the appeal only took four months. However, that is a freak case, and I will not pursue that line further.

Now, you want to hear about the New York experience. First of all, until September 1st of this year, 1967, adultery is the only ground for divorce in the State of New York. I think it should be told to you that this happened purely by accident. Originally, New York, as a colony, and somewhat later as a state, had what you have, that is, divorce by legislature, and they introduced special bills of divorce, or bills of divorcement, and the legislature used to pass on it, and that is the way a person got a divorce.

Approximately 170 odd years ago we had a politician in New York, Alexander Hamilton, who was a member of the New York State Assembly. All of a sudden a number of ladies in New York—in those days they used to do this through a trustee—petitioned the New York State Assembly for a divorce on the ground that their husbands had committed adultery. Well, this was not very good politically for Hamilton, because a lot of these fellows were concerned with their status as politicians. So he put through a bill that said that where the ground for divorce is adultery the courts should have the power to try that case. Whether the ladies got the divorces is unreported history. However, Hamilton was off the hook on that account. But after that the New York State legislature still granted divorces on many other grounds, and, until about 1840, this situation continued.

By the second or third decade of the 19th century somebody discovered in New York that certain political figures were stealing money from the New York treasury, and when they were stealing the money they would get what they called special bills put

through the legislature—a bill to pay Mr. Jones for damage, or something of that kind, and the treasurer of the state would pay him the money, and that was fine. The law-makers decided to do away with that abuse and passed a statute, which is now an amendment to our New York constitution, that thereafter no special bills could be passed by the legislature. A divorce, as I have told you, was a special bill. Therefore, one could no longer get a divorce through the legislature. As a result of that, since the only ground on which courts could grant a divorce was adultery, and since the legislature now could not grant one at all, adultery became the only ground for divorce in New York. We were the only State in the Union with this medieval limitation.

Now, we had a lot of trouble with this. First of all, legislative committees were appointed from time to time, but it was very carefully worked out that they would never have any power to inquire into substantive law. All they could inquire into was procedure at law. All our New York divorce and separation statutes were contained in what was then called the Civil Practice Act, a procedural statute. Of course, these committees would meet, but if a matter of substantive law came up, they said, "This is not procedural," and they never did anything about it. They passed a lot of laws which had nothing to do with the subject we are talking about.

Finally, fortunately, two years ago, we were able to put a bill through our legislature for a joint legislative committee to inquire into substantive law as well as procedural law, and under the brilliant and aggressive chairmanship of Senator Jerome Wilson, this committee went to work in New York and did what you are now doing and held hearings all over the state.

It was interesting to me, as I read your proceedings, to see how closely your hearings paralleled the ones in New York. It was interesting, too, that there was a big discussion in New York about a church opposition to increased divorce. However, interestingly enough, when testimony was taken, no representative of any church—and there were many representatives of the Catholic church who testified—testified that the existing divorce laws were enough to take care of the social problems we had.

When these hearings were held before the New York State legislature—and I happened to be appointed by the legislature to assist that committee as an adviser—I testified on the final day on recommendations of our bar association. A copy of my testimony has been circulated to the members of your committee as the first report of our committee.

Now, all sorts of tricks were tried to stop us from getting a real divorce reform bill through the legislature. One of the things the opposition did say was that everybody was in favour of divorce reform but they were in favour of different kinds of divorce reform. As a result there were 30 bills in the Senate and 20 in the Assembly, and there was never a majority for one of them. Everyone wanted his own bill. Typically, one said "I am in favour of divorce reform and I think it is horrible that we have only one ground at present for divorce, but that one in paragraph 9 is one that, if you are smart enough, you can see makes no difference between the two different ways, so I cannot vote for that one."

Finally, the leaders of the legislature put up a bill—the leaders of the Senate and the leaders of the Assembly—and this was a really bad one. They used to say about monthly magazines that you could take two magazines and combine the best parts of each. But the leaders in this case took 50 bills and combined the worst features of each. I am not even suggesting it was English, but it would not work. There were a multitude grounds for divorce but the procedures were utterly unworkable.

A group of us got together and said: "Either you mean this or you do not. You have been wasting time, we know, for 40 years." We finally put through a draft of a bill, that everybody agreed to. By everybody, I mean the leaders agreed to it. Between the two houses of the legislature we had about 30 sponsors. Even at the last minute we almost lost out, because one group in the Assembly wanted one special bill. If the Senate passed one bill and the Assembly passed another bill with a miniscule difference

in it, it would not be possible to get the job completed, because the legislature was going to adjourn in two days.

However, a consensus bill was finally passed.

We knew when that bill passed that there were some things in it that just would not work. They had a conciliation procedure in it, and I shall speak about that in a few minutes, with your permission. That procedure was so complicated that you never could get a lawyer to take a matrimonial case, because you could spend a year going through the conciliation proceedings, and while you were doing so everybody would rush to Reno if they could spare the 42 days, or to Mexico if they had the $500 and get a divorce.

When the bill passed, we knew it was not a completely workable bill but, as often happens when you make a general law codification a 67-page statute or a 30-page statute, you do not make it effective until later, so that you can work in between to straighten it out. We believe we have done that.

You also have had circulated to you—if you will forgive me for referring to my own work—our bar association special committee report on the bill as passed. That is the one I am talking about. It suggests the reform that we want now.

I hope you will print this as an appendix to the proceedings of the committee. Whether or not you do so, I have brought to you the actual law passed last year, which I think you might want to have. You will notice in looking at it that there are certain things crossed out and certain other things in italics. This is the way we print amendments to laws in the State of New York. If a thing is crossed out, it is part of an old statute. If it is in italics, it has been added. This is the bill as passed last year.

I should like also to make public for the first time—and I got permission last night from our legislative committee, through its chairman, Senator Delwin J. Niles, to do this—something that even many of our legislators do not know about, because this was "dropped into the box" last night. This is the new bill introduced, as of this morning, in the New York State Legislature, which we hope will clear up the troubles in the existing statute. May I have permission to have this printed also as an appendix?

I think this will show to you how we had to make our way out of our difficulties. I am not saying that you should do the same thing. I do not think we should suggest legislative methods to you. But I feel this illustrates the things we had to overcome.

I noticed—and I suppose this is what you want from me—I noticed you had some inquiry and frankly some exaggeration about what the grounds for divorce are in the United States of America. One of your witnesses said you do not want to be like "our neighbours, the great Republic to the south," where they have 40 grounds for divorce". Of course, with all due respect, he just did not know what he was talking about. There are 40 or even 50 grounds for divorce, but we have 50 separate jurisdictions and no state has more than six or seven grounds. The reason there are all these various grounds is because some states express the same ground one way and other states express it in another way. For example, New York State now provides for divorce on the ground of "cruelty such as will impair the health of a person, mentally or physically." Other states call it "intolerable cruelty". Other states call it something else.

Some states speak of leaving the husband by a wife, or vice versa, as "abandonment". Other states call it "desertion". It is still the same thing.

Incidentally, I think this may interest you. On pages 19 through 22 of your proceedings, when Mr. Hopkins was testifying, he was asked whether the law of England has been largely incorporated into your, you might say, domestic relations law; and he was asked about English decisions. He gave a very excellent summary of the English law on various subjects—when it is "cruelty", when it is "desertion".

When I read that through, I realized immediately that I did not have to bring to you any American judicial citations on the subject, because they are substantially the same.

There seems to be less decisional law here on the subject. There does not seem to be much difference.

Co-Chairman Senator ROEBUCK: May I interrupt, to tell you that Mr. Hopkins is sitting on your right?

Mr. E. Russell Hopkins, Senate Law Clerk and Parliameentary Counsel: I would like to thank you for the unsolicited testimonial.

Mr. SPELLMAN: In any event, the decisions on the many statutes are about the same to a great extent in all jurisdictions. For example, a person is not guilty of actionable cruelty because he reads a newspaper in the morning instead of listening to his wife tell how the dry cleaning machine did not work the night before. Even if he swats her once or twice, provided he does not hurt her too much, that is not a ground for divorce.

Even looking at the Scotch decisions, which I thought might be a little different, I found that the decisions were substantially the same thing in regard to the marital relationship. An ordinary matrimonial squabble is something like an industrial hazard—she takes on an industrial hazard by being married—and this is not enough to create a ground for divorce.

Likewise, in regard to desertion, he gets up one morning and has an argument with his wife and loses his temper—he does not like her mother, anyhow—he goes off and stays in a hotel. The next day he is sorry and he comes back. That is not desertion.

As I have stated, the reason it is said there are so many grounds is because we call it by different names.

You are lucky here because you have one Parliament to do the deciding, which is nationally, if you are going to do it; so you are only going to call one thing one thing.

May I give you this—and I do not expect every one to sit and read this chart now—this is a chart which shows you the grounds for matrimonial action in every state in the Union. On the top, there is every ground for divorce, separation or annulment. Here you can see duplications. For instance, you find one ground, "physical incapacity" to complete the marital act. You find another ground, "malformation" so that one cannot do it. The same thing is merely put differently in different places. They call these things by different names in different states.

On the chart, the grounds are followed out opposite each state, and in that way you will find the remedies—whether a given thing is a ground for annulment, divorce, separation, or more than one remedy.

I would like for your information to offer you this. Whether you care to have it printed or not, I do not know. I could not have it reproduced except by making a large chart. It is extremely valuable. It is only accurate up through 1965. I do not think it makes much difference to you whether it is technically accurate as of the present second, as you want to see what is the "grasp" of language that we use for divorce, annulment, separation.

Another thing which I think may be of interest to you deals with one of our difficulties in the United States. That is to find out what the law is in a given jurisdiction. I know this sounds peculiar. One calls the Secretary of State of a given state—I did, when I was writing one of my books—and asking "Would you please be good enough to give me the numbers of your statutes, and I will look them up here." In some cases they replied that they did not know what we were talking about. Some wrote and said: "This is our law, but there are others we have not used for years." That is the difficulty in some jurisdictions.

I have one other thing to mention and then I shall have finished. There is no common law of divorce or separation in the United States of America. None. Although our statutes often provide, with regard, for example, for some right to jury trial, that

that right shall be as it existed on such and such a date in 1787, there is no such a thing about divorce or separation. It is all statutory with two exceptions. One of them is in the State of Louisiana, where they follow the French law to a certain extent. There are certain rights for the division of community property which are taken care of as a matter of, you might say, "common law-equity," if that is not a contradiction in terms. In a few states they have somewhat similar provisions, but that is the only community property state we have.

However, I did not mention annulment when I said there was no common law ground. Annulment based on fraud is a ground for vitiating any contract, whether it is a marriage contract or any other contract, and so, if you have an actionable fraud, that can give rise to an annulment. Let me give you an example. One spouse makes the representation in advance of marriage that such and such is the fact. The other spouse marries on that representation but discovers that it is false—usually this would be shortly after marriage, but it might be at the end of seven years, when the "seven year itch" sets in. At any rate, the one discovering the fraud leaves the other. Those are the elements of simple fraud. In some states we still do have what you might call "common law-equity" grounds for annulment of marriage; otherwise it is entirely statutory.

I am going to cover now a rather tender subject, and I hope in my saying this you will understand that I am not expressing any opinion. I have one, but I am not expressing it.

We ordinarily assume that a divorce is given to a wronged spouse against one who commits a wrong. I suppose the most common thing that exists in all the fifty states of this United States is adultery. I do not mean that adultery exists in every one of the fifty, but what I mean is that it is a ground for divorce in every one of the fifty. It is a classical injunction, practically a biblical injunction. If a woman is wronged by her husband committing adultery, she may sue for divorce. But for some years in certain jursidictions in Canada, a wife could not sue for divorce unless her husband actually kept his mistress in her house. That was the law here until 1833. I think I am right about the year. That was true for certain jursidictions here.

Aside from that, however, other grounds for divorce in the United States are cruelty, desertion, imprisonment over a period of time and, in some states, for example, addiction to narcotics and habitual drunkenness. These things are wrongs committed by wrongdoers, and the wronged spouse gets the divorce because of the wrong.

But I earnestly ask you to consider the case where there is not any wrongdoer in a marriage but the marriage just plain does not work. I am not talking about a couple of kids who get angry with each other and break up the marriage and the girl goes home to mother after two weeks. I am talking about people who, in good faith, have tried to make a marriage work. Perhaps you can explain the chemistry to me; I cannot explain it to you. It just does not work. These people are unhappy, miserable. The dissolution of such a marriage is what has been labelled divorce by consent.

For example, we have provided in New York now that where there is a separation judgment between the parties and that judgment goes on for three years and the parties live apart under this judgment—and we are about to reduce it to two years, in fact to a year and six months—they can be divorced at the suit of either party who has complied with the judgment.

Senator ASELTINE: You do not have that in New York now?

Mr. SPELLMAN: We have it now, and on September 1, 1967 it will be effective, and we hope it is going to be reduced to a year and six months. Now where there is a judgment of separation between the parties—and at the end it is going to be a separation of a year and a half—even the person who was the wrongdoer in the separation action may then get a divorce. The theory is that there is no sense in perpetuating a paper marriage when the marriage itself is dead.

We have got one other new ground: Where the parties have entered into a separation agreement in writing and have lived apart under that agreement for three

years either party may get a divorce, even though at the time the agreement was entered into, there was no wrongdoing or at least nothing was said about wrongdoing.

People have said this is divorce by consent, but what are the facts? I daresay you have had in Canada, just as we have had in New York—and we have taken testimony of this from judges—the situation where two people really want a divorce and so frame up a case. Until a short time ago there were no grounds in New York except adultery. So if two people really wanted to get out of their marriage because it was miserable, what did they do? They probably framed up a case of adultery.

One judge testified how embarrassed he was to hear these undefended cases, and that is where the curse always is, in the undefended cases. If a case is fought on both sides, you can be pretty sure you are going to get some resolution of the facts. At any rate, the judge in question, a man 83 years old, who had since he was 70 been staying on the bench by reason of a permissive statute, said, "Why is it that, in all the 50 years that I have tried divorce cases, the co-respondent was always a brunette with a pink nightgown. Why was she not just once a blonde with a blue nightgown?"

Then we had the phoney annulment cases. A woman would come in to court; she and her husband could not stand the marriage any more and she would say that he promised to give her a religious ceremony after they got married down at city hall. "He promised to give me a religious ceremony and after three years I found out that he was not going to do it." That was a fraud and the courts granted the annulment. Why? Because it was ridiculous to keep the marriage going.

Now, if you are going to have the type of divorce that I am talking about, you may remove, and I say this with the greatest of respect and from the depths of ignorance, you may remove some of the dishonesty in your own courts. And you cannot tell me that your judges and your parliamentary committees and now your Senate are not just as embarrassed about this sort of nonsense as the courts of New York were, because you must know that when you have all these hundreds of applications, particularly when they are accompanied by written separation agreements, that these people have it all worked out what they are going to do.

But in New York, and I think this will be of interest to you, to make sure that it is not a whim type of divorce we have provided for conciliation proceedings. No divorce may be granted in New York at all now unless the parties first go through a conciliation proceeding.

I think most of us agree that the term compulsory conciliation is nonsense. If two people do not want to reconcile they will not. But we make them at least once come to court and face each other. We have not seen it work out yet, because our statute is not in effect. But it is interesting to see how it has worked out in California and how it has worked out in Michigan. When these people come before what we call the conciliation bureau—that is a commissioner or councillor or a judge in some states—when they come before this officer of the court one element is removed. They may have wanted to get together but each one was too embarrassed to say he was the one who wanted to come back. I know this sounds funny.

Co-Chairman Senator ROEBUCK: Have you any law with regard to collusion as we have here?

Mr. SPELLMAN: May I come to that in a minute?

Co-Chairman Senator ROEBUCK: Yes.

Mr. SPELLMAN: It was found, if you did bring them to court, that the element of embarrassment was removed and, if you could do something with a marriage counsellor, you did it. And this has worked out in some states. How it will work in New York, I do not know.

It is fair to say that if you have these consensual divorces at least you ought to have some proceeding where the state can assure itself that this is not one of these paper marriages and paper divorces.

Now, coming to the question of defences. We have a statute in New York which we are going to repeal under this new bill, I hope. You have a copy of that before you. We have a statute in New York which makes equal guilt a ground for denying a divorce; it makes collusion a ground for denying a divorce or connivance or privity a ground for denying divorce. Since there are courts of equity handling these cases—and in the United States we have some distinction between law and equity—we do not think there is any need for collusion and connivance provisions, simply because a court will not grant a divorce as a matter of justice with such proof. But, on the other hand, the equal guilt theory and recrimination theory seemed to us wrong.

I am going to take what I hope is an extreme case. Let us assume a man is guilty of adultery constantly and the wife is guilty of adultery constantly. If you have the recrimination provision, the court says to them both: "You are so terrible, both of you, that we think you ought to continue to live together. We will not give you a divorce." Then, if you have a conciliation statute and if they go back together for the purpose of trying to reconcile but cannot work it out and if you also have a condonation statute at the same time then, the first time they retire together, they wipe out the ground for divorce. As one of our wits in New York said, it results in a situation where you have copulation at night and conciliation during the day. We hope to repeal that entire statute.

I would like to say one thing more, and then with your permission I would like to answer any questions that members may want to ask. Many people say we should hold marriages together because of the children. This is a standard statement—"We cannot break up this home because of the children." The studies that have been done, and I am not suggesting that they are the final almighty word, indicate that children are liable to fare less well in a disturbed home which is not a broken home than they are in a broken home where they are under the aegis of one parent with visitation rights in the other.

This leads to our most important point: If a separation agreement is going to be recognized—and we in the United States do not recognize an agreement whereby they agree to live apart, but if they are already living apart and file an agreement to settle custody and property rights, we give recognition to that and now allow it as basis for a divorce. Also in the United States, if children are involved, the court may say "I don't care what you agree about with regard to the children, this is what is going to happen." Because an agreement may give custody to a wife even if she is a drunk. So the court reserves the right to decide this matter. As far as the husband and wife are concerned they can agree on property rights. But this is something that should be seriously considered; this is a suggestion. If children are involved and if the parties have entered into a separation agreement, before the court makes its decree of divorce incorporating that separation agreement, it may be wise for the purposes of this case for the court to appoint a special guardian to inquire on behalf of the children how far that agreement is fair to them, because the childrens' lawyer was not around when it was being drawn up. We all know that you can get situations like this. A man may say "Look, I will give you $50 extra a week if you let me see the kids every second weekend." This is the man who has been so bad that the wife cannot live with him any more. And for the extra $50 she says "Sure, you can see them." Or you can have the situation where a man with a well-to-do wife will be told "Don't give me any alimony, but don't ever come to see the children. Put in the agreement that you can see them once every six months, but don't come to see them at all."

The suggestion has been made and I think it is probably worthy of your consideration that the rights of the children be guarded in any proceedings such as this. There is one other thing—and then at long last I shall have finished—divorce in the United States, as I told you, is a purely statutory proceeding with the exception of annulment on the ground of fraud. Now in the United States, and this is true in every state, the body which has the right to grant a divorce, separation or annulment—and when I say "body" it is always some court, usually the highest court of original

jurisdiction has the right to do this—they have the right to deal with all ancillary things, custody of children, rights of visitation, alimony. You divide alimony into two parts here, alimony before the trial and maintenance after that. To us it is alimony all the time. The court can consider the question of the support of the children, and where there is a dispute about who owns property, it can straighten the property rights out. We don't have any property division as such except in Louisiana.

I realize the quandary you are in, and, after reading the testimony given by some of the witnesses, it appears that nobody is certain what the power of the Senate actually is with regard to these ancillary things. I don't know what the law of attrition is in Canada. In any event it is absolutely necessary that whatever body is going to take care of the dissolution of marital situations, it is necessary that that body should have the right and the duty, I think, of disposing of these other things. You cannot provide that people should be divorced where there are young children without providing what is going to happen to the children, and you cannot do that unless you decide who is going to support them in some way that can be enforced. You cannot provide for any of these things under our system—and I imagine it is worse here with the possible exception of the power of the Senate—without having some statute saying so. There cannot be any doubt among the judges of various jurisdictions as to what powers they have. I don't say that out of any disrespect for your judges, because, heaven knows, coming from the United States, I would have no right to do so in view of the things that the Supreme Court has been doing in recent months. The story is told that recently the faculty of law at Harvard University asked that the course in constitutional law should be renamed a course in current events. If you are going to give the power to act in this respect, give them the whole power and do not have this division which leads to the unhappy family with the happy ex-husband and wife.

Co-Chairman Mr. CAMERON: Before we start the questioning period, if there is no objection I am going to ask Mr. Hopkins to ask any questions he may wish of Mr. Spellman. I also have Mr. Ryan's name down.

Mr. RYAN: After Mr. Hopkins.

LAW CLERK OF THE SENATE: I have some questions to ask, but please go ahead and I shall ask them later.

Co-Chairman Mr. CAMERON: We will regard you as an ordinary member, Mr. Hopkins, and you can ask any question you wish.

Mr. RYAN: When you made the statement that separation agreements could not be entered into whereby the people would agree to live apart—is this true of all the states in the union?

Mr. SPELLMAN: No, that is not true of all the states. In Connecticut and Massachusetts and, I think, in Michigan—I am not sure of that—they have not held illegal an agreement that the parties shall live separate and apart. In most of the states they would say it is illegal if you put it that they shall live apart, but you can say they may live apart, or if they have have lived apart for a certain time it would be legal. An agreement to live apart in the future like a written agreement to get a divorce is absolutely illegal in all states.

Mr. RYAN: What about a trial separation?

Mr. SPELLMAN: It could be in some states for example, we have a provision in section 200 of the New York Domestic Relations Laws which says that a party may sue the other for separation from bed and board either permanently or for a limited time. We don't have it very much in actual fact because the separation agreements ordinarily terminate in some sort of court proceedings.

Mr. RYAN: On the question of the failure in Canada to be able to lump together the divorce action with support for the children and alimony—this, of course, is due to the divided jurisdiction between the federal Government and the provinces. I wonder if

you don't have the same problem in the United States between the federal Government and the states?

Mr. SPELLMAN: We have no problem as far as the federal Government is concerned because it has no power in divorce matters. But they can do this: If I live in New York and I go to Nevada to get a divorce, presumably under our full faith and credit clause in our federal Constitution, New York would have to give credence to that Nevada decree even though it is based on a ground not recognized in New York. However, New York could assail it on the ground that the person who went to Nevada did not have a bona fide residence in Nevada.

There the federal courts come into it, because the United States Supreme Court has held two things which I think are interesting. Firstly, however good your ground for attack on the divorce in the granting state—not the home state—a person who appears in that state by Notice of Appearance, or goes there to initiate it, is estopped from attacking the validity of that divorce. Secondly, unless the granting state gives permission for a given outsider to attack the divorce, the home state will not grant permission for such an attack. To that extent, the federal Government has control of what you must recognize, by reason of the provision in the United States Constitution that says that each state shall give full faith and credit to a judgment of other states.

LAW CLERK OF THE SENATE: I would like, if I may, to ask Mr. Spellman whether the State of New York has paid any particular attention to the disability under which women labour with regard to domicile?

Mr. SPELLMAN: We do not have that any more in New York.

LAW CLERK OF THE SENATE: Why is that?

Mr. SPELLMAN: Because we have a statute which says they can live where they want. In other words, the old rule was that a woman's domicile followed that of her husband, unless the husband left her in a position where she did not know where he lived or without any means of following. We in New York permit women to have separate domicile from husbands in all matters.

LAW CLERK OF THE SENATE: In all matters, or in all matrimonial matters?

Mr. SPELLMAN: In all matters of all sorts. For instance, we have the county situation. A husband can live in Albany County and his wife can live in New York County, and her will can be probated in New York County. We have tried to give women equality.

Senator ASELTINE: Is that a statutory right?

Mr. SPELLMAN: Yes, that is a statutory right.

LAW CLERK OF THE SENATE: Is this emancipation recent?

Mr. SPELLMAN: The emancipation of all women in New York goes back to about 1870 in most situations. Now, finally, we do not even give up our seats in the subway.

LAW CLERK OF THE SENATE: Is this emancipation from domicile restriction general throughout the United States?

Mr. SPELLMAN: No, by no means. As a matter of fact, I have not studied it precisely, but I would say this exists in much less than half the states, except most states recognize that where a wrongful act of the husband has created the inability of the wife to live with him, her domicile can be that where it originally was.

LAW CLERK OF THE SENATE: Is the residence then the test and not domicile?

Mr. SPELLMAN: Residence is the primary test within the granting state which sets up a residence requirement; but from the point of view of inter-state recognition, domicile is the test—not only actually living there, but intention to return and remain there. So, constitutionally, where you can attack it in another state residence is not enough; domicile is required.

LAW CLERK OF THE SENATE: Did I understand you to say that in New York State a woman, although married, is capable of establishing a separate domicile?

Mr. SPELLMAN: Definitely, even though not divorced, even though, also I may add, she is not without fault herself. In other words, she is just like a man, in some respects.

LAW CLERK OF THE SENATE: As in the old English expression feme sole—unmarried?

Mr. SPELLMAN: I think it goes beyond that, because even there certain things had to be done under trustee. In other words, a woman, except for obvious things, is a man in the State of New York.

LAW CLERK OF THE SENATE: And this is not universal throughout the United States?

Mr. SPELLMAN: By no means—I would say in less than half the states.

Co-Chairman Senator ROEBUCK: Before we pass on, I have a subsidiary question. You have given certain rights to women in New York State that have really abolished the old principle of domicile. Have you had any experience with regard to the recognition of the woman's rights internationally?

LAW CLERK OF THE SENATE: Outside of New York State?

Mr. SPELLMAN: Yes, we have had three types of experience. First, with respect to the division of property in a state which permits it—and not necessarily New York State—another state will recognize that as a matter of full faith and credit under the Constitution, even if it gives the woman individual rights.

With respect to guardianship or custody of children, no state has to recognize what another state did if the children are then within this state, because the court says, in effect, "What have you done for them lately? What have you done for them today? Never mind what happened six months ago."

With respect to property rights, you have to divide it into real property and personal property. With regard to the ownership and easements of real property, there is no question that that can only be governed by the state where the real property is.

With regard to personalty you have two divisions. One court has held that if the personalty was in New York at the time the decree was granted, for example in Michigan the New York law will control it. There are other decisions which say that since the parties were there it does not make any difference where the personalty is.

There is one final thing, the question of the case of a corporation and the question of where the transfer books are kept in a certain building, whether the determination of the rights to that personal property represented by shares of stock must be in accordance with the state where the corporation is incorporated. I will not enlarge upon this, because it could take all night, and even then we would have no answer because there are so many decisions. We have one volume in New York, the New York Supplement, and you can find any decision you want on any subject in the New York Supplement, and this is one of them.

LAW CLERK OF THE SENATE: Suppose the Parliament of Canada were to enact that for the purposes of divorce and such other matters as this committee is dealing with, a woman should be as competent as a man, though married, to acquire domicile in any province of Canada, if she is living there with the intention of remaining, and so on, and a divorce were granted in a province other than the province of her husband's domicile, what sort of recognition do you suppose would be given to that sort of divorce in the United States?

Mr. SPELLMAN: I can tell you about New York.

LAW CLERK OF THE SENATE: Well, New York particularly.

Mr. SPELLMAN: I am going on the general assumption I know to be the fact that we are at least as friendly with Canada as we are with Mexico; and in New York State we recognize a Mexican divorce, if the person was domiciled there or if the parties simply consented to submit to the jurisdiction of the court. There are two ways of getting a divorce in Mexico: one by signing a certificate of residence; and the other by both parties submitting themselves to the jurisdiction of the court. There are two cases on this I would like to mention, *Woods* and *Rosensteil.* In one case they had submitted to the jurisdiction of the court; and in the other they signed a certificate of residence. The New York Court of Appeals held they were both good, and the United States Supreme Court has not revised either of them.

LAW CLERK OF THE SENATE: With due deference to Alexander Hamilton, is Massachusetts as enlightened as New York?

Mr. SPELLMAN: I think Massachusetts has a slightly different view about it, because it applies local concepts; and New Jersey does practically nothing about recognizing them.

LAW CLERK OF THE SENATE: New Jersey was not in favour of the American Revolution!

Mr. SPELLMAN: I do not know about that.

Mr. WAHN: Mr. Chairman, I have a number of questions to put to Mr. Spellman. There has been some evidence presented to this committee that might help solve the problems of divorce, about being more careful about legislation permitting marriage. In other words, has your committee given any thought to the possibility that the two problems might be coupled—legislation permitting marriage, and divorce? Take couples who are not happily married. If there were legislation requiring, for example, a medical examination, including mental examination, before marriage, and perhaps counselling by qualified counsellors before the issuance of the marriage licence—can anything be done long these lines?

Mr. SPELLMAN: Yes, this was considered at great length by the state legislature committee. That is not my committee. My committee was the Bar Association Committee. Many people, mostly clergymen, testified that the difficulty with American marriages was that people were not prepared enough in advance for marriage. There were suggestions made for advance counselling, and of the necessity of getting a certificate other than a health certificate which we have to get now in the United States, unless it is waived by a judge. There were suggestions that there be a long period of waiting between the issuance of the marriage licence and the marriage itself, unless again that period was waived by a judge.

The legislative committee made no recommendation on it. Our Bar Association Committee felt that this should be a community activity, actively engaged in by people instead of having people just saying good words about it. But, we did not think the people would stand for a statute on it.

There were all sorts of crackpot ideas on it. One fellow recommended that there ought to be sex education in the high schools; not only instruction on hygiene but on the whole works. One of the senators said that then there would be no difficulty in getting the kids to do their homework.

A great deal was said on this matter, as I gather has been said during your hearings. I just wish somebody were ingenious enough to be able to do something practical about it. If they cannot marry in Montreal they will go to Buffalo, and if they cannot marry in Buffalo then they will go to Maryland.

As I understand your law, the question of the ability to marry and so forth is peculiar to your provinces, and not the country as a whole.

LAW CLERK OF THE SENATE: That is right. The celebration of marriage is within provincial jurisdiction.

Mr. SPELLMAN: If they cannot marry in one province they will go to another. I know of no practical solution to this. Some priests or rabbis will not marry anybody until they have talked things over with them first. I do not know of any church where that is a requirement. That was really the reason for the posting of banns years ago; it gave them a chance to think it over.

Senator FERGUSSON: My question follows Mr. Hopkins' question regarding domicile. Mr. Spellman, you said that you had emancipation of women back in the eighteen hundreds in New York, and that gave women, whether married or not, the same right to establish a domicile as a man.

Mr. SPELLMAN: I am sorry; I am afraid I said that our emancipation statutes started in 1870, but all the rights did not come about until fairly recently—in 1917 or 1920.

Senator FERGUSSON: My question is: Was the right of a woman to establish her own domicile enacted by statute, and if so can you give me the citation?

Mr. SPELLMAN: It was established in this way; it was not a statute that gave a woman the right to have her own domicile, but it was a statute that removed her disability to set up her own domicile. This was not an absolute statement that a woman could establish her own domicile. This is under our Domestic Relations Law. I am afraid I cannot now give you the citation, but I will send it to you. There is something that says a woman may set up her own domicile for certain purposes, but the other things were statutes for the removal of disabilities.

I do not know whether you know it, but in New York State today if a woman is injured by reason of somebody's negligence, and her husband runs up doctors' bills, he sues the person who negligently injured his wife in an action called "an action for loss of services", which is actually the same kind of action you sue under if your horse gets hurt.

Senator HAIG: In New York State is a divorce final immediately upon the granting of the decree, or is there a period of waiting?

Mr. SPELLMAN: There is a three-month interlocutory period. At the present time after three months the clerk of the court enters the divorce as final. He simply puts a stamp on it and says it is final. Years ago you had to make a new application to the court, but that is not so anymore.

Senator HAIG: With regard to these conciliation procedures I notice in this statement that the plaintiff in the divorce action would apply to the court, and then a supervising justice would handle the problem. Does the judge do it himself, or does he have officers such as social welfare workers to do this?

Mr. SPELLMAN: In the statute as it was passed that is just what it was, and that is pretty ridiculous. In the new statute—we have introduced this recent document that I have brought up here, but the New York legislature will know about it by tonight—and in that document we get rid of all that nonsense.

We do not have a bureau set up in each judicial district. We have one set up in each of the four judicial departments of our state. The courts will have charge of the administration of the bureau, but they will appoint people to work on conciliations. We will not have a judge working on them.

For example, if somebody proves an annulment on the ground that a defendant has another husband living then there would not be a conciliation proceeding. You could get a certificate of no need for conciliation. However, it will not be administered in the clumsy way that is in the present statute.

Mr. BALDWIN: I was interested, Mr. Chairman, in a statement made by Mr. Spellman to the effect that there is in the present law in New York State a provision that where there has been a separation agreement for a period of three years—you can

correct me if I am wrong in that—and the parties have lived separate for that period of three years, then this provides a basis for the dissolution of the marriage.

Mr. SPELLMAN: Yes.

Mr. BALDWIN: Is this a rebuttal of presumption? In other words, is it only necessary for the plaintiff to establish the existence of the written agreement, and that the parties have lived separate and apart for that period, whereupon the dissolution is immediately granted?

Mr. SPELLMAN: It is not automatic. In the first place, the agreement must have been signed and must have been acknowledged before a notary or a commissioner and filed with the county clerk within thirty days after it was signed. The reason for that is to prevent persons coming forward and saying: "We have been living separate for three years under a separation agreement". Here we have the written proof of it. But, even if that is done a person seeking a divorce must prove to the satisfaction of the court that he has lived up to the terms of the agreement for three years. If he has not, then he has not got a chance. I think that answers your questions.

Mr. BALDWIN: I raised this question because we had presented to us recently suggestions in regard to the breakdown theory, which has been the subject of discussion in the United Kingdom and here. We had a bill presented by two of our members which included a provision that where a period of a year has elapsed, this would constitute a presumption of breakdown. I should like to go one step further—

Mr. SPELLMAN: Excuse me, but in our case, it is not a case of creating a presumption of breakdown. This is a ground for divorce.

Mr. BALDWIN: I know that, but there is a resemblance between that and what is advocated here in this theory of condonation. In other words, is it necessary for a plaintiff affirmatively to establish that there has been no condonation during all this—

Mr. SPELLMAN: The very question you raise—

Mr. BALDWIN: —or that there has been no condonation of any matrimonial offence, for that matter.

Mr. SPELLMAN: The very question you raise was raised after this statute was passed, and as a result of that, in this, what I call, secret bill, section 171 of our Domestic Relations Law is going to be repealed. That is the section that covers condonation. We are going to take condonation out altogether, mainly because we think it is ridiculous.

Mr. BALDWIN: Dealing with the matter of domicile, has there been any great outcry in New York by people who have secured a divorce in a jurisdiction where an individual is entitled to her own domicile against the failure of other states or foreign countries to give recognition to the validity of that divorce?

Mr. SPELLMAN: We do not have any trouble in the Untied States with respect to other states. We may have difficulty with regard to other countries. But, the furtherst we go in regard to other countries is to recognize a Mexican divorce which, as I explained, is not based on domicile at all, and certain types of French decrees that are given. We have recognized those French decrees because it happens that in those cases both the husband and wife were living in France when the decree was granted. But please understand that the recognition of a divorce in a sister state is a constitutional requirement, whereas the other is simply a matter of comity.

LAW CLERK OF THE SENATE: We have no such constitutional requirement in Canada. We have no bill of rights.

Mr. SPELLMAN: One of the things which interested me in the Canadian law, and what I was curious about, is what would happen if a person got a divorce in one province and the other party got an annulment in another province. I am not asking you what would happen, but I was just curious about that.

Senator BURCHILL: I am curious to know if Mr. Spellman can tell us if the legislation follows the recommendations of the committee.

Mr. SPELLMAN: Of our committee, do you mean?

Senator BURCHILL: Yes.

Mr. SPELLMAN: I think so. I think there will be a few things where they will not agree with us, but as a whole I am happy to say that the legislation seems to be pretty well in accord with what we want. I think "as a matter of principle" no legislative body ever follows verbatim what is sought by a bar association.

Senator GERSHAW: Mr. Spellman, you enumerated some grounds for divorce aside from adultery. I wonder if you would enlarge a little on insanity.

Mr. SPELLMAN: Insanity is not a ground for divorce under our act, but we do have a procedure whereby if either spouse is shown to be permanently insane—and it is pretty difficult to get a doctor to say so—the marriage may be dissolved; but provision has to be made for the upkeep of that person. In other words, the other spouse can remarry, but upkeep of the permanently insane person is mandatory. That is not a divorce proceeding, and not technically an annulment proceeding. It is one of the two side issues I spoke about earlier. That is under our mental hygiene laws.

Mr. MACEWAN: I want to ask Mr. Spellman if in New York State certain justices of the Supreme Court are appointed to deal entirely with divorce, separation and annulment cases.

Mr. SPELLMAN: Yes, but it depends on the part of the state. In New York, in the first judicial department, we have a special Part, and I am speaking of "Part" with a capital P. In New York we have what is called Part 12, which takes care of matrimonial cases. Special judges are assigned to that during the course of a year. We have about eight different judges in there at different times. If they get overburdened they can send the cases out.

In Kings County they have what is known as Part 5, where they have only matrimonial matters and all things pertaining to matrimonial matters, such as *habeas corpus* proceedings in regard to children, custody, and so on. Upstate that is not true, because they do not have enough of these matters, frankly, to make any difference.

In the original bill in New York it was provided that there should be a conciliation bureau for every judicial district. We pointed out how ridiculous that is, because in one of the judicial districts there were 36 matrimonial matters a year. They wanted us to set up the same machinery, and with the greatest patronage that you ever saw in the world.

Mr. RYAN: Mr. Spellman, I was wondering what degree of resumption of marital relations would prevent the three-year separation period from running.

Mr. SPELLMAN: At the present moment the presumption would arise from a rule of evidence and that is that where a husband and wife had been available to each other—and "available" depends on what the individual judge thinks that means, and it would vary a great deal—neither party is in a position to testify that the other person did not have relations with the other. It is a sort of reverse confidentiality. Under the statute as drawn now, I do not think there would be any difficulty as to whether or not there was a condonation, because I think condonation is going to be abolished altogether. If it is not abolished, the most recent definitions of condonation are not merely getting together once, but it is a question of getting together in the belief that the marriage is saved. We do have this in common, too, that if a man has beaten his wife over a number of years so that she could get a separation, and now a divorce, from him, and takes him back some evening—perhaps she starts crying and he returns and remains over the nigh—the law in New York says that is not condonation but simply resuming relationship for one night. We are rather peculiar in New York about that, because in many states you hit the bull's eye and you get the cigar, and that is the end of it.

Co-Chairman Mr. CAMERON: Any more questions before calling on Senator Roebuck, I suggest that the committee might like to have printed as appendices the New York City Bar Association Report of Recommended Amendments to the divorce reform law of 1966, of the State of New York, which is chapter 254 of the 189th session of the laws approved on April 30, 1966.

Then, if we have your permission, Mr. Spellman, and I understand we have, I would also include the new proposed law which was introduced into the state legislature today.

If that is agreeable, perhaps someone will so move. Senator Aseltine signifies that he will so move, and I recognize Mr. Stanbury who has not participated thus far, as seconding the motion. Is there any discussion? Then that is agreed.

We also have this other large document, which I hold in my hand, and which I suggest we file as an exhibit so that it will be available for the use of the committee. Is that agreed?

Co-Chairman Senator ROEBUCK: Yes, but not to be part of the record.

Co-Chairman Mr. CAMERON: Just to be an exhibit.

Co-Chairman Senator ROEBUCK: Yes. This document may be very useful. For instance, supposing we take one of the subjects and advise that our law be changed similarly, it will be of great benefit for us to be able to say that certain states of the union have adopted that particular idea. In that way this document would be of great value, but I do not think it will be of very much use just on the record. It would be very difficult indeed to condense it to the size of a record.

Mr. RYAN: If it is filed as an exhibit, Mr. Chairman, would there be only one copy, or would each of us be provided with a copy?

Co-Chairman Senator ROEBUCK: We could supply each member with a photostat of it. I do not want the Printing Bureau to be under the obligation of printing it.

Mr. RYAN: I suggest that each member be given a photostatic copy.

Senator FERGUSSON: I agree with that, Mr. Chairman. I realize that printing would be almost impossible, but I think the members should have it in their hands.

Co-Chairman Senator ROEBUCK: Very well.

Co-Chairman Mr. CAMERON: Then is it agreed that this document be an exhibit and that members be provided with a photostatic copy for their use?

Hon. MEMBERS: Agreed.

Mr. SPELLMAN: May I have permission to say one thing more before I finish?

I explained to you that in the United States, on the status question, divorce, separation and annulment are taken care of in each state by the highest court of original jurisdiction. I merely touched on one thing, which I think I should have explained more fully.

In a number of the states we have special courts which pass on incidents of the marriage without passing on the marriage status itself. May I give one short example? In New York State we have what is called the Family Court of the State of New York. It has no power to decree a divorce, a separation, or an annulment, but where such remedy is not sought it has power to provide for support of the children or an order for the protection of the children; for example, if the father is disorderly, breaks down a door, or something of that kind. It is a social court. It also has charge of juvenile delinquency. It handles family problems, and even some quasi criminal problems, such as assaults in the family, but with no power to give criminal judgments. It is a social court. We have done pretty well with it, but strange things have happened. A case was brought before the Supreme Court, which is our highest trial court of original jurisdiction, where a mother sought to get support for her children, but she did not sue for a divorce, or a separation or an annulment. The Court of Appeals, the highest court

in New York State, held that although the Supreme Court was a superior court it had no jurisdiction for support of the children except as an incident to a matrimonial action. The Supreme Court had granted $350 a month to this mother for the children. This was reversed and the matter went to the Family Court. The Family Court usually awards $15 to $18 a week. Here it awarded more than had the Supreme Court. So the husband certainly did not win in this case.

Co-Chairman Mr. CAMERON: May I call on you Senator Roebuck as a distinguished witness?

Co-Chairman Senator ROEBUCK: Yes. I want to ask a question before I say anything about that, before I close these proceedings.

I am interested in what you say about condonation, because you said that you expect to abolish that in this new act, as it is ridiculous.

We have had that here for many years. The purpose of the rule is that when the parties come together, after one has committed an offence, and the innocent party takes the other party back and they live together again, that wipes out the past. The innocent party cannot hold it over the head of the other party, so as to make a continued cohabitation difficult and perhaps utterly impossible.

If you abolish that rule—you may modify it slightly, but if you abolish it—are you prepared to allow the innocent party to keep the right of action against the other party indefinitely—or is there any end to the right to re-commence the battle on the old ground?

Mr. SPELLMAN: Leaving out the question of the Statute of Limitations, because that is not worth talking about, I think any court would hold that, if there has been condonation, with or without a statute, unless the wronging spouse, wrongdoer in the first instance weve to pick up his wrongdoing again, that the mere fact that they were together would not give the wife a ground—the wife could not continue that with this thing hanging over her head. This is a matter equity law. As I said earlier, collusion is in fact not privity. No one is going to create a divorce where the husband and wife set out to frame it up. The abolition of the statute has the effect that condination is not going to create a situation where the Sword of Damocles is hanging over one's head.

You will find this in the court decisions. In states where they do not have a right of condonation, the statutory removal of the right of condonation, that if the wrongdoer should again pick up his wrongdoing with the condonation—it could be defined as a conditional thing, provided he behaves himself in the future.

You are talking about a man who commits adultery and then goes back to his wife, does that wipe out the act of adultery? I think it is better to look at the physical action. A man beats his wife, and finally she has to start an action against him. He goes back and pleads with her and says he will never do it again. She takes him back. A month later he starts it again. I do not think any court would hold that she was forever estopped by reason of condonation from ever bringing that action. In other words, she does not revive the previous action. What she does is cancel a wrongdoing because of the husband's misconduct. I think there are many decisions on this in many states. We have not any in New York, because we have condonation in the statute.

Co-Chairman Senator ROEBUCK: That is our law. If the guilty party who has been forgiven does not behave himself or herself, it revives the previous difficulties. That is clear enough.

Mr. Spellman, my duty now is to say to you that your adress to us has been simply wonderful. It has been full of material. For instance, take what you said about the Enoch Arden decision, where you actually dissolve the marriage, but one of the parties has been away for a certain length of time, long enough. Here our law is that if one of the spouses is away for seven years, and the one that stays at home remarries, the Criminal Code will not provide a bigamy charge against him.

Mr. SPELLMAN: We have that, too. That is the presumption of death.

Co-Chairman Senator ROEBUCK: On the other hand, if the first husband returns, he is the husband; and the second marriage is a nullity.

Mr. SPELLMAN: Even though the decree has been got? Do they not have a decree?

Co-Chairman Senator ROEBUCK: We do not have a decree.

Mr. SPELLMAN: In other words, in common law cases, where the disappearance exists for seven years, under conditions in which it is reasonable to presume that the person is dead—unless after that the other fellow shows up?

Co-Chairman Senator ROEBUCK: It frees him to a certain extent.

Mr. SPELLMAN: It creates a rebuttal.

Co-Chairman Senator ROEBUCK: It only relieves him from the possibility of a charge of bigamy.

Mr. SPELLMAN: Do you allow the will of the disappeared man to be probated as though he were dead. We have this problem.

Suppose you do, and suppose you have distribution—then suppose he shows up the next day?

Co-Chairman Senator ROEBUCK: This is the law with regard to probate of wills. An application is made to the court for a declaration that the man is dead. If the declaration is made by the court, then the will can be admitted to probate.

Mr. SPELLMAN: In New York we had a different situation, a crazy situation. With regard to personal property, if no distribution was made until seven months after the declaration of death by the surrogate court, that was all right, and the executor or administrator was not in any trouble, as long as he paid the taxes. But, as far as real property is concerned—since real property never goes through the executor but devolves directly as a result of the will—if the man came back later, he could get the property back. Please do not ask me what the law is in the State of New York. Most of us do not know.

Co-Chairman Senator ROEBUCK: You said something about the difficulty the lawyers had with this Enoch Arden situation. Of course, it was a terrible situation, if the husband ever returned.

I am reminded of a story from the English law courts, where some woman said that she had so much trouble with the lawyers since her husband died, and they were probating the estate and that sort of thing, that she almost wished her husband had not died.

Mr. SPELLMAN: It was reported the other day that the son of a very famous man, who thought his father's principles in life were being traduced by what was happening, in an organization to which he belonged, said that if his father came back to life that day he would turn over in his grave.

Co-Chairman Senator ROEBUCK: Mr. Spellman, it is my duty to try to put into words how grateful we are to you for coming here, such a great distance, to give us the benefit of your most mature long-established and thorough knowledge of the law of New York—and in very great measure the law of the whole of the United States.

You have touched upon point after point that we are thinking about here and wondering what we are going to do with it.

Your remarks will be studied most carefully by this committee and I can assure you that we will gain great benefit from them.

I say, on behalf of everyone here, most enthusiastically that we thank you for coming.

Mr. SPELLMAN: I am very grateful that you permitted me to come. I am especially grateful for the opportunity to come in this centennial year, and you will notice that I wear the decoration here.

Co-Chairman Senator ROEBUCK: May I explain for the record that the witness has on his lapel the Canadian Centennial insignia, which was given to him by the Canadian Secretary of State, the Honourable Judy LaMarsh.

The committee adjourned.

APPENDIX "65"

Committee Report
Special Committee on Matrimonial Law

Statement of Howard Hilton Spellman, Chairman,
before the New York State Joint Legislative Committee
on Matrimonial and Family Law.

On behalf of the Special Committee on Matrimonial Law of the Association of the Bar of the City of New York, for which Committee I speak as its Chairman, I thank your Committee for this opportunity to present, at your invitation, recommendations for changes in the Matrimonial statutes of the State of New York. Our expression of thanks should not be regarded by you as a perfunctory introduction to my statement; *because this is the first time in the history of New York State that a legislative committee has been authorized to consider changes in SUBSTANTIVE matrimonial law.* As you know, there have previously been legislative committees dealing with the subject of matrimonial law; but these committees have been confined by the resolutions creating them to study of *procedural* law. To put it mildly, the creation of the previous legislative committees should be regarded, at most, as an idle gesture giving lip-service to the proposition that there must be some legislative answer to the public demand for change in our matrimonial statutes.

For almost half a Century the Association of the Bar of the City of New York, through various committees appointed for that purpose, has vainly tried to impress upon the legislature the desirability of modernizing the divorce law of New York, which has remained virtually unchanged since its passage in 1787. The report of our Special Committee to the Association for 1964-1965 succintly stated the problem as follows:

> "New York's medieval divorce statutes, which, for one hundred fifty years, have without change provided only one ground (adultery) for divorce, have been the subject of adverse criticism for many decades. It is significant that New York is the *only* State in the Union which has this absurd statutory restriction. All attempts at realistic amendment have failed. The Association of the Bar through various special committees has vainly attempted to ameliorate the situation, which, as has been repeatedly stated, has led to disrespect for law and the substantial probability of recurrent fraudulent practices. The legislature has heretofore turned a deaf ear to every plea. Indeed, it has been virtually impossible to get any legislator even to introduce a bill covering this subject. There has been a Joint Legislative Committee on Matrimonial Law, but that Committee was confined by the resolution of its creation to a study of *procedure* and was denied the power to consider substantive changes in the law."

Happily, the situation has now been changed through the courageous act of the New York State Legislature during its 1965 session. The following further excerpt from the report of our Committee to the Association is, we believe, of more than passing historical interest:

> "As the result of its research during the summer and fall of 1964, your Committee determined that an effort should be made, forthwith, to create a New York State Temporary Commission on Matrimonial Law with full power to consider all substantive questions in the field and to be charged with the duty of reporting its recommendations to the legislature for action. The Commission

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approach had recently been demonstrated to be the soundest method of obtaining substantive broad amendments to the law (for example, the Commission on Ethics and the Commission on Revision of the Penal Law). In addition to the problem of grounds for divorce, many other situations needed reconsideration in the light of amendments made to statutes when the matrimonial law provisions were transferred from the Civil Practice Act to the Domestic Relations Law in the course of court reorganization. Other substantive problems (for example: the effect of the decision of the Court of Appeals in *Viles v. Viles*, 14 N.Y. 2d 365, casting doubt on the valitidy of separation agreements made in contemplation of divorce; and the matter of the validity to be afforded to Mexican divorces, granted upon the personal attendance of one party in Mexico and the appearance of the other party through a duly authorized Mexican attorney) cried for legislative action. However, individual bills to cover each problem probably would be bogged down in the legislative machinery; but is was believed by your Committee that a Commission could consider all of the problems and make a comprehensive recommendation for legislative action.

"In collaboration with New York State Senator Jerome L. Wilson of the 22nd Senatorial District, a bill was prepared by your Committee for the creation of a Temporary State Commission on Matrimonial Law. Senator Wilson introduced this bill in the Senate and an identical bill was introduced by Assemblyman Percy E. Sutton in the Assembly. You Committee then undertook a broad program of public education in support of the bill. Numerous television and radio programs were devoted to this subject. The New York Times gave the bill its strong and repeated editorial support. A meeting of representatives of other bar associations and of social service agencies was held at the House of the Association on April 26, 1965 and this meeting was addressed by the President of the Association and by your chairman and methods were devised for enlisting support for the Wilson-Sutton bills.—Instead of passing the bill for the creation of a Temporary Commission, a concurrent resolution was passed unanimously by the Senate and all but unanimously by the Assembly creating a new Joint Legislative Committee with full power to consider all substantive as well as procedural aspects of matrimonial law and with the duty of reporting to the legislature on December 15, 1965. The concurrent resolution also provided for the creation of an Advisory Committee of ten members to assist the Joint Legislative Committee. Thus, in substance, the concurrent resolution has accomplished all of the purposed envisioned by the Wilson-Sutton bills. That the resolution was not intended as a placating gesture is evidenced by the fact that the Joint Committee has been given an apropriation of $50,000!

"Your Committee intends to work during the present summer [1965] in close co-operation with the Joint Legislative Committee in the hope that that Committee will recommend passage of a broad statute resolving some of the difficult problems in the field of matrimonial law, including the creation of a realistic divorce law."

Our Committee was honored by the appointment to the Legislative Advisory Council of two of our members, Vincent J. Malone, Esq., and me.

Discussing past frustrations and contrasting them with the present hopeful outlook, Honorable Samuel I. Rosenman, President of the Association of the Bar, in his most recent annual report said:

"For many years now Presidents of the Association have been compelled to report complete failure of the Association's efforts to ameliorate New York's medieval laws dealing with divorce. It is with gusto that I report this year significant progress towards this long desired reform; and that this progress can be attributed in part to the work of our Association . . . Thus, the people of the State of New York now have a means by which intelligent consideration and

impartial consideration can be given to the need not only for the modernization of the laws relating to divorce but many other statutes relating to matrimonial law."

Some cynics have been reported as saying that the creation of the Joint Legislative Committee was but another meaningless placating gesture and that the Committee would accomplish nothing. The diligence of your Committee has belied this direful prognostication. You have appointed an able and energetic chief counsel and staff. The individual members of your Committee have applied themselves with singular devotion to the task appointed you. Our Committee can state these facts from close, personal observation, since we have been privileged to work with your Committee staff and members. As your Committee knows, we have undertaken in-depth studies of the problems involved and have been aided by the generous help of Columbia University Law School and New York University Law School, which great institutions have assigned student researchers to assist our Committee members. The studies prepared by us will, of course, be made available to your Committee at any time you may desire.

A major function engaged in by your Committee during the past few months has been the holding of hearings throughout the State (in New York City, Buffalo and Albany). At these hearings, testimony has been presented by a vast number of citizens an organizations familiar with the field which you are investigating. Not only Justices and lawyers but also representatives of all religious faiths and of social work agencies have testified. The proof adduced at these hearings has established beyond peradventure of doubt that the problems created by New Yorks' antiquated matrimonial statutes are statewide and are not peculiar to any single portion of the State. The hardships imposed by our present statutory straightjacket adversely affect citizens of cities, towns and villages, of all economic strata and of all religious faiths.

From the inception of the work of our Special Committee, we determined that it was our duty to approach the problems presented as *lawyers*. Thus, we have first considered the evidence, gleaned from the hearings held by your Committee and from our own knowledge in the courts of matrimonial practice, have then determined the ultimate facts which we deemed established by that evidence and, finally, upon consideration of these ultimate facts, have prepared our recommendations. It is our conclusion that, at the very least, the following facts have been established by the evidence:

A

New York is the only state in the Union which has a single ground (adultery) for divorce. This medieval approach is an absurd anachronism, since, in other respects, New York State is recognized as a leader in social legislation.

Historically, it is of importance to note that the divorce statute establishing adultery as a sole ground was not originally intended by the legislature to have that restrictive effect. Prior to the enactment of the statute, divorces were granted through application to the legislature, which issued a "bill of divorcement" in individual cases. When the number of applications for divorce on the ground of adultery became burdensome to the legislature, a committee headed by Alexander Hamilton, prepared a statute giving power to the courts to grant decrees in divorce cases where adultery was the ground of complaint. But this did not means that a New York divorce could not be granted on other grounds; because the legislature continued to grant "bills of divorcement" for many and varied faults on the part of the defendant. Indeed, divorces through the legislative process persisted for a great many years after the enactment of the divorce statute, until New York State's constitutional inhibition prevented the continuance of this practice.

B

For one hundred fifty years the New York statute making adultery the sole ground for divorce has persisted. Beyond any question, this limitation has led to grave and

New York's restrictive legislation. It is significant that no representative of any religious group testifying in the courts of your hearings has asserted that the present single ground for divorce is sufficient to meet existing social needs.

C

unhappy social consequences. Marriages which, in fact, have long since ceased to exist are nevertheless binding legal relationships. The testimony of every social agency before your Committee has presented a vertitable chamber of horrors of the consequences of

Almost two decades ago, a grand jury in New York County made a presentment, wherein it was asserted that, because of the narrow single ground for divorce in New York, perjury was rampant, particularly in undefended cases (which presently constitute in excess of 95% of all trials in matrimonial actions). During the course of your Committee's hearings Justices of the Supreme Court at the first New York hearing and lawyers experienced in the trial of matrimonial cases at the Albany hearing testified in no uncertain terms that it is obvious in most uncontested trials of matrimonial cases that perjury is being committed. Nevertheless, the Justices are compelled to grant divorces on uncontradicted testimony, even though they do not believe it, and the failure to grant a divorce in such circumstances will be reversed on appeal.

It has been estimated by Justices of the Supreme Court and by lawyers experienced in these matters that the trial of an undefended divorce case takes, on the average, between seven and seven and one-half minutes. These trials are a formal farce. A relationship, which has been recognized in the preamble of the resolution creating your Committee, as one of the most important human relationships, is legally dissolved in a rubber-stamp proceeding before an embarrassed judge, who is compelled by law to put his signature on a decree, which he and everyone else in the case knows is probably based upon an untruth.

In New York an additional tragi-comedy has been added to our undefended calendars. As statistics amply demonstrate New Yorkers use an action to annul a marriage as a substitute for a divorce action and the statistics further establish that New York has the highest rate of annulment actions of any state in the Union. Again, these actions to annul a marriage are often predicated upon an agreement between the husband and wife to end their marriage by a perjurious conspiracy. Precise testimony on this subject was adduced before your Committee through the testimony of one of the most experienced jurists in New York State. Another Justice of the Supreme Court testified that he and his fellow-judges were so embarrassed by what is going on in this field that they actually dreaded an assignment to sit in the parts of the court considering matrimonial actions. A thoughtful author has explored the absurdity of substituting actions for annulment for actions for divorce in an article entitled "New York, The Poor Man's Reno."

During the course of your hearings, Justices of the Supreme Court and lawyers testified that there is a virtual rebellion on the part of judges and reputable lawyers to end this orgy of perjury and disrespect for the law by the enactment of realistic divorce statutes.

D

A classical method of avoidance of New York's single ground statute (for those who can afford it) is to obtain a divorce in a state other than New York or in Mexico. In out-of-state divorces, where the parties actually reside in New York, perjury is completely demonstrable and no expert testimony is needed to establish its existence. The plaintiff "establishes a residence" for the period of time required by the state in which he or she seeks a divorce. In most jurisdictions, the plaintiff is required to testify that he or she not only lives in that state but intends permanently to reside there, thus establishing not only residence but domicile. The fact of the matter usually is that the person so testifying has no intention of remaining in the divorce-state, but actually has transportation arranged in advance for return to New York directly after the out-of-state trial is completed.

In Mexican divorces, there is not even a requirement that domicile be proved. In fact, the Mexican proceeding can hardly be regarded as a trial. Yet, by a strange

analogy, it would presently appear that a Mexican divorce is safer from attack in New York than an out-of-state divorce, because an out-of-state divorce can be attacked (by others than the parties who appeared by attorney) upon the ground that there was no domicile.

The tragedy of out-of-state and Mexican divorces arises from the fact that the trials of those cases *never* give attention to the protection of the children of the marriage. The customary practice (because all of these divorces are based upon an advance agreement of the parties) is that a separation agreement is entered into in New York. One of the parties then goes to the foreign jurisdiction and "establishes a residence." The other party authorizes an attorney of the foreign jurisdiction to appear for him. The separation agreement is offered in evidence in the foreign jurisdiction and is mechanically approved by the court. There is no inquiry as to whether provisions for the support of the children or for custody or visitation are in the best interest of the children. There is no inquiry as to the pressures applied by either party against the other in formulating the separation agreement. There is not even an inquiry as to whether the amount of support provided for a wife is sufficient or realistic. The foreign court acts as a rubber-stamp and there the nauseating process ends.

E

The cruel economic consequences of New York's single-ground statute have been the subject of extensive testimony before your Committee. It is perfectly obvious that the ability to escape to a foreign jurisdiction is non-existent in the case of that vast segment of our population that cannot afford the expense of such an escape. We are confronted by the fact that persons in the lower-income group who are unwilling to be parties to a perjurious New York State divorce or annulment action are completely unable legally to dissolve an insupportable marriage, no matter how great the hardship to both parties and to their children may be. Thus, we have, as several witnesses testified, "one law for the rich and no law for the poor."

Although there was no testimony at the hearings conducted by your Committee with respect to the economic impact of our one-ground statute upon people of means, our Special Committee is able to state of its own knowledge that this impact can be unjustifiably grotesque.

As I have heretofore stated, almost all out-of-state divorces are initiated by a separation agreement, which is obviously the result of bargaining between the parties. But an out-of-state divorce will not be granted unless both parties appear by attorney in the foreign jurisdiction. Thus, even though both parties may want a divorce, either one of them is in a position literally to blackmail the other by insistence on economic considerations out of all proportions to the realities of the case. Lawyers practising in the field of matrimonial law know that in many instances one of the parties will demand excessive economic compensation (whether in the form of high alimony, a substantial property settlement, or, conversely, low alimony and no division of property) as a price for agreeing to appear by attorney in a foreign jurisdiction. Even more terrible is the exaction as a price for such appearance of the custody of children and rights of visitation, without regard to the welfare of the children. The children are not represented by counsel either in the preparation of a separation agreement or in the trial in the foreign jurisdiction. Although they are euphemistically called "wards of the state" their protection is minimal or non-existent and it is no answer to this tragic proposition that a New York court may, acting as *parens patriae*, later change custodial and visitation determinations of a foreign court; because, when proceedings (usually by writ of habeas corpus or petition in equity) are initiated to attempt such change, the children are often more damaged by the trial of such proceedings than if they had not been started. We have all witnessed the pitiful situation where a child is called into court and questioned, either in or out of the judge's chambers, in a custody proceeding.

F

The representative of social work agencies testified before your Committee with ample supporting proof including the recitation of the facts in individual cases that,

because of New York's ground statute and the inability of the lower-income segment of our community to escape to another jurisdiction for the purpose of obtaining a divorce, there is a general and wide practice, which is characterized as "self-help." In simple language, this means that many people who cannot obtain a divorce are virtually compelled, by reason of their natural instincts and sometimes through economic necessity, to set up irregular relationships and create "new families" without benefit of clergy.

The consequences of such "self-help" result in many human tragedies. Children born of this "irregular family" are illegitimate. Upon the death of one of the mates, serious estate questions arise. Blackmail is rampant, being freely indulged in, for example, by a man who has deserted his wife and who then, upon discovering that she is living "in sin" with another man, threatens exposure unless he is paid off. "Self-help" often arises where a deserting spouse vindictively keeps his or her mate in a "marital limbo."

In the process of breaking up and re-forming families in the illegal fashion known as "self-help," many deserted wives and children are added to the relief rolls.

Although I have heretofore referred to the "self-help" situation in connection with the lower-income segment of our community, it should be borne in mind that "self-help" is often present in the economically well-fixed group. This subject was covered in-depth in your Committee's Albany hearing. The reports of decisions in the various Surrogate's Courts amply demonstrate this point.

G

Almost every witness who testified at your hearings emphasized the necessity for the State to adopt a realistic attitude toward preserving marriages. It seemed to be the consensus that some marriages can be preserved if the court is empowered to take steps toward that end. All the witnesses recognized that if a marriage has completely ended and the judgment merely memorializes that fact, no proceeding will be able to rescue such a non-marriage. On the other hand, it was urged that the bringing of a divorce action does not, *ipso facto*, mean that the marriage is truly at an end. Although it is stated in many decisions that the state is a party to every marriage, the power of the courts to attempt amelioration of the social situation leading to a divorce action is severely limited. The witnesses were unanimous that such power should be created.

* * *

Based upon the foregoing factual considerations and numerous others within the knowledge of the members of our Special Committee, we make the following recommendations for modernization of New York's matrimonial laws:

I

No divorce shall be granted unless the court makes a specific finding based upon all of the evidence that the disruption of the marriage is irreparable, that there is no reasonable expectation of reconcialiation and that there is no reasonable probability that the marriage can be preserved.

The concept underly this recommendation is that the State, through its courts, can realistically assume its technical role as a party to every marriage. The statute may be implemented by granting to the court the power to bring in witnesses of its own accord.

It is our submission that the requirement for such a finding, as a prerequisite to the granting of a divorce, is far superior to a mere reconciliation proceeding. A "compulsory" reconcialiation proceeding is a contradiction in terms. It is clearly meaningless if the defendant in a matrimonial case refuses to participate realistically in the same or if either party refuses to be reconciled.

On the other hand, the mandatory requirement for a finding as a matter of jurisdiction will enable (and indeed require) the court to make every effort to reconcile the parties, utilizing not only the process of the court to bring in as witnesses all

persons who may be helpful in reaching a solution of the marital problem, but also employing, if deemed by the court to be desirable, the help of social service agencies, probation officers and the facilities existing in the Family Court of the State of New York.

We do not recommend repeal of the present statute which grants power to the Appellate Divisions to set up reconciliation proceedings; but we urge that these should be an adjunct to the finding to be made or refused by the court.

The real question is whether a marriage can be saved. If a reconciliation or conciliation proceeding is deemed necessary for a resolution of that question, the court should be empowered to initiate such a proceeding.

A jurisdictional finding, such as we are here recommending, should be required in all divorce cases, including those brought upon the present permissible ground of adultery and those brought upon any of the additional grounds which I shall presently suggest.

II

It is recommended by our Special Committee that, in addition to the present ground of adultery, the following grounds for divorce be added to the New York statute:

1. Abandonment for one year.
2. Cruel and inhuman treatment of the plaintiff by the defendant.
3. Habitual drunkenness substantially affecting the welfare of the other spouse or the children of the marriage.
4. Chronic drug addiction substantially affecting the welfare of the other spouse or the children of the marriage.
5. Conviction of a felony in a state or federal court pursuant to which conviction the defendant has been actually incarcerated for a period of at least two years.
6. Living apart voluntarily for two years without cohabitation. However, this action or special proceeding shall be entitled without a denomination of either party as the plaintiff or defendant. Furthermore, this action or proceeding shall be termed "an action [or proceeding] for dissolution of marriage" and relief shall be granted to both parties, as justice requires.

The grounds suggested by us are those which, in the experience of lawyers and social workers and in the testimony adduced before your Committee appear to be the most disruptive of the marriage relationship. Each of these grounds is now operative in many states, some of them for a long period of time.

The text embodying each of the grounds recommended by us is, we believe, sufficiently clear to require no explanation. However, a few comments may be helpful:

Grounds No. 1 and No. 2 (abandonment and cruel and inhuman treatment). We suggest that the words indicated in our recommendation be used. These words already exist in the New York separation statute. They have been construed by the courts time and time again. By using these words we would avoid unnecessary future litigation as to the meaning of substitute phrases.

Grounds No. 3 and No. 4 (habitual drunkenness and chronic drug addiction). We have emphasized that the improper conduct must substantially affect the welfare of the complaining spouse or the children of the marriage. We do not consider habitual drunkenness or chronic drug addiction, standing alone, as sufficient ground for legal termination of the marriage; but where such conduct actually substantially affects the welfare of the family, the marriage should be ended.

Ground No. 5 (conviction of a felony) has been limited to those cases where there is actual incarceration for a period of at least two years. We believe that conviction,

alone, should not be a ground, because the shock attendant upon the conviction of a spouse may lead to a hasty and ill-advised commencement of an action for a divorce.

Ground No. 6 (living apart voluntarily) creates a new type of proceeding. Where the spouses have separated and have actually lived apart for two years or more, there would seem to be no reason why the legal bond of matrimony should be continued, *provided the court makes the finding required in our first recommendation.* There are some marriages which simply do not work out, despite every effort on the part of both spouses. There is no need to continue such a marriage *as a matter of law* when, as a matter of *fact*, such a continuance would only lead to misery on the part of husband, wife and children.

The proceeding here envisaged eliminates the question of guilt and removes the necessity for the parties, who have parted in a civilized manner, to become bitter protagonists in an adversary proceeding.

As the testimony before your Committee has shown and as the practice of the members of our Special Committee has amply demonstrated, many very young people marry hastily and learn, almost immediately after their marriage, that their union was a mistake and should never have taken place. Such young people, under the present law of New York, are confronted with the fact that, unless adultery is committed (or unless they are willing to enter into a conspiracy falsely to establish the existence of adultery or some legal ground to obtain an annulment, or are enabled to escape to another jurisdiction for the purpose of obtaining a divorce) they are legally bound to a status which has no relationship to the actual facts of their lives. It is not uncommon for such young people to separate and to continue living apart. In these situations, the establishment, as a ground for divorce, of voluntarily living apart for a period of two years or more, would seem to be the *only* reasonable solution. The two-year requirement should give ample time for the young couple to ascertain that their separation was not due to pique or to some hasty decision based upon a transient anger. In a somewhat different context, the same reasoning applies to couples who have separated for two years or more after a longer marriage.

Under present conditions in New York (and, indeed, in almost every other state), there is no statutory provision for screening prospective brides and grooms so as to evaluate, in advance, the probabilities of a marriage being successful. It is easier and cheaper to get married than to get a license to drive an automobile. Although ministers of the various faiths individually insist upon some sort of counselling before they consent to perform a marriage, this is certainly not the general rule. Nor are parents an effective brake on sudden and ill-advised prospective marriages. It has often been remarked that the surest way to get young couples quickly married is for the parents to object to the marriage.

Our Special Committee suggests that there be evolved some type of community action to establish advance counselling prior to marriage. We are not sure that any statute directed toward this end would be acceptable to the community; but we respectfully suggest that this matter should be covered in your Committee's report to the legislature.

III

In the case of *Viles* v. *Viles*, 14 N.Y. 2D 365, the New York Court of Appeals, by a divided Court, decided, as a matter of statutory construction, that a separation agreement between a husband and wife was subject to attack and vitiation if made in contemplation of a divorce or in furtherance of obtaining a divorce. The Court was construing Section 5-311 of the General Obligations Law, which, in substance, provides that the parties to a marriage may not contract to alter or dissolve the marriage.

As was pointed out in the dissenting opinion in the Court of Appeals, this determination might make it virtually impossible for parties who are contemplating a divorce to settle, as a result of bargaining and without rancor, such questions as support and the division of property. Thus, bitterness might well be evolved in a situation where such an attitude could have been avoided by agreement.

From the earliest days in New York, separation agreements have been a standard practice. Even before the "female emancipation statutes," giving women the right to enter into contracts, it was quite usual for a husband and wife to contract as to support and division of property, the wife acting through a trustee, who signed the contract in her behalf. In our modern era, separation agreements in situations where a marriage no longer exists in fact, are encouraged by all reputable lawyers in order to avoid painful and unecessary litigation, harmful both to the spouses and their children.

As I have stated, the decision of the Court of Appeals in the *Viles* case was based upon the majority of the Court's construction of a statute. It was not and has not been suggested that a separation agreement is immoral if it does not *require* the parties to obtain a divorce. Indeed, the law is well settled that an agreement making a divorce mandatory is void both upon legal and moral grounds. The question presented is whether a separation agreement, made in contemplation of a divorce or without any such contemplation, but containing no provision requiring either party to obtain a divorce, must, as a matter of statutory construction, be denied enforcement.

Our Special Committee strongly recommends that the doubt which has arisen by reason of the *Viles* decision be removed, in order that the parties to an unfortunate marriage, who have in fact separated, may not be required to go into court and litigate questions which could easily be settled by reasonable negotiation. Accordingly, we recommend that Section 5-311 of the General Obligation Law be amended by adding thereto a sentence, reading as follows:

> "An agreement, heretofore or hereafter made between a husband and wife, shall not be considered a contract to alter or dissolve the marriage unless it contains an express provision requiring the dissolution of the marriage."

IV

Section 235 of the Domestic Relations Law provides, in effect, that the contents of the files in matrimonial actions shall not be publicly disclosed and that, if the evidence on such trials be such that public interest requires that the examination of the witnesses should not be public, the court may exclude all persons from the room except the parties to the action, their counsel and the witnesses, and in such case may order the evidence, when filed with the clerk, sealed up, to be exhibited only to the parties to the action or someone interested, on order of the court.

This statute is a salutary one, aimed at granting protection against that type of publicity, which could make even more unfortunate and distressing the fact that a divorce, annulment of separation is being sought.

Although it is obvious that some type of protection ought to be afforded in cases involving the custody of children, there is no statutory provision to that effect. Accordingly, our Special Committee recommends that Section 235 of the Domestic Relations Law be amended, to include within its protection, cases involving the custody of or right to visitation with any child of a marriage.

* * *

On behalf of the Special Committee on Matrimonial Law of the Association of the Bar of the City of New York, I thank you for your having so attentively listened to our recommendations. We believe that they are practical and are legally, socially and morally sound. They are based on careful studies. If your Committee so desires, we are prepared to present to you the actuel texts of proposed statutes embodying our recommendations. We are also available to work with you on the drafting of such statutes as you may determine should be introduced in the legislature by your Committee.

After over a century of frustration, we are at the point where, through your Committee, substantial legislation can be introduced to ameliorate the disastrous effects of New York's medieval matrimonial statutes. The minute of truth is here. There is no justification for, nor can there be any excuse for, procrastination. We pray that the citizenry of New York may soon receive the benefit of the painstaking work to which your Committee has so devotedly addressed itself.

November 29, 1965

APPENDIX "66"

Legend: Deletions are indicated by square brackets. Changes or additions in text are indicated by italics.

1966 REGULAR SESSION

Domestic Relations—Matrimonial Actions

CHAPTER 254

An Act to amend the domestic relations law and the general obligations law, in relation to certain matrimonial actions, establishing a conciliation bureau in each judicial district, prescribing its functions, powers and duties, and repealing section one hundred fifty-four-a of the judiciary law and sections one hundred seventy, one hundred seventy-one, one hundred seventy-four and two hundred one of the domestic relations law, relating thereto.

Approved April 27, 1966, effective as provided in section 15.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section eight of the domestic relations law, as last amended by chapter two hundred sixty-five of the laws of nineteen hundred nineteen, is hereby amended to read as follows:

§ 8. Marriage after divorce [for adultery]

Whenever a marriage has been [or shall be dissolved, the complainant may marry again during the lifetime of the defendant. But a defendant for whose adultery the judgment of divorce has been granted in this state may not marry again during the lifetime of the complainant, unless the court in which the judgment of divorce was rendered shall in that respect modify such judgment, which modification shall be made only upon satisfactory proof that three years have elapsed since the decree of divorce was rendered, and that the conduct of the defendant since the dissolution of said marriage has been uniformly good; and a defendant for whose adultery the judgment of divorce has been rendered in another state or country may not marry again in this state during the lifetime of the complainant unless three years have elapsed since the rendition of such judgment and there is no legal impediment, by reason of such judgment, to such marriage in the state or country where the judgment was rendered. But this section shall not prevent the remarriage of the parties to an action for divorce] *dissolved by divorce, either party may marry again.*

§ 2. Section one hundred seventy of such law is hereby repealed and a new section one hundred seventy is hereby inserted therein, in lieu thereof, to read as follows:

§ *170. Action for divorce*

An action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on any of the following grounds:

(1) The cruel and inhuman treatment of the plaintiff by the defendant such that the conduct of the defendant so endangers the physical or mental well being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant.

(2) The abandonment of the plaintiff by the defendant for a period of two or more years.

(3) The confinement of the defendant to prison for a period of three or more consecutive years after the marriage of plaintiff and defendant.

(4) The commission of an act of adultery, provided that adultery for the purposes of articles ten, eleven, and eleven-A of this chapter, is hereby defined as the commission of an act of sexual or deviate sexual intercourse, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant.

(5) The husband and wife have lived apart pursuant to a decree of separation for a period of two years after the granting of such decree, and satisfactory proof has been submitted by the plaintiff that he or she has duly performed all the terms and conditions of such decree.

(6) The husband and wife have lived separate and apart pursant to a written agreement of separation, subscribed and acknowledged by the parties thereto in the form required to entitle a deed to be recorded, for a period of two years after the execution of such agreement and satisfactory proof has been submitted by the plaintiff that he or she has duly performed all the terms and conditions of such agreement. Such agreement shall be filed in the office of the clerk of the county wherein either party resides within thirty days after the execution thereof.

§ 3. Section one hundred seventy-three of such law, as added by chapter three hundred thirteen of the laws of nineteen hundred sixty-two, is hereby amended to read as follows:

§ 173. Jury trial

In an action for divorce there is a right to trial by jury of the [issue of adultery] *issues of the grounds for granting the divorce.*

§ 4. Section one hundred seventy-four of such law is hereby repealed.

§ 5. Section two hundred of such law, as added by chapter three hundred thirteen of the laws of nineteen hundred sixty-two, is hereby amended to read as follows:

§ 200. Action for separation

An action may be maintained by a husband or wife against the other party to the marriage to procure a judgment separating the parties from bed and board, forever, or for a limited time, for any of the following causes:

1. The cruel and inhuman treatment of the plaintiff by the defendant *such that the conduct of the defendant so endangers the physical or mental well being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant.*

2. [Such conduct on the part of the defendant towards the plaintiff as may render it unsafe and improper for the latter to cohabit with the former.]

[3.] The abandonment of the plaintiff by the defendant.

[4.] *3.* Where the wife is plaintiff, the neglect or refusal of the defendant to provide for her.

[5.] *4.* The commission of an act of adultery by the defendant; except where such offense is committed by the procurement or with the connivance of the plaintiff or where there is voluntary cohabitation of the parties with the knowledge of the offense or where action was not commenced within five years after the discovery by the plaintiff of the offense charged or where the plaintiff has also been guilty of adultery under such circumstances that the defendant would have been entitled, if innocent, to a divorce, *provided that adultery for the purposes of this subdivision is hereby defined as the commission of an act of sexual or deviate sexual intercourse, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant.*

5. The confinement of the defendant to prison for a period of three or more consecutive years after the marriage of plaintiff and defendant.

§ 6. Section two hundred one of such law is hereby repealed.

§ 7. Such law is hereby amended by inserting therein a new article, to be article eleven-A, to read as follows:

ARTICLE 11-A. SPECIAL PROVISIONS RELATING TO DIVORCE AND SEPARATION

Section

210. Limitations on actions for divorce and separation.

211. Pleadings and proof.

§ 210. Limitations on actions for divorce and separation.

No action for divorce or separation may be maintained on a ground which arose more than five years before the date of the commencement of that action for divorce or separation except where:

(a) The defendant has abandoned the plaintiff and defendant has not resumed living with plaintiff.

(b) The husband and wife have lived apart pursuant to a decree of separation for a period of two years after the granting of such decree and satisfactory proof has been submitted by the plaintiff that he or she has duly performed all of the terms and conditions of the decree.

(c) The husband and wife have lived separate and apart pursuant to a written agreement of separation, subscribed and acknowledged by the parties thereto in the form required to entitle a deed to be recorded, for a period of two years after the execution of such agreement and satisfactory proof has been submitted by the plaintiff that he or she has duly performed all of the terms and conditions of such agreement and such agreement has been duly filed in the office of the clerk of the county wherein either party resided within thirty days after the execution thereof.

§ 211. Pleadings and proof

An action for divorce or separation shall be commenced by the service of a summons. A verified complaint in such action may not be served until the expiration of one hundred twenty days from the date of service of the summons or the expiration of conciliation proceedings under article eleven-B of this chapter, whichever period is less. In an action for divorce or separation, a final judgment shall not be entered by default for want of appearance or pleading, or by consent, or upon trial of an issue, without satisfactory proof of the grounds for divorce or separation. Where a complaint or counterclaim in an action for divorce or separation charges adultery, the answer or reply thereto may be made without verifying it, except that an answer containing a counterclaim must be verified as to that counterclaim. All other pleadings in an action for divorce or separation shall be verified.

§ 8. Such law is hereby amended by inserting therein a new article, to be article eleven-B, to read as follows:

ARTICLE 11-B. CONCILIATION BUREAU

Section

215. Conciliation bureau.

215-a. General powers and duties of the conciliation bureau.

215-b. Commissioners; counselors; special guardians; other personnel.

215-c. Conciliation conference after commencement of an action for divorce.

215-d. Conciliation hearings.

215-e. Temporary alimony, child support and counsel fees.

215-f. Records to be confidential.

215-g. Stay of action for divorce.

§ 215. Conciliation bureau

There is hereby created and established a conciliation bureau of the state of New York in each judicial district of the supreme court. The head of such bureau in each judicial district shall be a supreme court justice designated by a majority of the justices of the appellate division of the judicial department in which the judicial district is located. Such justice shall be the chief administrative officer of the bureau and shall have the responsibility for administering and supervising the affairs of the bureau in accordance with rules and regulations promulgated by the appellate division of the appropriate judicial department. Upon the request of the supervising justice, one or more additional justices may be assigned to assist the supervising justice in the performance of his duties.

§ 215-a. General powers and duties of the conciliation bureau

The conciliation bureau shall have the power to conduct all conciliation proceedings after the commencement of an action for divorce, in the manner provided by this article.

§ 215-b. Commissioners; counselors; special guardians; other personnel

a. The supervising justice of each judicial district shall appoint as many persons as may be necessary to be conciliation commissioners, special guardians and counselors to perform the duties prescribed by this article. Commissioners, special guardians and counselors shall receive a fee to be fixed by a majority of the justices of the appropriate appellate division in each judicial department within the amounts made available by appropriation therefor by the state and no part of the cost herein shall be a charge against any party or political subdivision of the state.

b. No person shall be appointed as a conciliation commissioner unless he is an attorney admitted to practice in this state for at least five years.

c. The appropriate appellate division shall fix rules for the appointment of counselors and may provide for the use of public, religious and social agencies established in the various judicial districts.

d. No person shall be appointed a special guardian unless he is an attorney admitted to practice in this state for at least five years.

e. In addition to conciliation commissioners, special guardians and counselors, the Bureau may employ such other officers, employees and clerical assistants as it may deem necessary and shall fix their compensation within the amounts made available by appropriation therefor by the state and no part of the cost herein shall be a charge upon any party or political subdivision of the state.

§ 215-c. Conciliation conference after commencement of an action for divorce.

a. Within ten days after the commencement of an action for divorce, the party plaintiff in such action shall file with the conciliation bureau in the judicial district where the plaintiff resides, a notice of commencement of such action. Failure to file the notice as required herein shall be deemed a discontinuance of the cause of action. Such notice shall state:

(1) the names, age and address of the parties to the marriage;

(2) the names, age and address of minor, handicapped or incompetent children, if any, of the parties;

(3) the type of divorce action brought and the date on which commenced.

b. Upon the filing of such notice, the appropriate supervising justice shall assign the matter to a conciliation commissioner.

(1) If there are minor, handicapped or incompetent children of the marriage, the commissioner may request the supervising justice to appoint a special guardian for the minor, handicapped or incompetent children. Upon such appointment, the special guardian shall be deemed to be a party to the proceedings.

(2) The commissioner shall give notice of the filing under subdivision a of section

two hundred fifteen-c of this article to all parties within five days after the matter is assigned to him and shall fix a date for a conciliation conference. All parties shall be required to attend at least one conciliation conference, or may, upon good cause shown and in the discretion of the commissioner, secure a certificate of no necessity for a conference and conciliation procedures shall be at an end.

(3) If one of the parties to the proceedings fails to appear at a conciliation conference, the conciliation commissioner or counselor who scheduled the same may request the conciliation commissioner, if a counselor scheduled the conference, or the conciliation commissioner may apply to the supervising justice for an order directing such party to appear. Any party who fails to appear as ordered shall be guilty of contempt and proceedings thereon shall follow supreme court practice.

(4) If the concilation commissioner shall determine

(a) that further conferences will be beneficial and may result in a continuation of the marriage, he may refer the parties to the proceedings to a counselor.

(b) that no further purpose will be served by a continuation of conciliation conferences, he shall issue a certificate of no further necessity for conferences and report same to the supervising justice and conciliation procedures shall be at an end.

c. Special guardians shall have the following duties:

(1) to protect the interests of minor, handicapped or incompetent children of the marriage.

(2) to consult with the parties, conciliation commissioners and/or counselors and recommend concerning the well being of the children.

(3) to concult with the parties, supervising justice, conciliation commissioner and/or counselors and recommend concerning temporary custody, support, medical care and any other problem concerning the overall well being of the children.

(4) to file a report with the conciliation commission and the supervising justice setting forth his recommendations and his reasons therefor.

d. Conciliation conferences with counselors shall be held within ten days after the reference of the proceedings to a counselor and shall be conducted informally. The statutory provisions or rules of practice, procedure, pleading or evidence shall not be applicable to the conduct thereof.

e. In conducting a conciliation conference, a counselor shall do such acts as he feels necessary to effect a reconciliation of the spouses or an adjustment or settlement of the issues of the matrimonial action. To facilitate and promote the reconciliation the counselor may, with the consent of the parties, recommend or make use of the assistance of physicians, psychiatrists or clergymen of the religious denomination to which the parties belong.

f. In the event the conciliation conferences do not effect a reconciliation of the spouses, the counselor shall file a report with a conciliation commissioner and request that such commissioner hold a conciliation hearing on the issues of the controversy. The final report of a conciliation counselor must be filed within thirty days after the matter is assigned to him.

§ 215-d. Conciliation hearings

a. Within twenty days after receipt of a counselor's report, the conciliation commissioner may fix a date for a conciliation hearing and shall give written notice to all parties of such date. Attendance at a conciliation hearing shall be mandatory for all parties to the proceedings. Conciliation procedures shall be at an end if the conciliation commissioner, in his discretion, shall not hold a hearing.

b. Each party shall be entitled to be heard, to present evidence and to cross examine witnesses and shall have the right to be represented by an attorney.

c. A conciliation commissioner shall have the power to compel the attendance of all parties at a conciliation hearing. If one of the parties fails to appear at a conciliation hearing, the commissioner may apply to the supervising justice for an order directing such party to appear. Any party who fails to appear as ordered shall be guilty of contempt and proceedings thereon shall follow supreme court practice. In addition, any party and the conciliation commissioner shall have the power to compel the attendance of witnesses, the production of books, records, documents and other evidence by the issuance of a subpoena signed by him.

d. In each case a conciliation hearing shall be held within thirty days after the submission of a final report by a conciliation counselor.

e. If, upon all the evidence at the hearing, the commissioner shall find that reconciliation is possible and would best serve the interest of both parties to the marriage, and any children thereof, the commissioner shall submit his findings to the supervising justice and shall apply for an order from such justice requiring the parties, for a period not to exceed sixty days, to attempt to effect a reconciliation. If, upon all the evidence, the commissioner shall find that reconciliation is not possible, or would not serve the interest of the parties or their children, he shall submit a report to such effect with the supervising justice of the bureau and conciliation procedures shall be at an end.

§ 215-e. Temporary alimony, child support and counsel fees

Any party involved in a conciliation proceeding may, at any stage thereof, apply for an order directing the payment of temporary alimony, child support and counsel fees. Such application shall be made to the conciliation commissioner assigned to the parties hereunder who shall hold a hearing and take testimony as to the financial ability and needs of the parties and recommend and report his findings to a justice of the supreme court of the appropriate judicial district. Such justice shall review, determine and in his discretion shall issue an appropriate order based on said recommendation and report. The relief sought shall be based on an affidavit of the party seeking the relief which shall relate only to the financial ability and needs of the parties.

§ 215-f. Records to be confidential

The records of the conciliation bureau shall be confidential and shall be available only to employees of the bureau, the parties to the proceedings and their attorneys.

§ 215-g. Stay of action for divorce

No action for divorce shall be brought to trial until:

(1) a final report has been filed by a conciliation commissioner with the supervising justice of the conciliation bureau in the judicial district in which the action is to be tried; or

(2) one hundred twenty days have elapsed since the filing of a notice of commencement of an action for divorce as herein provided.

§ 9. Section two hundred thirty of such law, as last amended by chapter six hundred eight-five of the laws of nineteen hundred sixty-three, is hereby amended to read as follows:

§ 230. Required residence of parties [to marriage in action for annulment or separation]

An action to annul a marriage or to declare the nullity of a void marriage, or for *divorce or* separation may be maintained [in either of the following cases] *only when*:

[1. Where both parties are residents of the state when the action is commenced.]

[2. Where the parties were married within the state and either the plaintiff or the defendant is a resident thereof when the action is commenced.]

[3. Where the parties were married without the state, and either the plaintiff or the defendant is a resident of the state when the action is commenced and has been a

resident thereof for at least one year continuously at any time prior to the commencement of the action.]

1. The parties were married in the state and either party is a resident thereof when the action is commenced and has been a resident for a continuous period of one year immediately preceding, or

2. The parties have resided in this state as husband and wife and either party is a resident thereof when the action is commenced and has been a resident for a continuous period of one year immediately preceding, or

3. The cause occurred in the state and either party has been a resident thereof for a continuous period of at least one year immediately preceding the commencement of the action, or

4. The cause occurred in the state and both parties are residents thereof at the time of the commencement of the action, or

5. Either party has been a resident of the state for a continuous period of at least two years immediately preceding the commencement of the action.

§ 10. Section two hundred thirty-five of such law, as added by chapter three hundred thirteen of the laws of nineteen hundred sixty-two, is hereby amended to read as follows:

§ 235. Information as to details of matrimonial actions *or proceedings*

An officer of the court with whom the proceedings in an action to annul a marriage or *to declare the nullity of a void marriage or* for divorce or separation *or a written agreement of separation or an action or proceeding for custody, visitation or maintenance of a child* are filed, or before whom the testimony is taken, or his clerk, either before or after the termination of the suit, shall not permit a copy of any of the pleadings or testimony, or any examination or perusal thereof, to be taken by any other person than a party, or the attorney or counsel of a party who had appeared in the cause, except by order of the court.

If the evidence on the trial of such an action *or proceeding* be such that public interest requires that the examination of the witnesses should not be public, the court or referee may exclude all persons from the room except the parties to the action and their counsel and the witnesses, and in such case may order the evidence, when filed with the clerk, sealed up, to be exhibited only to the parties to the action *or proceeding* or some one interested, on order of the court.

§ 11. Such law is hereby amended by inserting therein a new section, to be section two hundred fifty, to read as follows:

§ 250. *Divorces obtained outside of the State of New York*

Proof that a person obtaining a divorce in another jurisdiction was (a) domiciled in this state within twelve months prior to the commencement of the proceeding therefor, and resumed residence in this state within eighteen months after the date of his departure therefrom, or (b) at all times after his departure from this state and until his return maintained a place of residence within this state, shall be prima facie evidence that the person was domiciled in this state when the divorce proceeding was commenced.

"The provisions of this section shall not apply to a divorce obtained in another jurisdiction prior to September first, nineteen hundred sixty-seven."

§ 12. Section 5-311 of the general obligations law is hereby amended to read as follows:

§ 5-311. Certain agreements between husband and wife void.

A husband and wife cannot contract to alter or dissolve the marriage or to relieve the husband from his liability to support his wife or to relieve the wife of liability to

support her husband provided that she is possessed of sufficient means and he is incapable of supporting himself and is or is likely to become a public charge.

An agreement, heretofore or hereafter made between a husband and wife, shall not be considered a contract to alter or dissolve the marriage unless it contains an express provision requiring the dissolution of the marriage or provides for the procurement of grounds for divorce.

§ 13. Section one hundred fifty-four-a of the judiciary law is hereby repealed.

§ 14. If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part thereof directly involved in the controversy in which such judgment shall have been rendered.

§ 15. This act shall take effect September first, nineteen hundred sixty-seven provided that the two year period specified in subdivisions five and six of section one hundred seventy of the domestic relations law as added by this act shall not be computed to include any period prior to September first, nineteen hundred sixty-six and provided further that sections ten and twelve hereof shall take effect immediately.

NOTE.—Sections one hundred seventy and one hundred seventy-four of the domestic relations law, proposed to be repealed by this act, relate to actions for divorce upon grounds of adultery. Proposed new section one hundred seventy set forth new and additional grounds for granting divorce. Section two hundred one of the domestic relations law, proposed to be repealed by this act, prohibits the granting of a final judgment of separation without proof of the grounds for separation. Section one hundred fifty-four-a of the judiciary law, proposed to be repealed by this act, provides for rules relating to voluntary marital conciliation proceedings. Article eleven-B of the domestic relations law, proposed in this act, establishes a new conciliation procedure.

APPENDIX "67"

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

42 West 44th Street

SPECIAL COMMITTEE ON MATRIMONIAL LAW

Report on Recommended Amendments to the Divorce Reform Law of 1966

(*Chapter 254 of the Laws of 1966*)

Our Committee played a significant role in the events which led to the enactment of the Divorce Reform Law of 1966 (Chapter 254). Since its enactment that law has been subjected to a substantial volume of criticism, much of which, in the view of our Committee, has been hastily considered and intemperate. Recognizing that the statute, as enacted, is defective in a number of respects, our Committee nevertheless feels that the remedy does not lie in a hysterical condemnation of the law as a whole or in generalized critical characterizations of various of its provision. We believe that the necessary changes in the law can be achieved only through a careful study of its provisions and the submission of specific proposals for necessary changes.

With this purpose in mind, the following report is respectfully submitted.

I

THE CONCILIATION PROCEDURES

A. *The Basic Procedural Scheme*

Much of the criticism of the law has been directed to the provisions of Article 11-B which establishes a conciliation bureau in each judicial district of the supreme court and provides for conciliation procedures in divorce cases. It has been urged that although one of the purposes of divorce reform in this state was to make the remedy of divorce available to the poor as well as to the rich, the proposed conciliation procedures may prove to be so time-cosuming and burdensome as to inordinately increase the cost of a divorce proceeding to the litigant and to discourage resort to the courts of this state for matrimonial relief, particularly among the lower economic groups.

The following analysis of the conciliation procedure contemplated by Article 11-B would seem to confirm the validity of these fears:

Sections 215 and 215-a of the Act establish a conciliation bureau in each judicial district of the supreme court under the administrative supervision of a designated supervising justice, and vest that bureau with power to conduct all the conciliation proceedings provided for in the Article after the commencement of an action for divorce. Section 215-b authorizes the appointment of conciliation commissioners, special guardians and counselors to perform the duties prescribed by the Article.

The party plaintiff in a divorce action, within ten days after the commencement of the action, is required to file notice of such commencement with the collection bureau (§215-c(a)). Upon the filing of such notice the appropriate supervisory justice is required to assign the matter to a conciliation commissioner (§215-c(b)). No time limit for the making of such assignment is prescribed.

Within five days after assignment of the matter the conciliation commissioner is required to give notice to all parties and to fix a date for a conciliation conference (§215-c(b)(2)). No specific period of notice prior to the date fixed for such conciliation

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conference is prescribed nor is a time limit prescribed within which such conciliation conference must be held. All parties are required to attend at least one conciliation conference unless a certificate of no necessity for conference is issued by the conciliation commissioner (§215-c(b)(2)). If one of the parties fails to appear at a scheduled conciliation conference, an order may be obtained from the supervising justice directing such appearance (§215-c(b)(3)).

If the conciliation commissioner determines that no further purpose will be served by a continuation of conciliation conferences he must issue a certificate of no further necessity for conferences and report the same to the supervisory justice, in which case conciliation procedures are terminated. However, if the conciliation commissioner determines that further conferences will be beneficial and may result in a continuation of the marriage, he may refer the parties to a counselor (§215-c(b)(4)).

Conciliation conferences with a counselor must be held within ten days after the reference of the proceeding to such counselor (§215-c(d)). The counselor is authorized to make such efforts as he feels necessary to effect a reconciliation or to adjust or settle the issues of the matrimonial action and may, with the consent of the parties, make use of the assistance of physicians, psychiatrists or clergymen (§215-c(e)).

If the conciliation conferences with a counselor do not effect a reconciliation, the counselor is required to file a report with the conciliation commissioner and request the commissioner to hold a conciliation hearing on the issues of the controversy. The final report of the conciliation counselor must be filed within 30 days after the matter is assigned to him (§215-c(f)).

Within 20 days after receipt of a counselor's report the conciliation commissioner may fix a date for a conciliation hearing and give written notice thereof to all parties. Attendance by all parties is required and may be compelled by court order, if necessary (§215-d(a), (c)). Each party has the right to be heard, to present evidence, to cross examine witnesses and to be represented by an attorney (§215-d(b)). Such conciliation hearing must be held within 30 days after submission of the conciliation counselor's final report (§215-d(d)).

If the commissioner finds that reconciliation is possible and would best serve the interest of the spouses and any children thereof he must submit his findings to the supervising justice and apply for an order requiring the parties, for a period not to exceed 60 days, to attempt to effect a reconciliation. If the commissioner finds that reconciliation is not possible or would not serve the interest of the parties or their children he must so report to the supervising justice and the conciliation proceedings thereupon terminate (§215-d(e)).

In cases where there are minor, handicapped or incompetent children of the marriage the conciliation commissioner may request the supervising justice to appoint a special guardian who is deemed a party to the proceeding (§215-c(b)(1)). Where a special guardian has been appointed his duties include consultation with the parties, conciliation commissioners, counselors and the supervising justice with respect to the well being of the children, and any issues concerning temporary custody, support and medical care. He is required to file a report with the counciliation commissioners and the supervising justice setting forth his recommendations and the reasons therefor (§ 215-c(c)).

In a Report of this Committee submitted while the "Leader's Bill" was pending before the legislature, we characterized the foregoing conciliation proceedings as "unworkable and impractical" and expressed the fear that they "create an unwarranted bureaucracy leading to the substantial possibility that they may be used as a means of expensive and unjustified political patronage." We still adhere to these views.

Participation in all the steps of conciliation procedures as now constituted may require a party to be in attendance before the conciliation commissioner and counselors on at least three different occasions. If one of the parties does not appear at a scheduled conciliation conference or hearing or if multiple conferences or extended hearings are

held, this figure may well be doubled to tripled. On a substantial number, if not all, of these occasions the appearance of the parties' counsel may also be required, thus substantially adding to the litigants' legal costs. Moreover, there may well be a duplication of the testimony and evidence submitted at the conciliation hearing and that ultimately produced at the divorce trial. We are accordingly seriously concerned that the inconvenience and additional legal costs imposed by the conciliation procedures on the litigants may well serve, as a practical matter, to prevent lower economic groups from resort to the courts and, as to members of more affluent economic groups, may perpetuate the scandal of "escape" to other jurisdictions.

We are also concerned that, by reason of the cumbersone complexity of the procedure there is the danger, on the one hand, that certificates of "no necessity" will be issued perfunctorily and without adequate conciliation efforts in appropriate cases, and, on the other, that if full scale efforts at conciliation are made in every case the staffs of the conciliation bureaus, at least in some areas, will be so overburdened as to be unable to function effectively.

We also question the efficacy of the power granted to the supervising justice to issue an order "requiring the parties, for a period not to exceed sixty days, to attempt to effect a reconciliation." This coercive power cannot be found in any of the conciliation or counseling provisions of other states. Apart from the fact that it may raise constitutional questions, conciliation experience adequately demonstrates that marital harmony cannot be mandated by judicial fiat. In testimony offered by our Committee before the New York State Joint Legislative Committee on Matrimonial Laws on November 29, 1965, we pointed out that a "compulsory" reconciliation proceeding is a "contradiction in terms."

Our Committee has heretofore suggested that the procedure could be simplified by the elimination of the conciliation commissioners. In lieu therefore, we recommended that the determination as to whether conciliation efforts should be undertaken in a given case be left to the appropriate justice of the Supreme Court who could make direct referrals to court-appointed conciliation counselors in cases deemed practically worthy of such reference. We reaffirm this recommendation; but suggest that if the legislature determines that our suggestion would place too great a burden on justices at Special Term, it reconsider the conciliation procedures which were embodied in the Wilson-Sutton Bill.

B. *Administration of the Conciliation Bureaus*

We recognize that the legislature may be disposed to provide a trial period for the existing conciliation procedures before considering revisions thereof. If this view be adopted we nevertheless strongly urge that the administrative provisions of Article 11-B are unsound and require immediate amendment.

(1) *Establishment of Conciliation Bureaus on Departmental Basis*

Under Section 215 of the Divorce Reform Law a separate conciliation bureau is to be established in each of the eleven judicial districts of the supreme court. The appointment of a supreme court justice in each such district as supervising justice of such bureau is required. The supervising justice is designated as the chief administrative officer of the bureau and is vested with responsibility for administering and supervising its affairs in accordance with rules and regulations promulgated by the Appellate Division of the appropriate judicial department.

In our view this administrative scheme is impractical and wasteful for the following reasons, among others.

(a) The administration of conciliation bureaus on a judicial district basis conflicts with the general intent of the present Judiciary article of the State Constitution to vest routine supervision of the administration of courts in the Appellate Divisions of the four judicial departments.

(b) In some judicial districts the volume of divorce cases may be so great as to impose an unnecessary burden on available judicial manpower by requiring the supervising justice to perform tasks which are largely administrative in character and which might be more economically handled by a salaried non-judicial administrative official of the court. In other districts the divorce caseload is so minimal as to make the designation of a supervising justice a meaningless gesture.

(c) Fragmentation of administrative control over conciliation proceedings among eleven separate judicial districts will make it almost impossible to establish meaningful uniform standards and procedures for the operation of such bureaus even within a single judicial department. By centralizing administrative control over these bureaus in the Appellate Division of each judicial department uniform standards could be established and enforced in each department and, through the vehicle of the Administrative Board of the Judicial Conference on which the presiding justices of each Appellate Division sit, statewide uniformity in policy and procedures could be achieved if deemed desirable.

We accordingly specifically urge that Section 215 be amended so as to provide for the establishment of a conciliation bureau in each judicial department of the supreme court rather than for each judicial district. It is further recommended that the provisions of Section 215 requiring the designation of a supreme court justice in each judicial district as supervising justice of the conciliation bureau be eliminated and that there be added to that section authorization for the appointment by the respective Appellate Divisions of one or more non-judicial officials in each judicial department who, subject to the supervision of the Appellate Division, shall be responsible for the administration and supervision of the affairs of the bureau in that department. Conforming amendments to other sections of Article 11-B in which reference is made to "the supervising justice" would also be required.

(2) *Appointment and Compensation of Conciliation Commissioners and Counselors*

Section 215(b) of the Act authorizes the supervising justice of each judicial district to appoint as many persons as may be necessary to be conciliation counselors, special guardians and counselors to perform the duties prescribed by Article 11-B. The fees of such personnel are to be fixed by a majority of the justices of each Appellate Division within amounts made available by appropriation therefor by the state. For reasons heretofore stated, we are of the view that the power to appoint conciliation commissioners and counselors should be vested in the Appellate Division of each judicial department.

We are also of the view that conciliation commissioners and counselors should be employed on a salaried basis, either full time or part time as the needs of each separate judicial department may dictate. In making this recommendation we are motivated by the following considerations:

(a) The only statutory qualification for a conciliation commissioner is that he be an attorney admitted to practice in his state for at least five years (Sec. 215-b(b)). No qualifications are imposed for conciliation counselors. It should be apparent that the conciliation procedures will be an exercise in futility unless the persons holding these positions are either possessed of special background or training in the work which they are to perform or, at the least, are enabled, by the accumulation of experience, to develop such expertise. Persons possessing such special qualifications are in short supply and assignment of conciliation commissioners or counselors on a case-by-case basis will not permit the necessary acquisition of experience and expertise.

(b) The development and application of uniform standards in the handling of conciliation matters will be rendered difficult, if not impossible, if the functions of conciliation commissioner and counselor are performed by a large number of persons assigned on a case-by-case basis.

(c) If compensation is awarded on a case-by-case basis there may be at least temptation for conciliation commissioners and counselors to protract their efforts

beyond those really necessary in order to buttress their individual applications for compensation. Even if there is no real danger of this, we are convinced that the use of salaried conciliation commissioners and counselors will prove much less expensive to the state than a system under which compensation is fixed on a per case basis.

(d) Employment of conciliation commissioners and counselors on a salaried basis will avoid the danger of the use of the appointive power as a means for expensive and unjustified political patronage.

(e) Employment of conciliation commissioners and counselors on a departmental and salaried basis will provide greater administrative flexibility in that the same personnel may be used in a number of judicial districts, the caseload of each of which may not warrant the employment of full time or even part time personnel.

(3) Designation of Public and Private Agencies as Counselors

Under Section 215-b(c) of the Act the Appellate Divisions may provide for the use of public, religious and social agencies for counseling purposes. In some areas of the state the functions of conciliation counselors might best be performed by existing community agencies. We accordingly suggest that existing provisions of this section be broadened so as to expressly authorize the Appellate Divisions to contract with appropriate public, religious and social agencies to perform the services of counselor contemplated by Article 11-B.

(4) Appointment of Special Guardians

Under the provisions of Section 215-b(a) special guardians are to be appointed by the supervising justice of each judicial district. No qualifications for a special guardian are prescribed other than that he be an attorney admitted to practice in this state for at least five years.

As in the case of conciliation commissioners and counselors it is important that special guardians possess or be enabled to acquire the special experience necessary for the proper performance of their duties. We are accordingly concerned that the indiscriminate appointment of special guardians on a case-by-case basis will not provide such expertise. In some areas of the state the services of special guardian could be most effectively and economically performed by a staff of one or more attorneys attached to the court on a full time or part time basis. In other areas, where this is impractical, assignments should be made from a list of appointees approved by the appropriate Appellate Division. This is the procedure prescribed by Section 243 of the Family Court Act for the appointment of law guardians who represent minors in that Court.*

Accordingly, we recommend that Section 215-b be amended so as to authorize the Appellate Division to enter into agreements with legal aid societies or with any qualified attorney or attorneys to serve as special guardians under Article 11-B. We also recommend that, as an alternate procedure, the Appellate Divisions be authorized to designate a panel from which special guardians are to be appointed by the supreme court justices and, in this connection, to invite any bar association in the community to recommend qualified persons for consideration.

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* Family Court Act, Section 243:

"*Designation by appellate division.* (a) The appellate division of the supreme court for the judicial department in which a county is located may enter into an agreement with a legal aid society for the society to provide law guardians for the family court in that county or may enter into an agreement with any qualified attorney or attorneys to serve as a law guardian or as law guardians for the family court in that county.

(b) The appellate division of the supreme court for the judicial department in which a county is located may designate a panel of law guardians for the family court in that county. For this purpose, it may invite any bar association in the county to recommend qualified persons for consideration by the appellate division in making its designation."

Statistics compiled by the Judicial Conference indicate that where law guardian services have been provided under contracts with legal aid societies the cost per case has been less than $20, while the per case cost of such services performed by counsel on an assigned basis averages almost $50.

(5) *Pre-Litigation Conciliation*

It has been suggested that the conciliation procedures provided for by Article 11-B should be made available to spouses even prior to the commencement of a matrimonial action. Such a conciliation proceeding is already available under Article 9 of the Family Court Act and effectuation of this suggestion would create an unnecessary duplication of facilities and services. It may well be, however, that the conciliation facilities and services of the Family Court will have to be greatly strengthened if the purposes of Article 9 of the Family Court Act are to be successfully pursued.

II

SEPARATION ACTIONS

A. *Service of Pleading in Separation Actions*

Section 211 of the Divorce Reform Law requires that an action for divorce or separation be commenced by the service of a summons and prohibits the service of a verified complaint in said action "until the expiration of one hundred twenty days from the date of service of the summons or the expiration of conciliation proceedings under article eleven-B of this chapter, whichever period is less." Since the conciliation procedures provided for in Article 11-B pertain solely to actions for divorce and to not apply to separation actions, the foregoing provision (as to a separation action) is patently a typographical error which should be eliminated. A compulsory delay of 120 days between the service of a summons in a separation action and the filing of a complaint has never been suggested by anybody.

In the absence of mandatory conciliation procedures during this interval we are of the view that no real purpose is served by the mandated delay.

It is accordingly recommended that Section 211 be amended by eliminating the reference to separation actions from the first sentence thereof and that Section 215-e be amended as hereinafter set forth.

B. *Temporary Alimony, Child Support and Counsel Fees*

Section 215-e provides that any party "involved in a conciliation proceeding may, at any stage thereof, apply for an order directing the payment of temporary alimony, child support and counsel fees." Such application must be made to the conciliation commissioner, who is directed to hold a hearing and take testimony as to the financial ability and needs of the parties and to recommend and report his findings to a justice of the supreme court of the appropriate judicial district. Such justice is authorized to review, determine and in his discretion to issue an appropriate order based on such recommendation and report. Section 215-e further provides that "The relief sought should be based upon the affidavit of the party seeking the relief but shall relate only to the financial ability and means of the parties."

We approve the provision which permits the granting of temporary alimony, child support and counsel fees on the basis of affidavits relating only to the financial ability, means and needs of the parties. In our view, the elimination of the requirement of showing reasonable probability of success in the action is desirable since it avoids the necessity for recriminatory cross-allegations of fault, which presently strongly militate against any possibility of reconciliation during the pendency of the action.

We recommend that the provision concerning temporary awards on the basis of affidavits relating only to financial ability, means and needs of the parties be incorporated in the Domestic Relations Law by appropriate amendments to Sections 236, 237 and (to the extent applicable) 240 thereof.

We disapprove the provisions of Section 215-e of the Act which provide that applications for orders directing the payment of temporary alimony, child support and counsel fees should, in the first instance, be made to a conciliation commissioner. As we have noted above, this portion of Section 215-e could have no application to separation

actions, because separation actions are not within the compass of conciliation proceedings. However, our objection goes much deeper than this.

In the last analysis, the responsibility for fixing temporary alimony and counsel fees rests with a justice of the supreme court. This is recognized in the present text of Section 215-e, which requires a justice at special term to pass on the recommendation of the conciliation commissioner. What the present statute provides is that, in every case where there is a conciliation proceeding, the parties be subjected to a preliminary hearing on the question of temporary alimony, child support and counsel fees before a conciliation commissioner. Then, the matter goes back to a justice a special term. We thus have two steps in situations where a single application to the court usually prevails. It is true that the courts sometimes refer the matter to a referee and hold in abeyance the decision of the motion until the report of the referee comes in. However, although such a procedure may be justified in a given situation, it is absurd to make it mandatory and uniform.

It should be noted that there is no provision in the Act for a justice at special term to grant an interim order for temporary alimony and child support while the matter is pending before the conciliation commissioner. Since there is also no time requirement for the referral of the entire matter to the conciliation commissioner, a woman and her children might well starve before the matter of temporary financial adjustment would have been passed upon.

It should also be noted that Section 215-e makes no provision for the determination of temporary custody and visitation. If there is an issue in this respect (and there very often is) we might have the ridiculous situation where a justice of the supreme court determines questions of temporary custody and visitation but is powerless to decide questions of support while such temporary custody and visitation are in effect.

III

INHERITANCE RIGHTS OF DIVORCED INNOCENT SPOUSE

Under the provisions of Section 170(5) of the Act an action for divorce may be maintained by a husband or wife where they have lived apart pursuant to a decree of separation for a period of two years after the granting of such decree and satisfactory proof has been submitted by the plaintiff that he or she has duly performed all the terms of conditions of such decree. The operation of this provision may produce an inequitable result in certain cases by depriving a faultless spouse who has procured a judgment of separation without any desire of divorcing his or her spouse of the right to share in the other spouse's estate.

Under Sections 18 and 18-b of the Decedent Estate Law a "surviving spouse" has, subject to certain exceptions, the right to share in the estate of the other spouse who dies intestate. Under Section 83 of the Decedent Estate Law a "surviving spouse" has the right, subject to certain exceptions, to elect against the Will of the other spouse. Under Section 50 of the Decedent Estate Law the term "surviving spouse" as used in the foregoing sections is so defined as to exclude a divorced spouse regardless of whether he or she was plaintiff or defendant in the divorce action and regardless of whether or not the divorce was procured by reason of his or her fault. Situations may well be envisaged in which one spouse successfully maintains a separation action but, for religious or other reasons, does not desire a divorce. If the parties live separate and apart for two years after the granting of the separation decree the defendant in the separation action who has duly performed all the terms and conditions of such decree may procure a decree of divorce against the innocent spouse. In at least certain of these cases the loss by the innocent spouse of all inheritance rights may be grossly unfair.

It is accordingly recommended that a new section be added to Article 13 of the Domestic Relations Law so as to vest discretion in the court in divorce actions to include in any judgment of divorce based upon a separation decree obtained by the

defendant in the divorce action an express reservation to such defendant of the rights of a "surviving spouse" provided for in Sections 18, 18-b and 83 of the Domestic Relations Law. It is contemplated that such power would be solely discretionary in character and would be exercised only where the particular circumstances so dictated. Amendment of Section 50 of the Decedent Estate Law would also be required so as to expressly include within the definition of a "surviving spouse" a spouse whose inheritance rights had been expressly preserved by the terms of a divorce entered in this state as above suggested.*

IV

VALIDITY OF DIVORCES OBTAINED IN OTHER JURISDICTIONS

Much criticism has been directed against Section 250 of the Divorce Reform Law which provides, in substance, that proof that a person obtaining a divorce in another jurisdiction was either (a) domiciled in this state within 12 months prior to the commencement of the proceeding for said divorce, and resumed residence in this state within 18 months after the date of his departure therefrom or (b) at all times after his departure from the state and until his return, maintained a place of residence within this state, constitutes *prima facie* evidence that such person was domiciled in this state when the foreign divorce proceeding was commenced.

In our view this section, if properly construed, is applicable solely to *ex parte* divorces procured in sister states or in foreign jurisdictions in which domicile is the basis of divorce jurisdiction. We are strongly of the view that the application of these provisions to bilateral divorce decrees made in sister states would constitute an unconstitutional denial of full faith and credit. We are also of the view that Section 250 will have no application to divorce decrees issued in those areas of Mexico in which jurisdiction is based upon express or implied submission rather than domicile. If this section were otherwise construed we would favor its repeal.

V

FILING AND CONFIDENTIALITY OF SEPARATION AGREEMENTS

A. *Filing of Separation Agreements*

Section 170(6) of the Law provides, in substance, that an action for divorce may be maintained if a husband and wife have lived separate and apart pursuant to a written agreement of separation, subscribed and acknowledged by the parties thereto in the form required to entitle a deed to be recorded, for a period of two years after the execution of such agreement and satisfactory proof has been submitted by the plaintiff that he or she has fully performed all the terms and conditions of such agreement. That section further requires that the agreement be filed in the office of the clerk of the county wherein either party resides within 30 days after the execution thereof.

Despite the provisions of Section 235 regarding confidentiality, many attorneys are worried about the necessity for the public filing of a document which may contain detailed information about the financial means of the parties, alimony, child support, custody, etc. Since the requirement of filing is designed to provide reliable proof as to the facts of the execution of a separation agreement and the date of such execution, there would appear to be no real purpose served in requiring the filing of the entire agreement. We suggest that the objectives of the filing requirement could be satisfied by a provision authorizing the filing of a memorandum of such agreement subscribed and

* Consideration should be given to a solution of this problem in the event divorces and remarriages result in multiple proliferation of "surviving spouses."

acknowledged by the parties in the form required to entitle a deed to be recorded, which merely sets forth the fact of the making of the agreement and the date on which it was executed. We accordingly recommend that Section 170 (6) be amended accordingly. Conforming amendments to Section 211 (c) will also be required.

The requirement that the agreement, itself, be signed and acknowledged should be preserved to avoid any question as to its contents when a divorce premised upon observance of its conditions is sought.

B. *Confidentiality of Filed Separation Agreement or Memorandum of Separation Agreement*

Although Section 235 of the Divorce Reform Law is obviously designed to protect the confidentiality of separation agreements filed with the county clerk, the language is somewhat ambiguous and may be construed to extend the protection of confidentiality to such agreements only where a matrimonial or custody action or proceeding is before the court. If so construed, the protection of confidentiality which the section is designed to afford will not extend to the many separation agreements which will normally be filed in advance of any action or proceeding. We accordingly propose that Section 235 be so amended as to make clear that the written separation agreement (or a memorandum of separation agreement, if such is authorized) shall be held confidential whenever filed.

CONCLUSION

The passage of Chapter 254 of the Laws of 1966 (most of which will become effective on September 1, 1967) represented a fine legislative response to the clear and unmistakable will of the people of New York that New York State's medieval matrimonial statutes be modernized.

Unfortunately, some of the provisions of that statute may result in a situation where its beneficent aims cannot be accomplished because the mechanics for carrying out those aims are impractical and unworkable. It is the opinion of our Committee that the legislature will again be responsive to the need for amendment. For this reason, we have submitted the foregoing recommendations.

Since this report is issued before Election Day, we cannot assume, with any degree of certainty, who will be the legislative leaders in the forthcoming session of the legislature. However, it is believed wise to circulate this report as soon as possible so that, after the election, a bill may be pre-filed to carry out these recommendations or such portions thereof as the legislative leaders or individual legislators may desire to have enacted. Accordingly, copies of this report will not only be printed in THE RECORD of the Association, but will be widely circulated. Needless to say, any legislator (present or future) will be furnished a copy thereof upon more request addressed to the Secretary of the Association.

The drawing of bills (or an omnibus bill) to put into effect some or all of our recommendations may present some problems of draftsmanship. As in the past, our Committee happily holds itself open for consultation with and assistance to members of the legislature.

Respectfully submitted,

SPECIAL COMMITTEE ON MATRIMONIAL LAW
OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Howard Hilton Spellman, *Chairman*
Jacob L. Isaacs, *Vice-Chairman*
Samuel G. Fredman, *Secretary*

Leroy D. Clark
Bernard F. Curry
Doris J. Freed
Martin Kleinbard
Harold L. Lipton
Vincent J. Malone
Edmund P. Rogers, Jr.
Paul W. Williams

APPENDIX "68"

Legend: Deletions are indicated by square brackets. Changes or additions in text are indicated by italics.

An act to amend the domestic relations law and the estates, powers and trusts law, in relation to procedures governing matrimonial actions and repealing sections two hundred fifteen, two hundred fifteen-a, two hundred fifteen-b, two hundred fifteen-c, two hundred fifteen-d and two hundred fifteen-e of the domestic relations law relating thereto.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivisions three, four, five and six of section one hundred seventy of the domestic relations law, as added by chapter two hundred fifty-four of the laws of nineteen hundred sixty-six, are hereby amended to read, respectively, as follows:

(3) The confinement of the defendant [to] *in* prison for a period of [three] *two* or more consecutive years after the marriage of plaintiff and defendant.

(4) The commission of an act of adultery, provided that adultery for the purposes of articles ten, eleven, and eleven-A of this chapter, is hereby defined as the commission of an act of sexual or deviate sexual intercourse, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant. *The term deviate sexual intercourse shall include an act of sodomy, bestiality or homosexuality.*

(5) The husband and wife have lived apart pursuant to a decree *or judgment* of separation *granted on or after September one, nineteen hundred sixty-six,* for a period of two years after the granting of such decree *or judgment,* and satisfactory proof has been submitted by the plaintiff that he or she has [duly] *substantially* performed all the terms and conditions of such decree.

(6) The husband and wife have lived separate and apart pursuant to a written agreement of separation, subscribed and acknowledged *on or after August one, nineteen hundred sixty-six* by the parties thereto in the form required to entitle a deed to be recorded, for a period of [two years] *eighteen months* after the execution of such agreement and satisfactory proof has been submitted by the plaintiff that he or she has [duly] *substantially* performed all the terms and conditions of such agreement. Such agreement *or a memorandum thereof entitled "memorandum of separation agreement," subscribed and acknowledged by the parties thereto in the form required to entitle a deed to be recorded, and setting forth the names and addresses of the parties, the fact that a written separation agreement has been entered into by them in conformance with this section and the date of execution and acknowledgement thereof by each party,* shall be filed in the office of the clerk of the county wherein either party resides within thirty days after the execution thereof. *The eighteen month period specified herein shall not be computed to include any period prior to September one, nineteen hundred and sixty-six.*

§ 2. Section one hundred seventy-one of the domestic relations law as added by chapter three hundred thirteen of the laws of nineteen hundred sixty-two is hereby REPEALED.

§ 3. Subdivision five of section two hundred of such law, as added by chapter two hundred fifty-four of the laws of nineteen hundred sixty-six, is hereby amended to read as follows:

5. The confinement of the defendant [to] *in* prison for a period of [three] *two* or more consecutive years after the marriage of plaintiff and defendant.

§ 4. Section two hundred eleven of such law, as added by chapter two hundred fifty-four of the laws of nineteen hundred sixty-six, is hereby amended to read as follows:

§ 211. Pleadings and proof. [An action for divorce or separation] *A matrimonial action* shall be commenced by the service of a summons [.], *only and* [A] a verified complaint in such action may not be served until the expiration of [one hundred twenty] *sixty* days from the date of service of the summons or the [expiration] *termination* of conciliation proceedings under article eleven-B of this chapter, whichever period is less. In *a matrimonial action,* [an action for divorce or separation.] a final judgment shall not be entered by default for want of appearance or pleading, or by consent, or upon trial of an issue, without satisfactory proof of the grounds *therefor* [for divorce or separation.] Where a complaint or counterclaim in an action for divorce or separation charges adultery, the answer or reply thereto may be made without verifying it, except that an answer containing a counterclaim must be verified as to that counterclaim. All other pleadings in *a matrimonial action* [an action for divorce or separation] shall be verified.

§ 5. Section two hundred fifteen of such law is hereby REPEALED and a new section two hundred fifteen is added thereto to read as follows:

§ 215. Conciliation Bureau. It is the policy of the State of New York to preserve the marriage state wherever possible. To that end there is hereby created and established a conciliation bureau of the State of New York in each of the four Judicial Departments. The commissioner or head of such bureau in each Judicial Department and such assistants and staff as may be necessary and conciliation counsellors shall be appointed and be removable by the presiding Justice of the Appellate Division of such Judicial Department. Appointments and transfers to such bureau shall be consistent with the Civil Service Law. The Appellate Division may enter into agreements with public, religious and social agencies to provide conciliation counsellors, and may by rule in addition to or in place thereof provide for the utilization of the appropriate facilities of the Family Court.

Standards and qualifications of the personnel in such bureau shall be established by the Administrative Board.

The appropriate Appellate Division shall establish rules and regulations for the method of conciliation.

6. Sections two hundred fifteen-a, two hundred fifteen-b, two hundred fifteen-c, two hundred fifteen-d and two hundred fifteen-e of such law are hereby REPEALED and a new section two hundred fifteen-a is hereby added thereto to read as follows:

§ 215-a. Conciliation proceedings after commencement of an action.

a. Within ten days after the commencement of a matrimonial action the party-plaintiff in such action shall file with the clerk of the conciliation bureau in the Department where the action was started a notice of the commencement of such action. Failure to file such notice shall be deemed a discontinuance of the cause of action.

Such notice shall contain:

1. the names, ages and addresses of the parties to the marriage;

2. the names, ages and addresses of all children of the parties and those who are minor, handicapped or incompetent;

3. the nature of the action and the date on which it was commenced;

4. the duration of the marriage;

5. whether the husband is supporting the wife and children and who has custody of the children;

6. any attempts made at reconciliation.

After the filing of such notice and upon any information available to the court the court wherein the action is pending upon motion of either party or upon its own motion shall determine whether it shall issue a certificate of no necessity or call for a conciliation conference.

The court shall then either enter an order that conciliation proceedings are not necessary and that plaintiff is entitled to proceed immediately with the further prosecution of the action or refer the action to the commissioner of the bureau for conciliation proceedings.

Upon the filing of such an order, the commissioner of the bureau shall forthwith assign the matter to a conciliation counsellor.

The counsellor shall then hold at least one conciliation conference at which both parties may be compelled to attend and such other conferences as may be provided by the rules of the Appellate Division.

The final report of the conciliation counsellor must be filed with the commissioner within thirty days after the matter has been assigned to him unless the time is extended by the court.

If the counsellor has effected a reconciliation of the spouses, the action shall be dismissed. If he has been unable to effect a reconciliation, the commissioner shall thereupon issue a certificate of termination of conciliation proceedings and the action shall proceed accordingly.

7. Section two hundred fifteen-f of such law as added by chapter two hundred fifty-four of the laws of nineteen hundred sixty-six is hereby amended to read as follows and renumbered two hundred fifteen-b:

§ 215-[f] *b.* Records to be confidential. [The records of the conciliation bureau] *All conciliation records* shall be confidential and shall be available only to employees of the bureau *or such agency to which the matter has been referred.* [the parties to the proceeding and their attorneys.] *and such records and any statements made by the parties during a conciliation conference shall not be admissible in evidence for any purpose in any proceeding.*

8. Section two hundred fifteen-g of such law, as added by chapter two hundred fifty-four of the laws of nineteen hundred sixty-six, is hereby amended to read as follows and renumbered two hundred fifteen-c:

§ 215-[g] *c.* Stay of [action for divorce] *matrimonial actions.*

No action for divorce *annulment or separation* shall be brought to trial until:

[(1) a final report has been filed by a conciliation commissioner with the supervising justice of the conciliation bureau in the judicial district in which the action is to be tried; or] *(1) a conciliation proceeding has been concluded as provided in section two hundred fifteen and section two hundred fifteen-a hereof; or*

(2) [one hundred twenty] *sixty* days have elapsed since the filing of a notice of commencement of [an] *the* action [for divorce] as herein provided.

§ 9. Section two hundred thirty-five of such law, as last amended by chapter two hundred fifty-four of the laws of nineteen hundred sixty-six, is hereby amended to read as follows:

§ 235. Information as to details of matrimonial actions or proceedings. An officer of the court with whom the proceedings in an action to annul a marriage or to declare the nullity of a void marriage or for divorce or separation or a written agreement of separation or an action or proceeding for custody, visitation or maintenance of a child are filed, or before whom the testimony is taken, or his clerk, either before or after the termination of the suit, shall not permit a copy of any of the pleadings, *written agreement of separation or memorandum thereof* or testimony, or any examination or perusal thereof, to be taken by any other person than a party, or the attorney or counsel of a party who had appeared in the cause, except by order of the court.

If the evidence on the trial of such an action or proceeding be such that public interest requires that the examination of the witnesses should not be public, the court or referee may exclude all persons from the room except the parties to the action and their counsel [and the witnesses], and in such case may order the evidence, when filed with the clerk, sealed up, to be exhibited only to the parties to the action or proceeding or some one interested, on the order of the court.

§ 10. Section two hundred forty-one of such law, as added by chapter three hundred thirteen of the laws of nineteen hundred sixty-two, is hereby amended to read as follows:

§ 241. Interlocutory judgment in action to annul a marriage or for divorce. In an action brought for judgment annuling a marriage, or divorcing the parties and dissolving a marriage, the decision of the court or report of the referee must be filed and interlocutory judgment thereon must be entered within fifteen days after the party becomes entitled to file or enter the same, and cannot be filed or entered after the expiration of said period of fifteen days unless by order of the court upon application and sufficient cause being shown for the delay. The interlocutory judgment, in the discretion of the court, may provide for the payment of alimony or for the support and maintenance of the children of the marriage until the interlocutory judgment becomes final or until the entry of final judgment; *may provide, in the case of a divorce granted under subdivision five of section one hundred seventy in favor of a party against whom a decree of separation was entered, that the party against whom the interlocutory judgment is entered in an action for divorce shall qualify under the estates, powers and trusts law as a surviving spouse;* it may include a judgment for costs, when costs are awarded, in which case said judgment for costs shall be docketed by the clerk, and thereupon shall have the same force and effect as if docketed upon the entry of final judgment therein, except that it shall not be enforceable by execution or punishment until the interlocutory judgment becomes the final judgment or until the entry of final judgment in said action.

§ 11. Section two hundred fifty of such law, as added by chapter two hundred fifty-four of the laws of nineteen hundred sixty-six, is hereby amended to read as follows:

§ 250. Divorces obtained outside the state of New York, Proof that a person obtaining a divorce in another jurisdiction, *other than one obtained in an action in which both parties appeared*, was (a) domiciled in this state within twelve months prior to the commencement of the proceeding therefor, and resumed residence in this state within eighteen months after the date of his departure therefrom, or (b) at all times after his departure from this state and until his return maintained a place of residence within this state, shall be prima facie evidence that the person was domiciled in this state when the divorce proceeding was commenced.

The provisions of this section shall not apply to a divorce obtained in another jurisdiction prior to September first, nineteen hundred sixty-seven.

§ 12. Paragraph a and subdivision 1 of section five-one, two of the estates, powers and trusts law, as added by chapter nine hundred fifty-two of the laws of nineteen hundred sixty-six, is hereby amended to read as follows:

§ 5-1.2. Disqualification as surviving spouse. (a) A husband, [or] wife *or the former husband or wife of a marriage terminated by divorce* is a surviving spouse within the meaning, and for the purposes of 4-1.1, 5-1.1, 5-1.3, 5-3.1 and 5-4.4, unless it is established satisfactorily to the court having jurisdiction of the action or proceeding that:

(1) A final decree or judgment of divorce, *other than a decree or judgment of divorce in which the court preserved the right of a spouse to qualify as a surviving spouse*, of annulment or declaring the nullity of a marriage or dissolving such marriage

on the ground of absence, recognized as valid under the law of this state, was in effect when the deceased spouse died.

§ 12. Subdivisions 5 and 6 of section one hundred seventy of the domestic relations law as amended by this act and section ten of this act shall take effect immediately and sections two, three, four, five, six, seven, eight, nine, eleven and twelve of this act shall take effect September first, nineteen hundred sixty-seven.

NOTES: Section 171, herein repealed, establishes procurement, connivance, forgiveness, laches, and plaintiff's adultery as a defense to an action for divorce.

Section 215 creates a conciliation bureau. Section 215-a defines general powers and duty of such bureau. Section 215-b provides for Commissioners, Counselors, special guardians and other personnel in conciliation proceedings. Section 215-c provides for conciliation conferences. Section 215-d provides for conciliation hearings, including compulsory conciliation proceedings in the discretion of the Commissioner. These sections are repealed and conciliation proceedings are now provided for in new Sections 215 and 215-a in a more flexible and less complex manner.

Section 215-e herein repealed provides for temporary alimony, child support and counsel fees based solely on financial ability and need.

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Section 215-e herein repealed provides for temporary alimony, child support and counsel fees based solely on financial ability and need.

First Session—Twenty-seventh Parliament

1966-67

PROCEEDINGS OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON

DIVORCE

No. 20

THURSDAY, MARCH 2, 1967

Joint Chairmen

The Honourable A. W. Roebuck, Q.C.

and

A. J. P. Cameron, Q.C., M.P.

WITNESSES:

Robert McCleave, M.P.

Ian Wahn, M.P., Sponsor of Bill C-38.

APPENDIX:

69.—Bill C-38, An Act respecting Marriage and Divorce.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1967

First Session—Twenty-seventh Parliament

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QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1967

26037—1

MEMBERS OF THE
SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS
ON DIVORCE

FOR THE SENATE

Hon. A. W. Roebuck, Q.C., Joint Chairman

The Honourable Senators

Aseltine	Connolly (*Halifax North*)	Flynn
Baird	Croll	Gershaw
Belisle	Denis	Haig
Burchill	Fergusson	Roebuck—(12).

FOR THE HOUSE OF COMMONS

A. J. P. Cameron, Q.C. (*High Park*), Joint Chairman

Members of the House of Commons

Aiken	Forest	McQuaid
Baldwin	Goyer	Otto
Brewin	Honey	Peters
Cameron (*High Park*)	Laflamme	Ryan
Cantin	Langlois (*Mégantic*)	Stanbury
Choquette	MacEwan	Trudeau
Chrétien	Mandziuk	Wahn
Fairweather	McCleave	Woolliams—(24).

(Quorum 7)

ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the House of Commons:

March 15, 1966:

"On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—that a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee."

"By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19, an Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bills be referred to the Joint Committee of the Senate and House of Commons on Divorce".

March 16, 1966:

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce".

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce."

26037—1½

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Gower, Honey, Laflamme, Langlois (*Mégantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams."

LÉON-J. RAYMOND,
Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate and House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

March 29,1966:

"With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, namely, the Honourable Senators Aseltine, Baird, Belisle, Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig, and Roebuck; and

That a Message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—

Resolved in the affirmative."

May 10, 1966:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19 intituled: "An Act to extend the grounds upon which courts now having jurisdiction to grant divorces a *vinculo matrimonii* may grant such relief".

The question being put on the motion—

In amendment, the Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

J. F. MACNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

THURSDAY, March 2, 1967.

Pursuant to adjournment and notice, the Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3:30 p.m.

Present: For the Senate: The Honourable Senators Roebuck (*Joint Chairman*), Belisle, Denis, Fergusson and Gershaw—5.

For the House of Commons: Messrs: Cameron (*High Park*) (*Joint Chairman*), McCleave, Peters and Wahn—4.

In attendance: Peter J. King, Ph.D., Special assistant.

The following witnesses were heard:

Robert McCleave, M.P.

Ian Wahn, M.P., Sponsor of Bill C-58.

The following is printed as an Appendix:

69. Bill C-58, An Act respecting Marriage and Divorce.

At 4:45 p.m. the Committee adjourned until Tuesday next, March 7, 1967 at 3:30 p.m.

Attest.

Patrick J. Savoie,
Clerk of the Committee.

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THE SENATE

SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

EVIDENCE

OTTAWA, Thursday, March 2, 1967.

The Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3.30 p.m.

Senator Arthur A. Roebuck and Mr. A. J. P. Cameron (*High Park*), Co-Chairmen.

Co-Chairman Senator ROEBUCK: Honourable Senators, members of the House of Commons, we have a quorum and I think we had better commence our porceedings. We have had a long and a very great series of meetings at which we have had witnesses, who were our guests, who have given us a wealth of information in masterly briefs and presentations. We did have a program for today but we have none now because of certain changes on the part of our witnesses, but we have got something that is equally important and must be taken care of.

Mr. McCleave promised us that he would look into the law of Nova Scotia, which as members will recollect, is somewhat different from the law in other provinces. He has now prepared a brief but I have only recently received it and have not been able to read it. I presume that is the way with all of you. Let us now call on Mr. McCleave to present his brief and any comments he may wish to make on it. Mr. McCleave will tell us what the law of Nova Scotia is in this matter.

Mr. MCCLEAVE: Thank you, Mr. Chairman, and colleagues in the committee. I do not know whether you want me to read the brief. I think it would be helpful if I simply give the highlights of it.

Co-Chairman Senator ROEBUCK: There are only three pages, Mr. McCleave. Perhaps you would not find it difficult to read them.

Mr. MCCLEAVE: Yes, I can do that.

Co-Chairman Senator ROEBUCK: I received the brief only very recently, as I said, and have not had an opportunity to read it.

Mr. MCCLEAVE: Very well, Mr. Chairman, I will read it.

As Mr. E. Russell Hopkins has pointed out in an outstanding presentation, "Cruelty" as a ground for divorce has existed in Nova Scotia since 1761 (Page 13). Mr. Hopkins dealt with the jurisprudence which has developed concerning cruelty at pages 19 and 20 of our proceedings.

My purpose will be to add somewhat to the opinions of the courts that he placed on record, since it is important to dispel any public notion that "cruelty" is not widely defined so as to embrace marriage breakdown in all its aspects.

Frequently in divorce cases involving cruelty allegations, the offender will be found guilty of the conduct complained of but will say that he or she still loves the petitioner.

In other words, it is a question of lack of intention.

English courts and Nova Scotian courts have wrestled with this problem for years, and there have been significant changes in the law.

In 1939, for example, in *Astle vs. Astle*, 1939 3 All England Reports, Mr. Justice Collins stated "intention or malignity is an essential ingredient in cruelty."

But in less than a decade, in *Squire vs. Squire*, reported in 1948 2 All England Reports, the Court of Appeal unanimously held that malice was not essential in an action founded on cruelty. Lord Justice Evershed specifically referred to the Astle case, and said: "As I read his judgment (Collins J), the Judge was of the opinion that the absence of any spiteful or malignant intention on the part of the wife (as he found to have been the fact) was fatal to the husband's claim. I am unable to agree with this view."

One of the latest decisions of the House of Lords, *Gollins vs. Gollins*, 1963 2 All England Reports at page 966 et seq., is the most authoritative statement on the question of intention. The husband was lazy, gave little assistance to the wife who ran a nursing home, and she was reduced to a physical and mental state where she would not longer be able to maintain herself or her children. She also had assumed several of his debts. Divorce was granted on the ground of cruelty. The House of Lords had to decide whether an intention to injure the other spouse is or is not a necessary element of cruelty. Divorce was granted by justices at Ludlow, reversed by a divisional court of the Probate, Divorce and Admiralty Division, restored by the Court of Appeal, and affirmed by the House of Lords.

Lord Reid put his conclusions in this way:

> If the conduct complained of and its consequences are so bad that the petitioner must have a remedy, then it does not matter what was the state of the respondent's mind.

Lord Evershed agreed, and said:

> In my opinion, however, the question whether one party to a marriage has been guilty of cruelty to the other or has treated the other with cruelty does not, according to the ordinary sense of the language used by Parliament, involve the presence of malignity (or its equivalent); and if this view be right it follows, as I venture to think, that the presence of intention to injure on the part of the spouse charged or (which is, as I think, the same thing) proof that the conduct of the party charged were "cruel" according to the ordinary sense of that word, rather than whether the party charged was himself or herself a cruel man or woman.

In the Nova Scotian courts, one of the leading pronouncements was by Mr. Justice Currie—now Chief Justice of the Appeal division—in *Clattenburg* v. *Clattenburg,* reported in 1955 2 Dominion Law Reports. At page 375, he stated that a party seeking divorce on the ground of cruelty "must satisfy the court not only that he or she suffered in the past but also that he or she is in need of protection in the future."

I have dealt at length with the question of intention because I think that when we are dealing with the field of marriage breakdown in this committee this development of the question of intention must be helpful in that regard as well as with regard to the legal concept of what is cruelty.

My second purpose is to acquaint the committee with views of the Justices of the Supreme Court of Nova Scotia on the question of codification of the concept of "cruelty". The views are unanimously not to codify, and I was able to speak to a majority of the six trial judges. The current legislation in the United Kingdom may be found at Page 52, where the words are "treated the petitioner with cruelty." Cruelty is not otherwise defined in the British Statute.

It might be noted that the justices also agree that no one judge should be assigned to deal with divorce. Some years ago this was the practice in Nova Scotia, but is now generally agreed that the orderly development of concepts in what constitutes cruelty will best come about if several judicial minds are responsible for that development.

My third point concerns the number of cases in which relief may be granted to a petitioner because of cruelty. Up to 1950, the number of such cases was small. Recollection at the Law Courts in Halifax is that one or two cases a year would be

heard. The number now is approximately 15 out of some 420 cases being handled each year. We are thus dealing with an addition to the current divorce rate in an approximate order of three to four per cent.

In the second last paragraph I stated that "The number now is approximately 15 out of some 420 cases being handled each year." Since this was written, a check was made by Miss Marjorie Hyde, Deputy Registrar, of 100 tried cases, and she found 16 involved cruelty. The estimate of three to four per cent should therefore be corrected to about 19 per cent. In other words, of the 100 cases, 84 would be on the usual ground of adultery and 16 on the ground of cruelty and the percentage, 19 per cent, represents the proportion of 16 to 84. This is a helpful guide since elsewhere in Canada one would be looking for the expected number of cases of cruelty which do not now exist.

I have closed by thanking the Chief Justice and the Registrar for their kind assistance.

I have given an appendix which was prepared some time ago. The Registrar handed me eight files at random, there was no selectivity about it, and I went through them to pick out the allegations of fact, which were substantiated by evidence, and in some cases by the notes of the trial judge. At any rate, this just gives the committee a list of a few of the types of cases which constitute cruelty in the province of Nova Scotia. I did that so there would be no doubt that we were dealing with unquestionable cruelty, cruelty as such, and not with incompatibility.

Co-Chairman Senator ROEBUCK: Are you going to read the cases?

Mr. MCCLEAVE: I had not planned to.

Co-Chairman Senator ROEBUCK: There are only a few of them; I suggest you read them.

Mr. MCCLEAVE: All right, Mr. Chairman.

CASE ONE: Woman beaten over a period of two years by her husband, including a kick to her abdomen when she was pregnant. She required medical care after one beating. There were also threats that he would kill her.

She got a divorce on that ground.

CASE TWO: Husband refused normal marital sexual relations over a period of twenty years, resulting in a deterioration of her health. He threatened her with a razor, threatened her because the tea was cold, acted so that she required hospital treatment—not specified in petition as to what these acts were—quarrelled with her and had temper tantrums, sulked, displayed fits of temper and was uncongenial.

Co-Chairman Senator ROEBUCK: That cold tea would be a good defence.

Mr. MCCLEAVE: The tendency in divorce petitions is for the petitioner to throw everything he or she can at the spouse and so the tea made its way into the report along with the razor.

CASE THREE: Wife said her husband treated her in a "cruel, harsh and inhuman manner by repeatedly assaulting and abusing her," that while intoxicated he struck her across the face, struck her on the abdomen when she was seven months pregnant—on both occasions the husband was intoxicated—hit her so hard her kidney was punctured, grabbed her by the throat and shook her, attempted to close the door on her hand, knocked her down with a blow on her face, choked her and threatened to kill her, and caused nervous disorder. Evidence by a psychiatrist was presented.

In that case relief was granted.

Co-Chairman Senator ROEBUCK: There is not much difficulty in recognizing cruelty there.

Mr. MCCLEAVE: No.

CASE FOUR: Woman complained that her husband used abusive, threatening or offensive language towards her, threatened assault and carried out assaults, so that she

"was in constant fear of some serious bodily injury," assaulted her at least ten times and dragged her across the floor by her hair and ripped clothing from her body, caused her to fear to go out alone the street and kept her door locked.

The relief was granted.

CASE FIVE: Woman complained that her husband used abusive, offensive or threatening language, threatened and carried out assaults, tore her clothing, bruised her about face and body, pounded her head against the wall during a quarrel over money, struck her and their child, dragged her about on the floor, threatened to kill her, waited for her with a loaded rifle, hit her on the eye breaking her glasses and cutting her eye.

The relief was granted.

CASE SIX: Woman complained of her husband's adultery and of his cruelty. She alleged that he treated her in a harsh, cruel and insulting manner, abused her verbally, called her insulting names, and thus impaired her mental and physical health. The decree was granted on the grounds of cruelty. The woman's evidence was supported by that of two other women.

CASE SEVEN: Woman complained that her husband was a heavy drinker and stayed out late at night, complicating her pregnancy because of her strain and worry, some of it induced by his spending habits; that he drank and came home with his clothes torn from street brawls, causing her strain and worry; that after nine years of marriage he commenced to use abusive language, would throw dishes on the floor, threw an open can of paint on the floor, broke windows, played the radio at high volume in the night, attempted to drag his wife to bed with him while she was doing the dishes, and bruised her in the altercation which followed. She complained that he dragged her by her wrist around the house when she attempted to leave him—she was pregnant—threw her on the bed atop a child, struck her on the face; that the child died shortly after birth, that he threw a large coffee table at her; that he knocked down a Christmas tree while intoxicated, that he would not stay with the children on New Year's Eve; that he set a fire in the house by accident while intoxicated; that he persuaded his wife to return to him by threatening to commit suicide; that she was unable to write four exams because of the tension and nervous exhaustion; there was evidence of extreme drinking throughout.

CASE EIGHT: Husband complained of physical assaults, insults, nagging, neglect and ill treatment of the children, and persistent efforts to prevent him sleeping. His health was injured. The trial judge found that much of her conduct was intended to injure her husband physically, and to cause injury to his health, and that her attitude was sadistic, selfish, callous and indifferent.

Co-Chairman Senator ROEBUCK: Playing the radio at night would be sufficient cruelty.

Mr. MCCLEAVE: It depends on the station.

In Case No. 8 it was not in the petition but I have knowledge of the fact that at one time the husband woke in the night to find his wife standing over him threatening him with a poker and the divorce was granted.

Co-Chairman Senator ROEBUCK: This is significant, because one cannot read these cases without coming to the conclusion that our Canadian judges are in one important respect somewhat different from the judges in some other countries in that they demand something substantial by way of evidence in the matter of cruelty. If we adopted cruelty as one of the grounds, I think we would have reason to depend upon the moderation of Canadian judges in this matter and not expect them to treat as cruelty such preposterous complaints as burning the toast or reading the newspaper at breakfast in the morning or allowing the tea to cool. I think this is important.

Mr. WAHN: Am I correct in thinking that while there is no judicial definition of cruelty in the province of Nova Scotia the term itself is used there.

Mr. McCLEAVE: Yes, that is right, it is. They have also developed the jurisprudence in accordance with the English practice.

Mr. WAHN: There has been no difficulty in doing that, despite the lack of statutory definition?

Mr. McCLEAVE: That is right. I should add that it is the practice where the mental cruelty picture enters for the courts to require strong evidence, and it has to be the evidence of a psychiatrist.

Mr. PETERS: What do you think the decision would be if there was only one case of cruelty? Would that be a sufficient ground?

Mr. McCLEAVE: Perhaps I could illustrate this with two cases that I have knowledge of. In one case there was only one act of cruelty. Within less than a week of the marriage the groom struck the bride severely on the mouth, breaking her teeth. This was only one incident and the divorce was granted.

It was followed by a case where a husband and wife were married for over thirty years. There had never been any physical violence between them and one day the husband hit his wife on the mouth and broke her teeth. In the first case the judge decided that if this was going to be the sort of thing that would happen where this young woman was so severely injured within a week of marriage, he had better grant the divorce on the ground of cruelty because otherwise the husband might murder his wife or keep on beating her badly. On the other hand, he decided in the second case involving this older couple that one incident of violence in thirty years did not suggest that the offence was likely to repeat itself and he refused the decree.

Senator BELISLE: Do you not think, Mr. McCleave, that in the case of the young couple a civil penalty would have been effective in bringing the groom to his senses? Had that been the decision, I do not think there is any reason to believe that the marriage might not have been saved. I do not think the divorce should have been granted in the first week of married life. In that case there should have been counselling and if the offence had been repeated three times, say, within a month, then I would say the divorce should be granted.

Mr. McCLEAVE: I hope we can come up with some formula for reconciliation and counselling which will work, but that formula will be very difficult to find.

Co-Chairman Senator ROEBUCK: And to administer.

Mr. McCLEAVE: Yes. In that marriage perhaps the judge could have withheld decision to see whether the passing of time would bring that couple together again.

Senator BELISLE: If it is possible for a politician to regret a speech he had made some time ago, surely it is possible for a man to regret an assault he had committed upon his wife within a week of their marriage.

Mr. McCLEAVE: Yes, and to give the lady a chance to get even with him over a long period of time.

Co-Chairman Senator ROEBUCK: He might not have got used to the nagging of the woman in so short a time and later on perhaps he would be able to take it in a way that he could not in the first week of marriage.

Co-Chairman Mr. CAMERON: Might not the judge have been influenced by evidence showing the surrounding circumstances to be such as to lead to the conclusion that this first blow was only a hint of what was to come in the future.

Mr. McCLEAVE: I have no doubt I have simplified the case, but I am sure the facts are as I have given them.

Senator FERGUSSON: The court must be satisfied that the woman is protected in the future and that is certainly a case where she needed protection, when she could be beaten up in the first week.

Mr. McCLEAVE: The original conception of cruelty, which has been fairly well defined, is conduct of such a nature that the other party must be protected against it, and protection has been primarily the purpose in granting a divorce in such cases.

Co-Chairman Senator ROEBUCK: Have you any further questions? Have you any further comments, Mr. McCleave?

Senator FERGUSSON: I am interested in the suggestion that a series of cases should not be heard by one judge. This interests me because you have just one judge that deals with divorce cases in our province. He does not deal with cruelty cases.

Mr. MCCLEAVE: Under the practice where one judge had continuously heard cases it has been generally agreed that his approach tended to retard the orderly development of the divorce law in Nova Scotia and I mention this particularly because of the remarks of certain witnesses who have appeared before us.

Co-Chairman Senator ROEBUCK: We would need no change in our law to bring about an improvement in the administration if we could get the consent of the Exchequer Court to make several of their judges commissioners. In that way we could criculate the burden of cases and that would accomplish the result we have in mind.

Senator FERGUSSON: Would the Exchequer Court Judges act in all provinces?

Co-Chairman Senator ROEBUCK: No, in conjunction with our parliamentary divorce committee.

Senator FERGUSSON: That would not affect the situation in New Brunswick, where we have one judge.

Co-Chairman Senator ROEBUCK: It is up to the authorities there to make what arrangements they please. We cannot interfere with that. In that case administration is within the provincial jurisdiction and usually it is carried out by the chief justice who says, "You go to such and such a place and you go somewhere else." There is nothing much we can do about it, but if it were possible in the parliamentary divorce committee for a larger number of Exchequer Court Judges to be made our commissioners, the administration would be greatly facilitated.

Co-Chairman Senator ROEBUCK: The parliamentary committee goes over the finding of the judge. Our committee reads each case after the judge gives his decision, so that it is not entirely up to him. The committee takes some responsibility. In other words, it is not just one man's opinion. On the other hand, one man hears these same cases day after day, month after month, and now year after year, and while he becomes an expert in divorce hearings, it must be exceedingly boring to him. It is also too confining. I would like to see some more judges made commissioners so as to give our present judge a little more experience in other cases. He asked for it when he came before us.

Senator BELISLE: Are you thinking that in the hearing of such cases he becomes immune to petty grievances and looks only to serious offences.

Co-Chairman Senator ROEBUCK: I do not know about what effect it must have on his mind, but in a general way I think it is undesirable that a judge should be kept at one series of cases year after year. How could he feel the enthusiasm that is necessary, or at least advisable, in the hearing of these cases? They must get stale.

Co-Chairman Mr. CAMERON: I should think he would get fed up.

Co-Chairman Senator ROEBUCK: "Fed up" is a good expression. Not that there is any evidence of our commission getting fed up. I merely repeat what he said when he was before us. Is that all, Mr. McCleave?

Mr. MCCLEAVE: That is it, sir.

Co-Chairman Senator ROEBUCK: I wish to express my thanks and those of my chairman and of the committee as well for the work you have done, Mr. McCleave, in this connection, and the contribution you have made to our deliberations.

Co-Chairman Mr. CAMERON: I concur in what my co-chairman has said. Mr. McCleave has presented his brief precisely in the manner one would have expected, and I for one have a clearer understanding of the legal concept of cruelty than I had before he gave his explanation.

Co-Chairman Senator ROEBUCK: Honourable senator and members, there is another gentleman who, I think, will be as interesting as the last one and he also has a great deal to tell us. I refer to Mr. Wahn. I should explain that there have been a number of bills introduced into the House of Commons and one in the Senate, and two or three of us discussing this matter thought that we should invite each one who has presented a bill to come and tell us what he has to say with regard to that bill. He may elaborate on it if he cares to do so; that is up to him. Mr. Wahn introduced such a bill in the House of Commons, Bill C-58. It is quite a lengthy bill with a great deal of material in it. Mr. Wahn is here to speak on it. Mr. Wahn, we shall be glad to hear from you.

Mr. WAHN: First, I thank the committee for giving me an opportunity to say a few words about the bill I have introduced in the House of Commons, and to answer questions that any members may wish to ask.

It may be of interest to the committee to know that I decided to sponsor this bill in the House of Commons because of a great many requests from people in my riding for action on divorce reform.

I should also like to say that a great deal of the work of research upon the bill and the review of laws which apply in other countries was done by Mr. R. J. Frost, then a law student at the University of Toronto and now practicing law in that city. He did a great deal of research and prepared a draft of the bill, and I am indebted to him for his assistance.

Since the bill was introduced, together with other bills for the same purpose, I have received a great deal of correspondence from all parts of the country, and almost unanimously there is a clear demand for basic reform in our divorce law. In the years I have been here I have not received as much correspondence on any subject as I have received on this particular question of divorce reform, and virtually all the correspondence that I have received favours strongly a thorough-going reform of our matrimonial law.

As indicated by the title of my bill, "An Act Respecting Marriage and Divorce," the primary purpose of this bill is to preserve the marriage relationship, where the continuance of a normal marriage is considered possible, and to provide a dignified, inexpensive and expeditious method of terminating marriage if it is entirely clear that a normal marriage relationship is no longer possible. The third and final purpose is to make sure that when a divorce does become necessary and a divorce decree is granted, there is proper protection for the children of the marriage.

As I say, the primary purpose is to preserve the marriage if a normal marriage is possible. That purpose is expressed in the provision contained in section 4 to the effect that, except in unusual cases, a divorce action cannot be commenced within three years after the date of marriage. This is a change from the previous law in an attempt to protect the marriage relationship and encourage parties to make a real effort to preserve their marriage.

This is substantially like the provision which has been in existence in English matrimonial law since 1937. It has obvious advantages, and disadvantages as well, but in England it is felt that the advantages outweigh the disadvantages and they have retained the provision, except in exceptional circumstances where it can be waived.

Generally speaking, section 4 of my bill would provide that there should be no divorce granted within three years after marriage. The thinking behind this is that, because of inadequate premarital counselling, many people run into marriage precipitately. The first three years of married life, it is recognized, are the most difficult. That is a period of adjustment, when two people find it difficult to accommodate themselves to each other. It is felt that the rule adopted in England is a wise one and I have followed it, so, that only in exceptional circumstances would divorce be permitted in the first three years after marriage.

Co-Chairman Senator ROEBUCK: Do you know what the practice is with regard to the determination of "exceptional circumstances"? I have not studied what exceptional circumstances are, but this rule would prevent divorce in the case of cruelty.

Senator BELISLE: Except in exceptional circumstances.

Mr. WAHN: There is provision that the court can waive this rule if it would impose exceptional hardship.

Senator BELISLE: That divorce granted in Nova Scotia after one week of marriage would not be possible, then.

Mr. WAHN: No, unless the judge came to the conclusion, as he might, that there were exceptional circumstances. Generally the rule would be, as in England, that no divorce would be granted within three years after the date of marriage, with provision for the court to dispense with the rule in a case of exceptional hardship.

That is one provision of the bill which is designed to preserve the marriage if there is any possibility of there being a normal marriage relationship.

The second provision of the bill so designed is contained in section 5. This provides that before the final divorce decree can be granted either party may request reconciliation proceedings and the judge, if he feels there is a possibility of reconciliation, can suspend the hearing for a sufficient period so that every possible effort can be made to bring the parties together. If within a month there is evidence that no reconciliation can be affected, either party can request that the divorce proceedings continue. This does give some protection against hasty divorces and provides that if there is any possibility of saving the marriage the court can refer the parties to experienced marriage consellors.

A third provision contained in the bill designed to preserve marriage is a rather technical one found in clause 7. This provides, in effect, that where the parties, after they have been separated, resume cohabitation and are seeking reconciliation, cohabitation for a period of two months or less is not to be considered condonation which would defeat the application for divorce.

I need not go into that provision in detail; it is a technical one.

Co-Chairman Senator ROEBUCK: But it is something we must consider when it comes to the drafting of our report. It is something that is really on the board for our consideration, where we modify condonation to that extent and the parties come together for a short period of time with the purpose of attempting reconciliation. In those circumstances that attempt at reconciliation shall not be regarded as a complete bar to the claims of either party as they existed prior to their coming together.

Mr. WAHN: Those are the main provisions in the bill designed to preserve marriage. It is recognized however that despite our best efforts there will be some marriages which must be dissolved; and it seems to me it is important that steps be taken the make sure that the method adopted shall be as inexpensive as possible, reseasonably expeditious, and dignified in procedure.

Clause 3 of my bill relates specifically to the jursidiction problem which many married women have encountered in the past. This involves the problem of finding the proper jurisdiction, particularly in cases where the wife has been deserted or has moved, or where she has moved from the jurisdiction of her husband's domicile. An attempt has been made under the Divorce Jurisdiction Act to deal with this problem, but it is generally recognized that it is not completely satisfactory. Clause 3 of my bill would extend the jurisdiction of the courts to the matrimonial residence of the parties. That would make it easier for a married woman to bring action.

Senator FERGUSSON: How do you define matrimonial residence?

Mr. WAHN: I have made no attempt to define that term. The term residence is defined by judicial precedent and the word matrimonial would indicate the place where the couple had lived for some time as the matrimonial home. There is no specific statutory definition.

A decision had to be made as to grounds for divorce. Traditionally the only ground in most jurisdictions in Canada has been adultery. It seemed to me therefore that historically divorce was based upon the principle that when two people took the marriage vow and became man and wife they did so on the condition that the vow

would be observed; and if in fact the vow is broken, that is to say if one party commits adultery, there is a breach of the marriage contract which entitles the injured party to dissolution.

Mr. PETERS: Suppose there were adultery in the first or the second year of the marriage, would that be considered an exceptional reason for granting the divorce before the expiry of the three-year period.

Mr. WAHN: I would not think so unless there were some other circumstances.

Mr. PETERS: In that case, then, there would be no exception?

Mr. WAHN: No. It is left to the discretion of the judge. The mere fact of adultery would not necessarily justify divorce within the three years.

Mr. PETERS: What would you consider exceptional?

Mr. WAHN: I can see that if there were adultery combined with reasonable fear on the part of one spouse, whether husband or wife, there would be a grounds—for instance, the case of the woman standing over her husband with a poker; that might be sufficient. As the bill is drafted, however, it is left to the discretion of the judge.

The basic theory on which divorce has been granted in the past is that if the contract is violated by one party committing adultery, the other party may proceed.

I was familiar with the doctrine of marriage breakdown, and I had to decide whether to adopt breakdown alone or in combination with the historical theory on which divorce has been based, namely, a breach of the marriage vow.

In my bill specific grounds for divorce are set out in section 6, in subclauses (a) to (i). It seemed to me reasonable to permit a dissolution on any of these grounds. This type of thing is not contemplated when the marriage relationship is entered into. Marriage breakdown is added at the end as subclause (j).

To go through the clauses very briefly. Subclause (a) is adultery. That is the traditional ground. The next is desertion for a period of not less than three years. When people get married it is assumed that they will continue to live together, but if one party deserts the other party for a period of more than three years it is reasonable to allow the injured party to get a divorce.

The next ground is cruelty or other conduct of such a nature that there is no reasonable expectation of a normal marriage relationship.

The next is drunkenness or the use of narcotics. When you marry you are entitled to assume that your partner will not become a drunkard or addicted to drugs.

The next ground, (e), is conviction for crime, where there is imprisonment for an extended period of time. That is set out in detail in subclause (e).

Subclause (f) relates to sexual offences where the defendant has committed or has been convicted of sodomy, bestiality, and so on.

The next is failure to pay maintenance. This subclause provides for any case where the defendant has wilfully and habitually failed for a period of more than two years to pay maintenance to the petitioner as required by a court of competent jurisdiction or as agreed upon between the petitioner and the defendant under an agreement for their separation if the court is satisfied that all reasonable efforts have been made by the petitioner to enforce the order or agreement under which the maintenance was ordered or agreed to be paid. I think it is reasonable to assume that when you get married you will support your wife.

Mr. PETERS: Suppose he stops working through no fault of his own?

Mr. WAHN: According to the bill, it has to be over an extended period, over two years. Perhaps it should be a longer or a shorter period. It is a question whether a two-year period of non-support is too short or too long.

Senator FERGUSSON: It would not be wilful if he had no way of obtaining money.

Mr. WAHN: The provision is "wilfully and habitually failed". If he is unemployed through no fault of his own he has not wilfully failed.

The next specific ground is mental illness, and the same principle applies: when you get married you assume the continued sanity of your partner.

The next subclause has to do with absence, where a court of competent jurisdiction has declared the other party dead. This is to give relief in a case where one of the partners has been absent for so long a period of time that the court sees fit to declare that person dead. Perhaps his spouse has remarried. This provision would permit dissolution of the first marriage in these circumstances.

These are specific grounds based on the theory that there has been a violation of the marriage contract or that something has happened which was not contemplated at the time of the marriage but which is of such gravity that the marriage ought to be dissolved.

Finally, there is subclause (j) which is based on the marriage breakdown theory. This provides that divorce may be granted if the petitioner and the defendant have separated and have lived apart for a continuous period of not less than five years immediately preceding the date of the final petition, provided there are no reasonable grounds for believing there will be reconciliation. If the court is of the opinion that there is no possibility of reconciliation and the parties have shown by the very fact that they have lived apart for so long a period that there is no possibility of a normal marriage relationship, there seems to be no point continuing the marriage. This is so even though no one is at fault and there is no marital offence. In short, the bill adopts the theory of marriage breakdown and dissolution is permitted.

Co-Chairman Senator ROEBUCK: I have received from the province of Quebec a letter in which a woman states that she was married twenty-two years ago and has raised quite a family, but for some reason she and her husband have been living apart. She does not claim any offence on the part of the husband. She is in receipt of an allowance from him and he now wants her to take action against him for divorce. She has no intention of doing so because her lawyer tells her that if she does she will release him from any obligation to pay her continued allowance, and from any claim she may have for alimony. For that reason and others she is refusing to take action against him.

Now, suppose you have a provision such as you have described, where the parties have been separated for five years—in this case the lady and her husband have been separated for seven years—I should think that the husband in this instance could qualify, according to your definition. Would you therefore give him a divorce which would relieve him of any liability for his wife? That is not the situation in the province of Ontario because in Ontario she could apply for a divorce and at the same time ask for alimony, which is frequently granted in this province. On the other hand, in the province of Quebec, divorce relieves the husband of any liability whatsoever to his wife. It seems to me we have to take that point into consideration.

Mr. WAHN: I believe we have had a learned memorandum submitted to us by the Justice Department indicating that we have jurisdiction to make provision regarding the children and the payment of alimony to the wife.

Co-Chairman Senator ROEBUCK: You would exercise anciliary rights?

Mr. WAHN: Yes.

Co-Chairman Senator ROEBUCK: Thank you; that is a complete answer.

Mr. WAHN: I would assume that if the parties had been living separately for over five years the court would grant a divorce and make proper financial provision for the protection of the wife and the children of the marriage. These are the only comments I have to make on my bill.

Senator GERSHAW: There came up in the Senate the other day a point which I might mention now. If the law of divorce were to be administered by the existing provincial courts would that include county courts as well as superior courts?

Mr. WAHN: I am afraid I am not familiar with that aspect of the matter.

Senator GERSHAW: It is the superior courts that have that right now.

Mr. WAHN: The idea would be to continue the existing courts.

Senator BELISLE: Our province is divided into districts.

Co-Chairman Senator ROEBUCK: I did not hear what Senator Gershaw said.

Senator GERSHAW: Would this be applicable to both county and superior court judges? In Ontario more than half the courts are in districts and the rest in counties.

Senator BELISLE: Mr. Chairman, I believe I heard you speak of the province of Quebec where, you said, the wife has no recourse against her husband. I believe you said that there was no obligation on the part of the husband, even if the husband is the applicant for divorce, to make provision for his wife.

Co-Chairman Senator ROEBUCK: That is right.

Senator GERSHAW: He is responsible for the children.

Co-Chairman Senator ROEBUCK: Yes. It does not affect his liability so far as the children are concerned.

Mr. PETERS: Is clause (j) of the bill based upon the theory of divorce by consent rather than upon the marriage breakdown theory?

Mr. WAHN: Clause (j) of the bill is based on the breakdown theory in that provision is made that there must be separation for at least five years—I do not know whether that period recommends itself to the committee—and it is also provided that the court must be satisfied that there are no reasonable grounds for believing that reconciliation is possible. That would suggest the complete breakdown of the marriage.

Mr. PETERS: If it is voluntary it is with consent.

Mr. WAHN: I took the view that the parties themselves, after five years of separation, should be the best judges as to whether or not the marriage had broken down. There are those who suggest that social service workers should conduct an inquest on the marriage to decide whether it has broken down. That is another view of the breakdown theory. Others feel that it should be left to a judge. It seems to me that if two people have lived apart for five years, or whatever period is considered reasonable, and if in addition to that the court finds that there is no likelihood of a reconciliation, that is fairly good evidence that there has been a breakdown, and perhaps the best way of determining the breakdown is to leave it to the parties themselves.

Mr. PETERS: The period provided in the bill in the case of desertion is not less than three years and I agree that no one is sure about the period, whether it should be one year or two years or ten. But desertion exists where one party decides to leave the other, and that is for three years. But I gather where two people have agreed, where there is consent and it is voluntary, the period is five years. Why should there be that difference where it is obvious that both are parties to the decision. In the case of desertion it takes only three years to get a divorce, whereas if they both agree it takes five years. My thinking would be the reverse of that. If they both agree I would have no objection. I cannot see why you should penalize these because they have made an agreement for five years.

Mr. WAHN: If one spouse deserts the other, the spouse that deserts would not be able to get the divorce after three years but the deserted spouse could get it. In other words, clause 6 of the bill is really based upon two distinct principles. The first is the matrimonial offence theory. A person who is deserted has the right to claim a breach of the marriage contract and to bring action for the dissolution of the marriage. The provision for divorce after a five-year separation by mutual consent, in my opinion, is based on the marriage breakdown theory. It means that the two persons have decided that the marriage has failed and in fact they have terminated their relationship. If in addition the court finds that reconciliation is impossible it seems to me that the marriage is ended anyway and it might as well be terminated formally.

Co-Chairman Senator ROEBUCK: Perhaps, Mr. Wahn, you would like to say something about condonation, collusion and connivance.

Mr. WAHN: The bill would leave these questions to the discretion of the court rather than being mandatory, and in addition would cover the point I mentioned

before, namely, that cohabitation with a view to reconciliation would not be considered condonation. It is an important change in the law.

Mr. McCLEAVE: Are you wedded to the idea of desertion for at least three years? This might be an extreme hardship on a woman who is deserted. Have you considered the advisability of cutting down that period?

Mr. WAHN: Perhaps some discretion should be introduced. I had great difficulty in deciding what would be appropriate time periods.

The committee adjourned.

APPENDIX "69"

1st Session, 27th Parliament, 14 Elizabeth II, 1966.

The House of Commons of Canada

Bill C-58

An Act respecting Marriage and Divorce

First reading, January 24, 1966

MR. WAHN.

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Short title.

1. This Act may be cited as the *Canada Marriage and Divorce Act.*

Certain marriages not invalid.

2. (a) A marriage is not invalid merely because the woman is a sister of a deceased wife of the man, or a daughter of a sister or brother of a deceased wife of the man.

Idem.

(b) A marriage is not invalid merely because the man is a brother of a deceased husband of the woman or a son of a brother or sister of a deceased husband of the woman.

Action for divorce.

3. An action for divorce a vinculo matrimonii may be brought in any province of Canada in which there is a Court having jurisdiction to grant a divorce a vinculo matrimonii if

(i) the parties are domiciled, or have their matrimonial residence, in that province at the date of the filing of the petition; or

(ii) if the parties were domiciled, or had their matrimonial residence, in that province immediately prior to the time at which the grounds upon which the petition is based arose; or

(iii) the action is brought by a married woman who either before or after the passing of this Act has been deserted by and has been living separate and apart from her husband for a period of two years or more and is still living separate and apart from her husband at the time the petition for divorce is filed and the husband of such married woman was domiciled in that province immediately prior to such desertion.

Limitation of time

4. (1) Subject to this section, proceedings for a divorce shall not be instituted within three years after the date of marriage except by leave of the Court.

In case of hardship

(2) The Court shall not grant leave under this section to institute proceedings except on the ground that to refuse to grant the leave would impose exceptional hardship on the petitioner.

Interest of children to be considered, etc.

(3) In determining an application for leave to institute proceedings under this section, the Court shall have regard to the interests of any children of the marriage and to the question as to whether there is any reasonable possibility of reconciliation between the parties before the expiration of three years after the date of the marriage.

Possibility of reconciliation

5. (1) In any proceeding under this Act, it shall be the duty of the Court to consider the possibility of reconciliation between the parties to the marriage, and if either party shall request it, or if, in the opinion of the Court, from the nature of the case or the evidence or the attitude of either party, there is a reasonable possibility of reconciliation, the Court may adjourn the proceedings to afford an opportunity for such reconciliation and may nominate or appoint a suitable person with experience and/or training in the field of marriage counselling or, in special circumstances, some other person, to endeavour to effect a reconciliation.

Resumption of the hearing

(2) If, within one month from the date of adjournment under this section, one of the parties requests a resumption of the hearing, it shall proceed.

Evidence of information not admissible

(3) No evidence of any information received or anything said or admission made to any one pursuant to proceedings under subsection (i) of this section shall be admissible in any Court or before any person or body acting judicially.

Disclosure of information to be an offence

(4) Disclosure of any information obtained pursuant to this section except insofar as it is required by the duty of the appointed party, is an offence punishable on summary conviction.

Grounds of divorce

6. A court having jurisdiction to grant a divorce shall, upon a petition by one of the parties to the marriage, decree dissolution of the marriage upon one or more of the following grounds:

Adultery

(a) that, since the marriage, the defendant has committed adultery;

Desertion

(b) that, since the marriage, the defendant has wilfully and without just cause deserted the petitioner for a period of not less than three years;

Cruelty

(c) that, since the marriage, the defendant has committed or been convicted of, cruelty or other conduct of such a nature that there is no reasonable expectation of a normal marriage relationship;

Drunkeness and use of narcotics

(d) that, since the marriage, the defendant has been guilty of habitual drunkenness or the habitual and excessive use of any narcotic, hallucigen, sedative or stimulating drug or preparation so that there is no reasonable expectation of a normal marriage relationship;

Convictions for crime

(e) that, since the marriage, the defendant has (i) within a period not exceeding six years suffered convictions for crime in respect of which he has been sentenced in the aggregate to imprisonment for not less than three years; or (ii) has been sentenced to prison for a term of not less than seven years and his sentence is still in effect at the date of the filing of the petition;

Sexual offences

(f) that, since the marriage, the defendant has committed or been convicted of sodomy, bestiality, incest, rape or attempted rape;

Failure to pay maintenance

(g) that, since the marriage, the defendant has wilfully and habitually failed for a period of more than two years to pay maintenance to the petitioner as required by a Court of competent jurisdiction or as agreed upon between the petitioner and defendant under an agreement providing for their separation if the Court is satisfied that all reasonable efforts have been made by the petitioner to enforce the order or agreement under which the maintenance was ordered or agreed to be paid.

Mental illness

(h) that, since the marriage, the defendant has been of unsound mind for a period of not less than three years and is of unsound mind at the date of the filing of the petition without reasonable hope of prompt recovery;

Absence

(i) that the defendant has been declared dead by order of a Court of competent jurisdiction or has been absent from the petitioner for such a time and in such circumstances as to provide reasonable grounds for presuming that he or she is dead;

Separation

(j) that the petitioner and defendant have separated and thereafter have lived separately and apart for a continuous period (except for a period of cohabitation of not more than two months that has reconciliation as its primary purpose) of not less than five years immediately preceding the date of the filing of the petition, and there are no reasonable grounds for believing that there will be a reconciliation.

Dismissal of petition

7. The Court may dismiss any petition for divorce on the grounds of connivance, condonation or collusion or if the petitioner's own behaviour has been such as to incite or contribute to the act or acts complained of. Any period of co-habitation of less than two months that has reconciliation as its primary purpose shall not be considered as condonation, whether sexual intercourse has occurred or not.

Rights saved

8. The right of a petitioner to obtain a divorce pursuant to the provisions of this Act shall not be denied by reason of the provision of any contract or agreement.

Repeal R.S., 1952, cc. 84 and 176

9. The *Divorce Jurisdiction Act*, and the *Marriage and Divorce Act*, are repealed.

Coming into force

10. This Act shall come into force on a day to be fixed by proclamation of the Governor in Council.

EXPLANATORY NOTES

The purpose of this Bill is to make provision for divorce in cases where, in fact, there is no reasonable expectation of a normal marriage relationship, while at the same time protecting, in other cases, the marriage relationship and providing for reconciliation of the parties.

The law of divorce will be administered by existing provincial law courts under their own rules of procedure. Present provincial laws with regard to property rights, alimony, guardianship and maintenance of children would continue.

Clause 2: This clause continues provisions now contained in the *Marriage and Divorce Act,* R.S.C. 1952, c. 176.

Clause 3: This clause is applicable only to provinces having divorce courts, namely all provinces except Quebec and Newfoundland.

At present a court in a province may only hear a divorce action if the husband has his domicile in that province except in certain cases covered by the *Divorce Jurisdiction Act,* R.S.C., 1952, c. 84.

This clause is designed to avoid such difficulties by basing the jurisdiction of the Courts not only on domicile but also on matrimonial residence either at the date of filing of the petition or immediately prior to the time at which the grounds for divorce arose and by continuing provisions relating to deserted wives contained in the *Divorce Jurisdiction Act.*

Clause 4: This clause provides that, except in unusual cases, a divorce action cannot be commenced within three years after the date of marriage. This is a change from the previous law in an attempt to protect the marriage relationship and encourage parties to make a real attempt to preserve their marriage.

Clause 5: This clause is new and is based upon the provisions of the statutes of New Zealand and England. It is designed to protect the marriage relationship by providing for reconciliation before divorce becomes final.

Clause 6: This clause extends the grounds for divorce but only in provinces now having divorce courts. The marriage relationship is protected by Clauses 4 and 5 which provide for a reconciliation procedure and also provide that except in certain cases no divorce action can be brought sooner than three years after marriage.

The defined grounds for divorce are based upon the principle that in the cases specified the basis for a normal marriage has disappeared or does not exist.

Clause 7: This clause provides for certain defences to a divorce action at the discretion of the court rather than being mandatory as under previous legislation. The clause specifies however that co-habitation with a view to reconciliation will not be considered condonation as has been the case in the past.

Clause 8: This clause provides that the right to a divorce cannot be prevented by any provision of a contract or agreement.

Clause 9: This clause repeals inconsistent provisions of earlier statutes.

Clause 10: This clause provides that the Act would become effective when proclaimed so as to permit a period during which the provincial Courts may, if necessary, amend their matrimonial rules of procedure.

First Session—Twenty-seventh Parliament

1966-67

PROCEEDINGS OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON

DIVORCE

No. 21

THURSDAY, MARCH 9, 1967

Joint Chairmen:

The Honourable A. W. Roebuck, Q.C.

and

A. J. P. Cameron, Q.C., M.P.

WITNESSES:

Professor Stephen J. Skelly, Faculty of Law, University of Manitoba.
The Honourable A. W. Roebuck, Q.C., Sponsor of Bill S-19.
Robert McCleave, M.P., Sponsor of Bill C-133.

APPENDICES:

70.—Brief by Professor Stephen J. Skelly.

71.—Extracts from the Debates of the Senate on Bill S-19, "An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such a relief".

72.—Bill S-19, "An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief".

73.—Bill C-133, "An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief".

74.—Brief by the Canadian Association of Social Workers.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1967

26039—1

MEMBERS OF THE
SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS
ON DIVORCE

FOR THE SENATE

Hon. A. W. Roebuck, Q.C., Joint Chairman

The Honourable Senators

Aseltine	Connolly (*Halifax North*)	Flynn
Baird	Croll	Gershaw
Belisle	Denis	Haig
Burchill	Fergusson	Roebuck—(12).

FOR THE HOUSE OF COMMONS

A. J. P. Cameron, Q.C. (*High Park*), Joint Chairman

Members of the House of Commons

Aiken	Forest	McQuaid
Baldwin	Goyer	Otto
Brewin	Honey	Peters
Cameron (*High Park*)	Laflamme	Ryan
Cantin	Langlois (*Mégantic*)	Stanbury
Choquette	MacEwan	Trudeau
Chrétien	Mandziuk	Wahn
Fairweather	McCleave	Woolliams—(12).

(Quorum 7)

ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the House of Commons:

March 15,1966:

"On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—that a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either house;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papaers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee."

"By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19, An Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bills be referred to the Joint Committee of the Senate and House of Commons on Divorce".

March 16, 1966:

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, is was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce".

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce."

26039—1½

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Goyer, Honey, Laflamme, Langlois *(Mégantic)*, MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams."

LÉON-J. RAYMOND,
Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate and House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

March 29, 1966:

"With leave of the Senate,

The Honourable Senator Beaubien *(Provencher)* moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, namely, the Honourable Senators Aseltine, Baird, Belisle, Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig, and Roebuck; and

That a Message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—

Resolved in the affirmative."

May 10, 1966:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19 intituled: "An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief".

The question being put on the motion—

In amendment, the Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

J. F. MACNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

THURSDAY, March 9, 1967.

Pursuant to adjournment and notice, the Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3:30 p.m.

Present: *For the Senate*: The Honourable Senators Roebuck (*Joint Chairman*), Aseltine, Baird, Belisle, Denis, Fergusson, Gershaw and Haig—8.

For the House of Commons: Messrs. Cameron (*High Park*) (*Joint Chairman*), Baldwin, Brewin, Forest, Honey, MacEwan, Mandziuk, Otto and Peters—9.

In attendance: Peter J. King, Ph. D., Special Assistant.

The following witnesses were heard:

Professor Stephen J. Skelly, Faculty of Law,
University of Manitoba.

The Honourable A. W. Roebuck, P.C., Sponsor of Bill S-19.

Robert McCleave, M.P., Sponsor of Bill C-133.

The Following are printed as Appendices:

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74. Brief by the Canadian Association of Social Workers.

At 5:15 p.m. the Committee adjourned until Tuesday next, March 14, 1967 at 3:30 p.m.

Attest.

Patrick J. Savoie,
Clerk of the Committee.

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THE SENATE

SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

EVIDENCE

OTTAWA, Thursday, March 9, 1967.

The Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3.30 p.m.

Senator Arthur W. Roebuck and Mr. A. J. P. Cameron (*High Park*), Co-Chairmen.

Co-Chairman Senator ROEBUCK: Honourable senators and members of the House of Commons, we have a quorum so let us proceed. We have a very ditsinguished and thoroughly informed witness today. I read his brief this morning and was much impressed with it, and I am sure you will be when you hear our witness. He is Stephen J. Skelly, Professor of Law at the University of Manitoba. Professor Skelly read law at the University of Hull, England, and graduated in 1963 with upper second class honours. Professor Skelly then did two years research at the University of Oxford, working first under Professor F. H. Lawson and later under Professor O. Kahn-Freund. The research was concerned with divorce law to provide material for a thesis on comparative divorce law and divorce reform, which he is at present completing.

Professor Skelly was appointed an assistant professor at the Manitoba Law School (now the Faculty of Law, University of Manitoba) in 1965, and has taught Domestic Relations since that time. Professor Skelly sat as a member of the committee appointed by the Manitoba Bar Association to prepare a brief for the Special Joint Committee on Divorce Reform.

Professor Skelly has the following articles published: *Survival of a Breach of Promise Action*, *Comparative Study of the Development of Matrimonial Relief*, *Current Law-Domestic Relations*, *Canadian Domicile*, and *Divorce Reform* to appear in the next issue of the *Western Law Review*. The latter article was the basis for some parts of Professor Skelly's brief which he will now present to us.

I have a letter which I think is sufficiently interesting to read to you. It is from Mr. R. Anderson of the firm of D'Arcy, Irving, Haig and Smethurst, Winnipeg. He addresses the letter to me and says:

> As appointee to chair the committee to prepare the brief presented on behalf of the Manitoba Bar Association, I wish to express my approval of the brief presented by Stephen Skelly, Assistant Professor at the Manitoba Law School.
>
> The Manitoba Bar Association had the good fortune to have Stephen Skelly as a member of the committee struck to prepare the brief on behalf of the association and I, having chaired the meetings had the opportunity of hearing him express his ideas and I also had the opportunity of reading his brief.
>
> I endorse the majority of his views and though I cannot speak on behalf of the Manitoba Bar Association, I know that most of its members would agree with the majority of his views.

With that introduction—and I could not have a better one than that written by Mr. Anderson—I have great pleasure in introducing to you Professor Skelly.

Professor Stephen J. Skelly, Law Faculty, University of Manitoba: Mr. Chairman, honourable senators, honourable members of the House of Commons, ladies and gentlemen, after that introduction I will do my best to live up to it. I would like to thank you for allowing me to appear before you. I deem it a great honour and I hope I contribute something by so doing. Because my brief is fairly long I did not intend reading it to you. May I take it that the committee have read the brief, Mr. Chairman?

Co-Chairman Senator ROEBUCK: I do not think you can assume that. I have.

Professor SKELLY: What I will do then is to go through it and make my points and explain my reasons for them. I think this is the best approach.

I will begin by discussing the question of jurisdiction. I know that you have already had many witnesses who have argued the various reasons why we should change our basis of jurisdiction, so I will only touch on the faults in the present system as far as it is necessary to make my distinctions with regard to the proposals I am going to make. As I say, I will go through discussing the points, and perhaps if you have any questions you will stop me when I make the point, or if there is anything in the brief which you would like to ask me questions about on that matter I will do my best to answer them at that stage.

First of all then we deal with the question of jurisdiction. Our present system based on provincial domicile is I think dreadful. There are two solutions to this, one of which I think is better than the other. The first solution is to establish a Canadian domicile. This was done in Australia where, in 1959, an Australian domicile was established. They had a very similar situation to our own; each state being a separate domicile but in addition each of the states was legislating individually. In 1959 they produced a uniform divorce act for Australia and a uniform domicile. This is one of the solutions.

This is a solution which we could introduce here; call Canada one country, because after all it is one country. For divorce purposes there is no reason why we cannot do it, so that for this purpose Canada would be one domicile. What would be the advantage of this over provincial domicile? First of all, many of our problems are concerned with the very concept of domicile itself; that is, as you move around you change your domicile, and with provincial domicile you may change as you move from province to province; not necessarily, but it is possible, and is frequently the case. Also, it is frequently difficult to know whether you have or have not changed your domicile, which again is an unfortunate state of affairs.

One further thing in connection with the concept of domicile which produces problems is what is known as unity of domicile between husband and wife. The wife's domicile is always her husband's; she cannot acquire one of her own; wherever he moves she in theory moves with him, whether in fact she remains behind. This again creates problems. There have been attempts, notably with the Divorce Jurisdiction Act, to help in this regard; it has helped but it is still not the answer.

Uniform domicile in Canada would simply mean that when a person enters Canada and would normally establish a domicile in a province he would establish a domicile in Canada. This he will keep until he leaves Canada, wherever he moves within the country. This gets over the problem of moving from province to province and many situations which arise to determine where a person is domiciled; there would no longer be any need for this; this would be done away with.

There is one disadvantage in that we still will not have cured the problem of people who move to the United States or another country. They will still not

come within our concept, and they will still be a problem to us. An answer to this is, I think, my second recommendation; that is, residence within the province. If you reside within the province—forgetting about domicile altogether—for a specified period of time, this itself would be sufficient. It is possible to determine accurately whether a person has resided within the province for a particular period of time if a specified limit is set.

With domicile, it is sometimes difficult to be absolutely certain where your domicile is. We can be fairly certain in many cases, but with some people, like, e.g., servicemen, the question is often a very difficult one to answer. One advantage of Canadian domicile over residence is that if a uniform bill for Canada were introduced and a uniform act passed, so that in theory we give everyone in Canada an equal right to divorce, if for any reason—it does not really matter what the reason is—divorce courts were not established in Quebec and Newfoundland, (where they do not exist now), our concept of Canadian domicile would mean that anyone domiciled in Canada could get relief in any court which had powers to grant a divorce. Therefore, people in Quebec and Newfoundland would not be denied the same rights that everyone else in the rest of Canada had; they would simply have to go to a court in another province and, then if the grounds were sufficient, would automatically have the right to relief there.

Senator HAIG: You would eliminate then the granting of divorce by senate resolution.

Professor SKELLY: There would be no need for this. People of, for example, Quebec would get relief simply by going to Ontario, because we would be dealing with a Canadian jurisdiction and not simply a provincial jurisdiction.

In the case of residence, again this would be an advantage over the present situation. At present, if a person in Quebec wanted a judicial divorce he would have to establish a domicile in another province. If on the other hand we required, say, three or six months' residence, all he would have to do would be to go to the other province and establish this residence, leave the jurisdiction where divorce was not possible and go to a province where it was. This is not a good answer but it is an answer. I put it to you not as the best solution but as a solution. The answer is to establish divorce courts.

Senator HAIG: If you have residence what you are doing is what happens in some of the American states, where you move into another state for a certain period and it is a false residence.

Professor SKELLY: False residence only in the sense that you are considering residence for a specific purpose. I am simply saying that a party is entitled to a divorce if he has resided somewhere for a certain time. It does not matter why he has resided there. I would eliminate the question "Why is he living here?" The question is simply, "Is he resident here or not? Has he been resident for the period required or not?" I know this sounds as though you are just leaving Quebec to go for an easy divorce, but this is not the case. Our divorce laws would be uniform across the country and the obvious answer would be to have divorce courts. I am only saying that if they were not established, we would have a better situation than we have at present, because the whole idea is that if we are to have uniform laws they must apply equally to everyone and everyone must have an opportunity to act upon them. As I say, moving to another province is not the real answer, but it is an answer, that is all.

Co-Chairman Senator ROEBUCK: As I read your brief and as I listen to you now, you are making domicile and residence alternative methods of dealing with the problem. Would it not be possible to adopt them both; that is, to give Canadian domicile, require that from anybody applying to our courts and allow them to apply to the court only of the province in which they are residing?

Professor SKELLY: The only problem I could foresee might be some conflict between one court maintaining it had jurisdiction on the basis of domicile and another court talking about residence, but I do not think that is a real criticism. I think that could be quite a good solution. I must admit it is one that did not occur to me. I really considered these in the alternative rather than as being together. I think perhaps this might be possible.

One further point I could perhaps make is that we have problems with the recognition of foreign divorces. We have to bear in mind that people do go to other places, they come from other places and they may have got a divorce in another country. This problem frequently arises with regard to the United States. Divorces granted in the United States are frequently not recognized in Canada. If we have Canadian domicile this will not help it, because the basis of our recognition is on what is called reciprocity. Would we have given a decree in the same situation, would we have granted a decree if the parties had been asking for it in Canada and not in the place where they actually asked for it. If the answer is "Yes" we would recognize the divorce; if the answer is "No", we would not; it is very simple.

If we have Canadian domicile we will always require the parties to have been domiciled in the place where they obtain the decree. If on the other hand we have residence, we can recognize many of the divorces granted in the United States. This raises problems, or apparent problems, but I do not think it is as bad as it seems. First of all you may say, "If we are going to recognize all the American decrees granted, people are just going to flood to the United States to get a divorce." I think there are two answers to that. First of all, why do people go? It is inconvenient, it is expensive, it causes a lot of trouble. They go because our divorce laws do not take into account the change in social conditions, they do not give divorce where it is needed.

I am not an advocate of easy divorce. I am an advocate of divorce where it is needed. Divorce is a necessary evil; it must be given where it is needed, not made available to anyone who wants it. Let us take an example which sometimes arises. Two parties obtain a divorce in the United States. They obtain a divorce in a state which has residence as a basis of jurisdiction.

Senator ASELTINE: Are you recommending fictitious residence?

Professor SKELLY: By residence you mean?

Senator ASELTINE: Going to the United States, living there two or three weeks and having a divorce.

Professor SKELLY: No. I am just trying to show why this would not be the result of my suggestion. If I may continue, two people obtain a divorce in a state in the United States where residence is the basis of jurisdiction. The husband perhaps remains in the United States, remarries and intends to spend the rest of his life there; the wife comes to Canada. In Canada we would not be able to recognize that divorce unless we could establish that the husband at the time of the divorce was domiciled in that state. The United States says, "This woman is single"; Canada says "This woman is married. We will only give her a divorce if she is domiciled in Canada." The United States will not give her a divorce because she is single as far as they are concerned. This woman is condemned to spend the rest of her life married in Canada and single in the United States; she can never remarry unless she wishes to move to the United States.

I am suggesting that if we have liberal grounds—and when I say liberal I mean divorce grounds which provide justice in the circumstances, they allow divorce where it is necessary—then people will not be tempted to go to the trouble and expense of going to the United States to obtain their divorce. In fact, if our divorce grounds are adequate people will not need to go. If we were not going to make changes the only solution would be to have Canadian domicile, but if we were going to make changes I think we would certainly be better off with residence as a criterion rather than domicile.

Therefore, my first point is residence for a specified period. In my draft bill I suggest six months, perhaps three months would be sufficient, but this is merely residence. There is no other hidden reason; there is no question of, "Does he intend always to reside here?" The question is simply, "has he or she lived here for the period specified?" In most cases the practical situation would be that, "The wife has lived here for many years. She wants to obtain a divorce. The husband is miles away somewhere else, perhaps in another country. Should we give her a divorce or shouldn't we, or does she have to chase after the husband?" My solution would be that in the majority of cases we would give her a divorce because she has resided here for a specified period. If people in Canada have realistic grounds for divorce they will not go to the trouble and inconvenience of going to the United States because they will gain nothing, since in the majority of cases with enlightened divorce legislation they could obtain relief here.

Mr. PETERS: I am thoroughly confused now, maybe because of the example and my lack of knowledge of the domicile clause. If, for instance, Mr. and Mrs. Smith want a divorce, Mr. Smith moves to Las Vegas, Nevada, where two weeks' residence would give them a divorce—

Professor SKELLY: I think it is six weeks.

Mr. PETERS: Six weeks then, if the money holds out that long. They establish for the purpose of divorce six weeks' residence collectively—she does not have to go because she is already there according to our domicile—and he decides to stay there. How does the court decide she is not really divorced in Canada?

Professor SKELLY: The first question would be: at the time of the divorce was the husband domiciled there? Without going into a great discussion on domicile, which is a very complex and difficult topic, I would say you can acquire a domicile if you have the right intention, simply by putting your foot in the country or state in which you intend to reside. If he goes there with the intention of spending the rest of his life there he will establish a domicile; but what usually happens is that he goes there simply to get a divorce and then moves to another state.

Mr. PETERS: Granted he does, or does not, it does not really make any difference. I am just curious how our courts at the present time will decide her marital status.

Professor SKELLY: The courts would say first of all, "Was he domiciled there at the time of the divorce?" If he was domiciled at the time of the divorce, then we will recognize the divorce; she is a single woman; if he was not domiciled there at the time of the divorce, then we would not recognize it.

Mr. PETERS: He is obviously domiciled for at least six weeks because the state demands that; the fact he got a divorce indicates that domicile or residence was established there for six weeks. Say he decides to stay there; that Nevada divorce is still not legal in Canada; he can stay there ten years.

Professor SKELLY: All you have to do is to decide whether at the time of the divorce petition, the petitioner, in this case the husband, was domiciled in the particular place where it was granted. This is what they must establish. Domicile means, "Do you intend to reside here permanently?" The question simply is, "At that time did he intend to reside there permanently?" If the answer is "Yes" we will recognize it; if the answer is "No" we will not; that is all.

Mr. PETERS: I should not be asking this, except that I am curious. What has been our experience with the legal interpretation of establishing this?

Professor SKELLY: Establishing domicile?

Mr. PETERS: We are using a very bad example, at least an extreme example, with Nevada. I was under the impression that no Nevada divorce was recognized in Canada.

Professor SKELLY: We will recognize it if a domicile is established but usually it is not. As I say, it depends on your intention. It is interpreted according to the circumstances. If the husband takes all the belongings, sells the house where they are living, moves everything to Nevada, buys a house and settles there, then the court will usually say he has established a domicile there, if he remains there from then on because a decision on domicile is taken at a subsequent date. Years later we say, "Well, he is still there, he went there with all his things, he established domicile." It only requires putting your foot on the soil with the correct intention. If you go there simply to obtain a divorce and move on, the court will say you did not establish domicile and will not recognize it. It all depends on whether you establish domicile or not.

Mr. PETERS: It is still hypothetical. Let us say he moves to Michigan from Nevada after he gets his divorce and he does not re-establish Canadian domicile. What happens then? He is going to stay in Michigan for ever; at least, that is his intention.

Professor SKELLY: You say he goes to Nevada, obtains a divorce, moves to Michigan and establishes domicile in Michigan?

Mr. PETERS: Yes. The divorce is recognized in Michigan.

Professor SKELLY: Yes, on the basis of full faith in credit.

Mr. PETERS: But it will not be recognized in Canada.

Professor SKELLY: No, so therefore the woman is still married as far as we are concerned. I will not spend too much time on jurisdiction because it is not my major consideration, but I take it we now have in mind the concept of jurisdiction.

Senator ASELTINE: The point has been bothering the committee very much.

Professor SKELLY: The question of jurisdiction?

Senator ASELTINE: The question of judgment and domicile.

Professor SKELLY: If you have any questions on it I will certainly give whatever answers I can. Perhaps I can summarize it briefly. Canadian domicile is much better than the present situation.

Senator BAIRD: I think I agree.

Professor SKELLY: There is no doubt that Canadian domicile is much better than our present situation; there are very few arguments against it.

Senator ASELTINE: But that does not help you when dealing with marriages that take place in Las Vegas.

Professor SKELLY: When you have a divorce taking place in another country—

Senator ASELTINE: You cannot change your domicile unless your mind is made up not to return.

Professor SKELLY: You must have the intention of residing permanently.

Senator ASELTINE: You cannot go down there for six weeks, establish domicile and then come back to Canada after the divorce is granted and remarry, even though you have Canadian domicile.

Professor SKELLY: It is possible to establish domicile, I would say, even in six weeks. The usual case is where the wife intends to return; the husband remains and the wife returns; the husband can establish domicile and remain there.

Senator ASELTINE: That is it. They never do remain where they get their divorce; they come back.

Professor SKELLY: I would not doubt that you could establish domicile within that period.

Senator ASELTINE: I have had three or four cases just like that. There was one case in Saskatchewan, even though they went to the states and got married again and then came back to Canada, to the previous domicile, we had to take action to dissolve the marriage in Saskatchewan, at great expense. I think the committee would like to be able to establish some reasonable law of domicile. Perhaps the solution is Canadian domicile.

Professor SKELLY: I have given them in the alternative as two proposals.

Perhaps I can move on to my next proposal, which concerns legal aid. I do not propose to say very much about it. I would only like to emphasize that there is a need for legal aid. I would quote some statistics which may or may not be indicative of the position in Canada; they are quoted from England because at short notice statistics were not available from anywhere else. In 1965, in England there were 41,000 divorce petitions, of which 27,000 were supported by legal aid, so you see the need which is felt in England to support these petitions. I would suggest that in Canada also there is a need to see that a person is not prevented from obtaining a divorce simply because he does not have the means to do it.

Co-Chairman Senator ROEBUCK: Is not that provincial jurisdiction? We have never gone into that type of thing, assisting people with legal aid, while the provinces have. For instance, the Province of Ontario has very recently passed a bill with regard to legal aid, and they intend to spend a very great deal of money in connection with it.

Professor SKELLY: The only reason I took this up was because certain submissions have been made to the Government of Manitoba on legal aid, but they have not included divorce in this matter. I would just like to make it known that I think it is necessary that this should be considered, and it is as essential as many others.

Co-Chairman Senator ROEBUCK: You are not proposing that we establish a great system of legal aid in the dominion?

Co-Chairman Mr. CAMERON: It is not in the draft bill.

Professor SKELLY: I do not think it would be a thing which this committee or the federal government would be expected to do. I agree it is more on the provincial level. I would just like to make it known that I think it is necessary and should be done. I do not know how the federal government could, not necessarily give a lead, but give some indication to the provinces that they feel this is an important consideration.

Co-Chairman Senator ROEBUCK: I think you have given all the information that is possible.

Mr. PETERS: I think it is the fact that the federal government is now providing legal aid in the Senate Divorce Committee. In reading the reports over the years I have found a number of people in very poor circumstances have come without legal counsel and on occasion the committee has waived the private member's fee, which is really the court fee, so although it might be stretching a point we are applying a type of legal aid. Maybe it is exemption rather than aid.

Mr. MANDZIUK: That does not extend to aid in the courts of Ontario.

Mr. PETERS: I agree it does not, except I think it is the costs they are waiving rather than legal fees, but I think the court itself has made a decision to rebate the initial payment on a number of occasions.

Professor SKELLY: I would like now to move on to what I think is a most important consideration, and that is the grounds for relief; the grounds for divorce in fact. It is very important that something be done about our grounds for divorce. I think they are archaic, they are out of date, they are causing a great deal of injustice, and unnecessary injustice, because in many instances they achieve nothing, they prevent people obtaining a divorce, they force them to do

things they should not be expected to do, they force them to commit adultery, or force them to pretend to commit adultery.

If a marriage has broken down, if the parties find they cannot live together and are living in a common-law union with someone else, what does it prove to say, "If we don't give them a divorce they may go back together?" I think this is ridiculous. They will not go back together. If they are living with other people, if they have children by these other people, if they have responsibilities that they feel for these other people more than the persons they are legally married to, then nothing on earth will send them back together.

Mr. MANDZIUK: Professor, if people separate and one or both is living in common-law with someone else, you have got perfect grounds for divorce; there is adultery there and there is no difficulty. I think the committee would be interested to know what other grounds you suggest.

Professor SKELLY: There are situations where, for one reason or another, one of the parties does not wish to bring an action. Without going into that, I would like to progress to the main theme. As I said earlier, my intention is not to make divorce easier as such, but to try to bring relief to the parties who need it. I would like to quote you the words of Viscount Simon, the Lord Chancellor, in *Blunt v. Blunt*, a decision of the House of Lords in 1943, which was a very important decision in the realm of divorce law. I think this sums up entirely my attitude towards the need for relief. He said:

> The interest of the community at large is to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public polity to insist on the maintenance of a union which has utterly broken down.

Our aim is to balance the needs of society to protect the sanctity of the institution of marriage, and the public policy which makes it wrong to force two people to go on living together who no longer have a valid marriage, who no longer have a marriage that means anything at all. It is a meaningless bond. This is our task, to balance these two.

We want to protect the sanctity of marriage. There are two ways of protecting it. We protect it by giving divorce to people who need it. Equally, we protect it by preventing people getting a divorce who do not need it. That may sound rather high-handed, but I think there is a need to prevent people getting a divorce who in fact do not need a divorce. That is the general attitude towards the sanctity of marriage, that we should prevent people getting out of marriage. There is another way of protecting the sanctity of marriage, and that is by allowing divorce where it is necessary. If there is a cancerous growth in the human body we do not leave it there; we cut it out, we destroy that part, we sacrifice that part to protect the whole. This is what I suggest we need to do with the institution of matrimony; we must take out the marriages which no longer benefit society, because marriage has two aspects, it benefits the parties and it benefits society generally. If a marriage is no longer benefiting the parties it is no longer benefiting society generally, and surely the thing to do is to take it out, to let the rest of the marriages benefit from removing this part.

I have suggested two types of reform, one of which I call a modified conventional development, and the other is simply marriage breakdown. I think marriage breakdown is the ultimate answer, but I am not sure that we are ready for marriage breakdown. There are practical considerations, so I would first like to deal with what I call my modified conventional development.

The conventional development would be, I think, along the lines of the 1937 Matrimonial Causes Act in England; that is, to add cruelty, desertion and permanent insanity to the already existing adultery. This was the development which took place there. That would be the conventional thing for us to do if we were going to follow the English legislation. Australia and New Zealand

branched out very early; they introduced a long list of grounds, and in addition they have what is known as the separation ground which says that if the parties have lived apart for a certain period of time they should be entitled to a divorce irrespective of who is at fault.

Senator HAIG: Do they sign an agreement prior to this separation or is it just physical separation?

Professor SKELLY: This comes before the court; the court gives a decree, which is a divorce, but it is on the basis of living apart for a period of time.

Some people argue that we should add cruelty, desertion, insanity and this separation ground to our law and call that our divorce law. Well, this is an answer and it would be better than the present situation, but to me this is not really the ultimate answer.

Now let us look at these grounds. I would advocate retaining adultery; I would advocate accepting cruelty, but I do not think it is a good idea to accept desertion, insanity and separation. First of all, what is wrong with these grounds? They are all artificially formulated grounds; they are all grounds which we establish a formula for and we say, "Try to fit your facts to this particular ground" with very little consideration for the real picture of the marriage; just, "Have you done this? Have you done that?"

Permanent insanity is, I think, very important, because there are many people in Canada committed to a life sentence with a partner who is permanently insane, perhaps not confined but not in a state to give the other party any companionship, any feeling that there is a marriage there at all. They have no way of getting out of this because usually the other party cannot commit adultery.

If we introduced permanent insanity as England has done there is one major problem, and that is that this is not working in England. There are a very small number of divorces granted on the ground of permanent insanity. This is due to the advance in medical science. You must get a doctor to stand up in court and say, "This man is permanently insane, he is incurable", which is what the act requires. But the doctors, perhaps in their wisdom, do not believe that anyone is permanently insane, that anyone is incurable; they believe there is always a chance. It is very rare, therefore, to get a doctor to stand up in court and say "This person is incurable," so this does not work.

The proposal I make is that we have a much wider ground which would cover these three—that is, desertion, insanity and the separation ground—and this ground would be called lack of consortium. Now, what do we mean by consortium? Consortium means living together as husband and wife and all that goes with this relationship. One of the problems of having these three grounds as separate grounds is that in each case you have to show which category your situation fits into; you have to show whether it is desertion, whether it is separation, whether it is insanity. My question is: why do we need to do this? I think my ground of lack of consortium would cover the three.

The situation in Australia is that for separation as a ground there needs to be actual separation of the parties, so you must first of all show the degree of separation; if the parties are living in the same house you must show that they are living as two households. It is one of those little games we lawyers play to keep the public fooled most of the time. You must show that there are two households. It is not sufficient to show the parties are living separately unless you can show they are living in separate households. This, I would suggest, is again a little pointless. If we are to have desertion and separation we have to show whether the parties separated because they consented to separate or whether they separated because one of the parties wished to do it without the other party's consent; that is, we have to decide whether it is desertion or separation. I have already shown you the faults of the insanity ground.

If we say to the courts that the ground for relief is lack of consortium, that means if the parties for a period of years—I have suggested three years; perhaps you may think that is too long; I think it is certainly not too short and may be too long; perhaps you may say that two years is sufficient—if for a period of time there has been no consortium between the parties—they may have lived apart because they have separated by consent, they may have lived apart because one has deserted the other, they may have lived in the same household but really not lived together as man and wife, but lived there for purely economic reasons, because the husband refuses to make proper maintenance for the wife, or because the husband will not make proper provision for the children the wife has stayed there although she would like to have left—if for any reason there has not been a proper marriage between the parties for a period of two or three years, whatever period is set by parliament, then they would be entitled to relief.

There would be certain safeguards which I will mention in a moment, but that would be the basis and it would be for the courts to decide—as in the case of cruelty in England they were left to decide what was cruel—what constituted lack of consortium. They may think refusal of sexual intercourse for three years would be sufficient. I would certainly think it sufficient if the parties had lived separate for three years.

What we are trying to do is to decide "Has this marriage broken down?" but we are not just using the general ground of marriage breakdown. We are providing the courts with a way to measure, some way to decide "Has it happened or has it not happened?" I am not sure that the courts are ready to be told, "Give relief just where the marriage has broken down." I think if we give them some sort of test this will happen, and if we say a ground shall be no consortium for a period of years they will have some measure, some way of determining what has happened to the marriage, whether it has broken down. So it is a test for breakdown; it is not breakdown itself.

There may be situations where the marriage has broken down; it will not fit into our test, but basically we are concerned with a fairly wide test, a test which I think will enable us to show in many cases whether it is a valid marriage, whether it is worth while that the parties should be kept together or whether we can allow them to separate and give them relief.

Having this ground, why do I also retain adultery and cruelty? The Lord Chancellor appointed a committee to consider the Archbishop of Cantebury's committee's report, *Putting Asunder,* and they came out with the decision that you could not just have one ground of, say, separation or something of that nature, that you needed something for the people who required a divorce now because the situation was particularly bad. I am thinking basically of cruelty. Where there is cruelty the wife may need relief now; she does not want to wait three years, she wants relief immediately. This is why I have retained adultery and cruelty, in case the situation is very bad, that the courts will be able to give relief; but the majority of our cases will fall within the concept of lack of consortium.

When separation was introduced in Australia as a ground it was thought that this did a great deal of good; just introducing separation as a ground cut down many of the problems which existed. I would like to quote a statement by Sir Stanley Burbury concerning the effect of introducing separation as a ground. Let me just illustrate it a little. The situation in Australia when the ground of separation was introduced was that there were a large number of grounds, many more than in England; all types of situations were formulated, and my contention is that you can never formulate enough grounds to cover every situation which will arise, there will always be something you have not

thought of. Despite this large number of grounds, when separation was introduced in Australia Sir Stanley Burbury made the following statement:

> The introduction of separation as a ground has I believe removed a strong incentive to perjury and in many cases has avoided the unreality under the label of desertion (actual or constructive) of attributing the breakdown of the marriage to the fault of one party.

I would draw your attention particularly to the opening words:

> The introduction of separation as a ground has I believe removed a strong incentive to perjury.

Remember, in Australia there were many grounds for relief, but despite this he felt that the introduction of separation as a ground—and in Australia it is five years' separation—still cut down the number of cases where perjury existed. I therefore think if we have just these two grounds and in addition this wide ground of lack of consortium we are to a large extent cutting out the need for people to perjure themselves.

You may think it necessary to reduce the lack of consortium ground to two years. I would agree. I thought three years was an outside limit. Perhaps two years would be enough to show that the marriage has broken down. Perhaps even one year is enough to show the marriage has broken down, if the parties have not lived together as husband and wife during that period. This would be a matter for those who draw up the final act.

Co-Chairman Senator ROEBUCK: You would leave some discretion, I presume, to the judge too.

Professor SKELLY: There is a discretion, as we shall see in a moment, which I think applies to these three grounds I have suggested. In fact, they are in a sense bars. I would do away with the present bars because to a large extent they are meaningless, they are archaic rules which really have no application now. I would introduce instead three new bars. The first one would be that there must be no reasonable hope of a reconciliation being effected. This would be an attempt—a small attempt but an attempt—to refuse relief for one isolated act of adultery if the evidence generally is that the parties could still make a go of the marriage. I wish to avoid the situation where just one isolated act of adultery will be sufficient to give a person a divorce, when in fact if the parties are told "We think there is a hope of reconciliation" they might very well go back together and make a go of it. I think there are such situations. This is an attempt to give divorce to people who need it and not just to anyone who asks for it.

My second suggestion for a bar is that the decree should not be granted if it will be harsh and oppressive to the respondent, that is the party against whom the decree is to be made. What do we mean by this? This is an expression which has been used in the Australian and New Zealand legislation, and they have taken it as meaning something which is really bad. The situations which have arisen where they have allowed this have been where it may prejudice the respondent's employment if a decree is granted against him, or if he is going to lose something under the testators family maintenance legislation of that particular place. Basically it is not simply because a decree is being granted but because there is something outside this concept. Just because relief is given against him, whether he is guilty or innocent does not matter.

When dealing with the last suggested ground, lack of consortium, we are dealing with a non-fault ground, a ground where fault is not important. It is important only at the stage of deciding whether it is harsh and oppressive to the respondent. The court may decide as the respondent has been perfectly innocent, as the respondent has done everything, as this may affect his career in some way, to refuse a decree The court will be given a discretion there to decide

whether it is harsh and oppressive to the respondent. That is where the discretion will come.

Having decided that the ground has been made out, that there has been adultery, cruelty or lack of consortium, they will then decide: is there any hope of reconciliation? Is it harsh and oppressive to the respondent? If the court is satisfied neither of these possibilities arise, then it looks at the third bar, which is really a procedural one but a very important one: is this in the best interests of the children? In particular, has proper provision been made for the maintenance and custody of the children? This is very important. I think the paramount interest is the children. We must think of the children first. If there are no children of the marriage we have a much simpler situation. If there are children we must decide whether it is better to separate these people or keep them together. This is a paramount consideration.

Having satisfied those three bars the court would be entitled to grant relief. However, I have one further provision, which I must admit is lifted from English divorce law, but I think it is something which deserved a certain amount of consideration. In England it is not possible to get a divorce within the first three years of marriage. It is thought that this prevents people rushing in and out of marriage. When the Morton Commission in England reported in 1956 they made the following statement with regard to this three-year bar:

> The purpose of the restriction is to encourage husbands and wives to face and resolve their differences in the period of adjustment which necessarily takes place during the first few years of married life, and thus to reduce the number of broken marriages. Whether in practice it has had this effect can only be a matter of opinion, since the statistics available are of instances where the restriction has failed in its purpose and not of instances where it has been successful. We consider that on the whole the restriction has had a stabilizing effect on marriage.

Perhaps three years is too long, I do not know, but I certainly think this is a valid consideration. It is something which can show people—and I think it is a preventive measure which is needed here—the importance of the step they are about to take. At the end I would like to say a few words about other preventive measures which I think should be taken, but I think this could be a valid consideration, that the parties be prevented taking this step for a period, and I have included a clause to this effect in my draft bill. If there is exceptional hardship or exceptional depravity, something really bad, the court can consider it, but basically relief would not be granted within this three-year period; you would have to wait, you would have to try to make a go of it.

Co-Chairman Senator ROEBUCK: Would syphilis be a ground for waiving the three-year period?

Professor SKELLY: First of all you would have to bring it within one of the grounds; you still have to have relief on the basis of one of the three grounds stated. It would not come within the lack of consortium ground because we have the three-year requirement at present, which may be reduced. It may be considered cruelty if the husband forces the wife to have sexual intercourse with him when he has contracted veneral disease; this could be cruelty and could very well be considered an exceptional hardship or exceptional depravity by the husband. I do not know of a case so I cannot give you a "Yes" or "No". I would say, having looked at the cases which have been decided on the point, it would be possible. Really it is to make people think what they are doing when they take the step of entering into matrimony. How serious is it? Very serious I would say; probably the most serious decision you make in the whole of your life, and people should realize this. Those are my three bars to relief, safeguards or bars, whatever you like to call them.

Senator GERSHAW: What about the so-called "gunshot marriages", where there is a marriage just to give the baby a name and then they break up? There are a lot of them.

Professor SKELLY: There are a lot of them. I feel very strongly about them; I think they are a very bad thing, but I do not want to be led aside. I could easily get into the realm of illegitimacy, which is another thing that has to be considered soon. Why do we have to call a child illegitimate? What did it do to be given this label? Why should the act of two other people give a child this stigma? Why should not all children be children?

To get back to the main point, I do not think that would come within exceptional depravity or exceptional hardship, and I would not want it to, because I would want to discourage this type of marriage, I would want to discourage people getting married just to give a child a name.

Mr. MACEWAN: Why?

Professor SKELLY: Because I think it is wrong and because I think it causes a great deal of harm to the parties involved. The percentage of marriages where it succeeds, where they marry and say "We will try" and it works, are very small. The majority of them seem to come to a miserable end. I think it would be much better for the parties to stop and think about it and for the child not to be legitimated in this way rather than go into marriage and use it just as a means of legitimizing a child. I would like marriage to be regarded as a much more sacred and important thing than merely a means of giving a child a name. Are there any other questions on these grounds?

Mr. MANDZIUK: Do you recommend that cruelty can be a completely separate ground for divorce, and how do you define cruelty? Are we leaving it up to the judges to set precedents and define cruelty? How does it work in other jurisdictions?

Professor SKELLY: In England, for example, where cruelty has been a ground since 1937, I think it has been a very valuable ground. It is a ground which gives a great deal of flexibility to the law. It has enabled the law to stay in touch with changing social conditions, because the law can adapt itself, and it has given the court the ability to adapt itself in that way.

Co-Chairman Senator ROEBUCK: That is if you do not define it.

Professor SKELLY: That is if you do not define it. No one has ever attempted to define cruelty, except I think perhaps the Canadian Bar Association. Apart from the Canadian Bar Association very few people have attempted a definition of cruelty; no judge has ever attempted one, because it is impossible to cover every situation which exists.

Co-Chairman Senator ROEBUCK: Because it will expand or contract.

Professor SKELLY: Yes. There are certain criteria we can lay down. First of all we say there must be injury to health. This was established in 1897 in a very important case, *Russell v. Russell*. There must be injury to the petitioner's health. The petitioner must have suffered some injury or be in apprehension of some suffering. This must be shown. You cannot get a divorce simply because you do not like something. You must have suffered injury to health, and usually you need a doctor's certificate to this effect. The courts have interpreted this as meaning it does not matter what injury to health; if the conduct is very bad they will accept a very mild injury to health. First of all then there must be injury to health, this must exist. Secondly, is the conduct sufficiently bad? We use the expression "grave and weighty". What do we mean by "grave and weighty"? This was first used by Lord Stowell in 1790, and since then we have hung on to this term. We mean something wider than the normal wear and tear of married life, something a married person does not expect to take on when entering into the institution of marriage, something which is outside the normal wear and tear.

We have left it to the courts to decide what is outside the normal wear and tear, but up to now they have acted very responsibly. I am now talking about the English courts.

Mr. MANDZIUK: Would you say the American courts are not stretching it further than the legislation anticipated?

Professor SKELLY: I would say the American courts have gone a little far. After all, we do follow most English decisions or the English concept with regard to the Wives and Children's Maintenance Act; that is preliminary litigation where you have provision for the wife's maintenance etcetera, separation; we follow the English meaning of cruelty here, and if we use it as a ground for divorce I see no reason why we should not carry on with this; I think this would be a natural trend.

I think that having got these two criteria, these two basic things, the courts can then be left alone to do what else they will. Australia has followed the English decisions, and so has New Zealand. Some of the states of the U.S.A. have, but not many; they have gone on in their own happy way. I think we would certainly follow the English decisions and I would think it would be safe to say that cruelty would have the same meaning here as it has in England. I think this is the realistic approach. It is mental as well as physical cruelty, but it is nothing extreme. Courts are not prepared to give relief if there is not some justification for it; they do not give it because someone says, "He squeezed the toothpaste in the middle"; there is more to it than that.

Senator GERSHAW: Do you say it is dangerous to try to define cruelty?

Professor SKELLY: I think it is impossible to define it.

Senator GERSHAW: It is worse if we do not define it.

Professor SKELLY: No, I would not say it is worse if we do not define it. I would say we are quite safe in not defining it. I do not think anything can go drastically wrong, because I think the courts are responsible and they will interpret it in such a way that we would do the right thing. I do not think we would go any wider than the English, Australian or New Zealand courts have done. They are very fair about it, they do not give relief unless it is justified, so I think it is quite safe. The ground of adultery we have at present, so I think there is nothing I need say about that.

Co-Chairman Senator ROEBUCK: We have some experience along those lines in Nova Scotia, and also in connection with judicial separation; and of course it is the English decisions that we follow and not the American.

Professor SKELLY: Perhaps I might move on to my second basis for relief, which is marriage breakdown. This, I feel, is the ultimate solution. Perhaps first I might make a few comments about the disadvantage of the grounds I have already suggested. It may sound as though I am shooting myself down, but these disadvantages are in relation to pure marriage breakdown, not in relation to anything else. There are the reasons why I think pure marriage breakdown is better.

What disadvantages are there to the idea of combining an offence with the marriage breakdown ground? This is what in fact we are doing. There are problems. One is concerned with guilt or innocence. With regard to the other the question of guilt or innocence does not arise. If the parties appear before the court on a marriage breakdown ground the court is concerned not with who is guilty or innocent, but simply whether the marriage has broken down. When dealing with adultery or cruelty the court has to decide whether the respondent is guilty or innocent, so we have different criteria and the court has to keep this in mind. One day the judge may be dealing with guilt or innocence, the next day he may be dealing with marriage breakdown, and keeping this clearly in mind does sometimes cause problems for the judiciary. When dealing with a marriage

breakdown situation either party may petition. In the case of a fault ground, an offence, only the innocent party can petition. So you have these differences which when run together in one divorce law tend to cause little problems.

Secondly, I am against formulating grounds as such. We are still formulating grounds. The Australian and New Zealand legislatures, and the American states in particular, have on the whole a long list of formulated grounds, they have anything up to 22 or 23 grounds for relief. This has been found not to be the answer, because they still cannot cover all the situations that arise, they still cannot make allowance for everything that crops up.

Take our present situation. We have, for instance, a little slot in a door which is labelled "adultery". If you can push the facts of your case through that slot we do not want to know anything more. Does it go through the slot or does it not? If it does it is adultery. We can make more of these slots and label one "cruelty," which has a slightly different shape, another "desertion" or anything else. We have a number of different shaped slots so that if our facts do not fit the adultery one we try the cruelty one, and if they do not fit there we try the desertion one. Really all we are doing is making divorce easier. We are not really making it something that is being given when it is needed necessarily, we are just making it easier to obtain.

I have attempted here to limit this to a certain degree, because one of our bars is that there must be no hope of reconciliation. We look at the case and say, "Is there a hope of reconciliation?" If there is we are not going to give relief. We are not just saying, "Try to push your facts through some slot." We are saying, "We are going to look at it a little more fully, we are going to see what the real situation is; we want to know in reality what is happening; not whether you did this specific thing but what is really the picture." One isolated act of adultery will at present get you a divorce, but it may be meaningless if you look at the whole marriage. The parties may have been married ten years; the husband in a mad moment when away one weekend at a convention commits an act of adultery; the wife becomes incensed and insists on a divorce, whereas if she had swallowed her pride and thought a little more about it she might very well have got together with the husband and worked out a solution by which they could keep the marriage intact.

I am suggesting that by creating more and more grounds we are simply making divorce easier. I have attempted here, by saying there must be no hope of reconciliation, to make it a little more difficult, to try to sort out the cases where divorce is needed from those in which it is not needed. I think there will still be a tendency to say, "Has an offence been proved? If it has we will let it go through", and the court may not look into it as closely as we would like, rather like the procedure at present with undefended petitions on the ground of adultery which go through very rapidly. Everyone knows this. If you visit a court and watch you can see them going through in perhaps ten or fifteen minutes; they do not take very long.

I would like to think we were doing a little more than this, that we were slowing things down a little and looking at it a little more carefully, because I think marriage is our basic institution and it is not benefited by giving divorces freely; it is benefited by giving divorce where it is necessary, and we must always keep this in mind.

As I say, my solution to this is marriage breakdown. The court is simply told, "If the marriage has broken down you will give the parties relief. If it has not broken down you will refuse relief." I agree this is a very vague term. Certainly it is very vague. If we start laying down rules we get back to the situation where we have formulated grounds again. If we say, "The marriage has broken down where this, that and the other happens" we are really getting back to the situation where we have adultery, cruelty and desertion, because we have

gone no further than that. If we have marriage breakdown it is essentially a ground which is very wide and leaves almost everything to the discretion of the judge; the judge is left to decide "Has this marriage broken down or hasn't it?"

Senator HAIG: In your petition you have to allege certain reasons for the marriage breakdown, and you have to prove them.

Professor SKELLY: Certainly. You would say, "This, that and the other happened. We have been married so long. These things took place. I feel we can't go on living together", and the judge would then have to assess the situation and decide whether this really was a situation which could not continue or whether he could say, "No, I do not think the marriage has broken down." Certainly all the facts would have to be before the court, but we would not say to the judge, "He must prove this, that and the other before you give relief" because on the whole every situation is different, every family situation is a little different from another. Consequently we cannot lay down rules to apply to everyone. This is what they have tried to do in the United States, and also in Australia and New Zealand, to have a long list of grounds to try to compensate for every situation, but it has failed because you cannot do it.

What marriage breakdown is in fact is simply saying to the court, "Look at all the facts. We leave it to you to decide." Can a judge do this? Is a judge equipped to do this? I think he is. When he is asked to decide a question such as, "Do you think there is a reasonable apprehenson of injury to health, as judges in England are today in cruelty cases, he is able to judge from the circumstances whether there is or is not. I think that in the same way a judge here could say, "I think this marriage has broken down" or "It has not broken down". I would advocate certain additional training, such as psychiatric training and sociological training, specially designed for the judge to bring him a wider knowledge of the problems which exist and how to read the real situation into the facts presented to him. I think a great deal can be done in this way.

I get great support from the committee of the Archbishop of Canterbury which, as I am sure you are all aware, in the publication *Putting Asunder* said that marriage breakdown was the answer—"Throw out all matrimonial offences and let us have marriage breakdown." The Lord Chancellor, not wishing to rush into anything too hastily, established a committee to discuss this report, and having discussed it the committee decided this was impracticable, even if it was desirable to do it. One of the reasons they put forward was that there simply was not the machinery to deal with the number of petitions that would come before the courts, that the cost involved and the number of petitions would be too great for the courts to deal with.

First of all, I do not think cost should come into it. If we recognize that marriage is as important as we make out, then in some way we have to make the money available. Secondly, on the question of the number of petitions, in England in 1963 there were 32,000 decrees granted, whereas in Canada there were only 7,600, so there is an enormous difference in volume. The number would certainly increase, but I still think we could form enough courts and have enough people available to do a proper job, analyze the situation and decide whether in the particular case the marriage had broken down.

I would like to read a statement by Lord Walker who made a dissenting statement in the Morton Commission report. He believed that marriage breakdown was necessary even then, back in 1955. He made the following statement:

> The true significance of marriage as I see it is lifelong cohabitation in the home for the family. But when the prospect of continuing cohabitation has ceased the true view as to the significance of marriage seems to require that the legal tie should be dissolved. Each empty tie—as empty ties accumulate—adds necessarily harm to the community and injury to the idea of marriage.

I think that is a very important point, and one I made earlier. When a marrige has broken down it is far better to destroy that marriage, to allow the parties to get out of it, than to say "Irrespective of the situation we say you are going to live together." If *de facto* there is no marriage, why *de jure* should there be marriage? If in fact the parties are no longer living together as husband and wife and have rejected the bond of marriage, why should we legally say they are still married?

Mr. OTTO: Do you say the breakdown of a marriage is a question of fact or is it a question of mind between the two parties?

Professor SKELLY: When I say it is a question of fact, I mean from the surrounding circumstances we shall have to interpret their situation. The judge will be required to look at the factual situation and decide—not just from the husband saying the marriage has broken down but from all the evidence available whether the marriage has broken down so that he can give relief. Essentially, I am not recommending divorce by consent; I am not saying two people can get together and say, "We consent to a divorce." I am saying they can consent as much as they want, but the judge will be the one to decide whether the marriage has broken down.

Mr. OTTO: You are arguing at cross purposes, because the breakdown of a marriage can only be in the minds of the two parties; it cannot be either in the minds of the two parties or in the mind of the law, because these are two opposite views. In other words, the law might say or the regulations might say the marriage has broken down (because of cruelty,) but in the minds of the two parties there might not be a breakdown; in fact, it may be an accepted part of marriage. How can you reconcile those two views?

Professor SKELLY: First of all let me deal with your question on cruelty. I am not saying that in every situation where there is cruelty the marriage has broken down, because if I said that there would be no need for me to put in the bar that there must be no hope of reconciliation. Essentially I am saying that there may be cruelty, but whether the marriage has or has not broken down will be determined on the question "Is there any hope of reconciliation?"

On your second point, we are not doing exactly what the parties want. We are trying to protect the institution of marriage and in protecting the institution of marriage we may have to say to some people, "You may think you have got a broken marriage but we don't think you have, because you may not have given it sufficient chance, you may not have given sufficient to the marriage, you may not have contributed enough. If you contribute a little more we think it will work." You may say this is a high-hand attitude—

Mr. OTTO: Let us suppose this is so. Where then do you put the court? The court is to iron out differences between two people or between the state and people. If this is the case—and this has always been the case—what right has the court to interfere between two people who have already made up their minds? This is not the function of the court. The court cannot, and does not have any authority to, interfere between me and my mind or what I think, or between my friend and I in whatever we may think. It only has a right and duty in relation to another individual where our right and obligations are in conflict. I am asking you, how do you justify the court's involvement at all in the question of marriage breakdown?

Professor SKELLY: I would say that marriage is not a simple contract. Marriage is more than a simple contract; marriage concerns the question of status and the courts are concerned with questions of status. This is why the court has the right to intervene. It is not a private contract. If someone purchases an automobile from someone else the court will not mind what terms they make.

Mr. OTTO: You say marriage is not a simple contract?

Professor SKELLY: It is not a simple contract.

Mr. OTTO: Because all the evidence we have had, including that of the clergy, seems to be that it is no longer an ecclesiastical matter, it is a contract.

Professor SKELLY: It is a contract but it is not a simple contract. It is not a contract entered into by two parties without any effect on society at all, because it affects a change in status. Once the parties have married they have a different legal position and that is what the law is concerned with, their status. When I say "simple contract" I am not using that expression to differentiate between anything which is religious and anything which is not religious. I am using "simple contract" in the legal sense, which means that it is not a contract which two parties can enter into and the law cannot interfere with; it is a contract which governs status and one which the law has an interest in, because their legal position is changed by this union.

That is why the law is interested in it, and that is why the law is trying to protect the status of these parties and the status of marriage generally, because the law has an interest in this question of status; not in a private contract I agree, in what you might call a simple contract between two individuals, but in a contract which governs status the law has an interest. This is the law's "in" you might say, this is the law's right to get in there because status is involved, not simply a question of a personal contract between two people, otherwise you could terminate it by mutual consent, you could say to one another, "We have decided to terminate this contract" and the law would have to say, "Fine"; if it was a simple contract that would be all that was necessary, but the law says there is a question of status.

Mr. OTTO: You say status involves property?

Professor SKELLY: Not just property. These people are now different legal entities in the sense that this woman had a different standing in the eyes of the law—"This man has certain responsibilities towards her because she is his wife and she towards him because he is her husband."

Mr. OTTO: What the courts are saying is that this is a change in status which will affect other elements of our law.

Professor SKELLY: Many other aspects, but these are just two examples that I have given you. The law recognizes the changes because of the fact that a woman is married; the husband has certain responsibilities for the contracts his wife enters into. You see, this is the law's concern. But the law goes a little further and also attempts on behalf of society to protect the institution of marriage because this is the mandate, you might say, given to it by the legislature.

Co-Chairman Senator ROEBUCK: So that we keep the record straight, I do not think any of the lawyers who have appeared before us—I think I can confine it to the lawyers; I do not think the others have been very definite in the matter—have said that marriage is a contract, certainly not a simple contract. My own knowledge of the subject is that it is a condition brought about by a contract, but marriage itself is not a contract. Two people can enter into an agreement or contract to bring about the condition of marriage.

Professor SKELLY: Your engagement contract is, of course, a simple contract and it is enforceable if you break it. You can opt out of it in that you can terminate it by mutual consent. If you break it you can be sued. Who would say that for a breach of the marriage contract you can be sued? It does not follow, it is not the same thing. Your contract to marry is a simple contract; your contract of marriage is not a simple contract, it is a question of status.

Co-Chairman Senator ROEBUCK: "Condition" is a better word than "status" I think.

Professor SKELLY: I would certainly accept that. I was dealing with the practical application of it. I think it is possible to apply this; I think in Canada we could do this. Whether we are ready for it or not is a different question. It is a very drastic change. Let us face it, any change here would be a very drastic change, but this would be a drastic change for any country, even countries which have had developed divorce laws for many years, so I think perhaps it may be too much. However, it is something we should keep in mind when drawing up our present legislation. I say this in the hope that we will have present legislation. I think it should be kept in mind because it is a natural development and one which will have to take place.

Countries which have already gone almost as far as the extent I suggested in my modified conventional development have found they still have not got the answer. England introduced the extended divorce grounds in 1937. In 1963 a member of parliament called Leo Abse tried to introduce a bill which had separation for seven years as a ground for divorce; this was not accepted. I think everyone here would agree that seven years' separation is an awfully long time. Australia requires five years' separation, New Zealand requires three years' separation, and in the United States the period of separation varies from two to ten years.

This marriage breakdown legislation that we are considering is very new and would involve a major step forward. This is why I have given you the alternative, which I consider is perhaps a more practical approach at this time; but we should not forget that marriage breakdown is, I think, the ultimate solution, and perhaps we might be ready for it. The question is just how far we can go at this stage.

Mr. BREWIN: Why do we have to go through the experience of other countries? What reason do you see for us not jumping into the solution you apparently recommend? Do you want us to be very, very slow and backward, or what?

Professor SKELLY: I would think you had read the article mentioned at the beginning which I have written, *Divorce Reform*, if it had already been published because you use my very words, you quote me almost exactly. Why should we experience the mistakes others have experienced? Cannot we step out on our own? Yes, I think we can. I am not against this.

Mr. BREWIN: You just doubt whether we are as progressive as you are.

Professor SKELLY: I would not like to say that. I am too humble to suggest that.

Mr. BREWIN: Incidentally, you may be right if you do think that.

Professor SKELLY: I think the academics would say this is the answer at this time. Whether the politicians would agree is another matter. Therefore, as an academic I step warily and give you what I think is a better solution than might be given by just accepting the grounds England and Australia have adopted. I think my modified conventional development would be an excellent step; it would produce a great deal of good here; it would be something which has not been tried anywhere else; it would be entirely new. It would not be the ultimate solution, and I would not suggest it would be the final step; I think a further step is called for, but it would be so much better than the present situation that it would be really wonderful even to institute that.

Co-Chairman Senator ROEBUCK: Do you think the people of Canada are ready to take so drastic a step as abolishing all offences as grounds for divorce and bringing it down to the one single proposal of marriage breakdown?

Professor SKELLY: It is very difficult for me to comment, being a relative newcomer to Canada, being so young, and perhaps not having my finger on the pulse of the nation. I think the question is more; is parliament prepared to give

the judges this power? Does parliament feel it can give a judge the power to decide for himself? The legal profession may feel a little doubt, because they may say, "How are we going to advise our clients? How are we going to know when a marriage has broken down?" This is a legitimate question, but I think there is a legitimate answer in that a certain amount of case law will build up, and in the same way that you can tell at the moment that there is cruelty you would be able to say whether a marriage had broken down.

I think the criticism which is thrown around a great deal is not valid and that it is possible to get around it. I believe the people of Canada would accept this. I go no further than that. I think Canada is ready for this; it would do a great deal of good and would put us in the forefront, I would say, of countries in the world which have really enlightened divorce legislation. It would show that we are prepared to try, w are prepared to see if we can bring in something new, take the chance and make our own mistakes. If there is a mistake we will live with it, but we should not just follow along behind everyone else. It would be a dreadful thing if we simply adopted the 1937 legislation and left it at that, because it would mean that thirty years later we would have the same problem that England has at present. It is best to have one big flourish and provide the legislation we really need.

Co-Chairman Senator ROEBUCK: Not thirty years but thirty minutes.

Professor SKELLY: I do not know whether there are any other questions on the grounds. I do not know that I have any more to say about those.

There is one point I should perhaps make at this stage before I go on to deal with two other minor matters, and that is the question of what you might call preventive divorce. I think a great deal could be done to bring home to people who are getting married the serious step they are taking, the importance of the step they are taking. One of the greatest problems is with regard to young people who rush into marriage. I know several people who have married when very young and subsequently found that it did not work. They married at perhaps seventeen or eighteen, everything was fine for five or six years and then suddenly they found that unmarried friends of theirs of the same age were going here, there and everywhere, having a wonderful time, and they stop to think, "I've got a wife and child. I've got no money. We're up to our necks in debt. Was it all worth it?"

There is one thing we might consider. Whether or not this would be considered a federal matter I do not know. I think it is a federal matter, but there is some controversy among the constitutional lawers as to whether it is or not. That is the question of the age of marriage. I think it is within the power of the federal government to enact that the age of marriage should be such-and-such. At present we have a very strange situation. There has been no federal legislation so the provinces have attempted to introduce some age limit, which I think constitutionally they are not permitted to do.

The provinces have said, "You shall not enter into marriage unless you are sixteen." This is a question of capacity; we are dealing here with the capacity of the party entering marriage, and I think this does not come within the power of the provincial governments. Most of the provincial legislation skirts around the question. They say, "A licence shall not be issued. A ceremony shall not be performed." They talk about the marriage being void, but they say that if there has been sexual intercourse beforehand of it there has been cohabitation afterwards the marriage shall be valid. You cannot have a void marriage which is validated; a marriage is void or it is valid. You can have a voidable marriage which can subsequently be validated, but a void marriage—which is the wording of many of the acts—is not a marriage at all. Either it does not exist or it exists. There is no way of saying you can make a void marriage into a valid one.

The provincial governments have attempted to raise the age. At common law the age of marriage in Canada is twelve for a girl and fourteen for a boy, this is subject to any statutory changes. The provincial governments have tried to raise the age to sixteen, but they have only done it by saying "You shall not enter marriage. You shall not get a licence. The ceremony shall not be performed". Once the ceremony has been performed it is very doubtful whether they can do anything. I think the federal government could say that the age of marriage shall be eighteen, or perhaps seventeen, but I think a lot of good would be done by raising the age of marriage to make people think a little longer and stop them rushing into marriage.

Leaving aside the age question, I think a lot could be done by education in the universities. Many people, having married, have their little problems and think to themselves, "We are the only people who have ever had this problem. It has never happened to anybody else. We can't go on any longer. This is the end of it." Many marriages break up because of problems connected with sex; the parties are unable to understand the other's problems, they are unable to understand the other's needs, they do not appreciate the other party's situation. I think a great deal could be done in the universities and schools to educate people in sexual matters, in matters connected with marriage, the problems that may arise; show them what can happen; say, "Look, this has happened to other people. These problems have arisen—questions of finance, of just getting along with someone else. When you enter marriage realize these things could happen to you, but don't think there is no solution to them; there are solutions." Many of these things start as very small incidents and escalate until they become very, very big, and at that stage it is almost too late. I think we should consider doing something at the school and university levels.

Co-Chairman Senator ROEBUCK: That, of course, is purely provincial and we would not even attempt to advise in connection with it.

Professor SKELLY: Perhaps I could leave it as something that I think should be done.

Co-Chairman Senator ROEBUCK: It will be all right to put it on the record, as long as it is understood that we are not interfering in education.

Professor SKELLY: Thank you. I go on to my two final points, one of which concerns annulment. We have in Canada a ground which renders a marriage voidable for impotence. Impotence covers the situation where the party is unable to consummate the marriage. Another situation which arises is known in England as wilful refusal, where one of the parties wilfully refuses to consummate the marriage. This is a ground for annulment in England; it is not a ground for annulment here. We interpret very widely the meaning of impotence until we include everything except actual wilful refusal. We talk of invincible repugnance. One party refuses, but if there is wilfulness, if there is malice, unless you can show that for some mental or physical reason the other party is refusing you are stuck.

I advocate introducing a ground which would be wider than this, wider than just impotence, which would include wilful refusal, so that if a party wilfully refuses it would be just the same as if there was impotence in that the other party might obtain an annulment on this basis. I think this is something which is fundamental to a marriage and something which has been considered fundamental to marriage. If a party wilfully refuses to consummate the marriage the court would be entitled to say the marriage was invalid.

Finally there is the question of maintenance for divorced wives. Many people obtain a divorce in order to remarry. If the wife intends remarrying there is no financial problem because we assume her new husband will support her. However, if the husband intends to remarry there often is a problem. Frequently he is unable adequately to support two families. He may marry again, and

although the court may make an order against him to maintain his former wife human nature causes him to maintain the wife he now has and perhaps neglect his former wife. If he does not remarry but just forms a common-law union he will provide for the woman he is living with rather than the woman he is required by the law to provide for. This is seen over and over again. The law can do all sorts of things but it is very difficult to make a man send his money to the former wife.

My suggestion perhaps goes a little too far, but it is that we should try to control this through the government, in that a body would be formed to be responsible for seeing that divorced wives were maintained. An order would be made against the husband in the same way as it is at present, but the husband would pay to this body or institution and the wife would be paid by it, so that if for any reason the husband did not pay the wife, she would not be left without means, she would not be left to try to proceed against him. She would still receive the amount of money she was entitled to. The government body would then proceed against the husband and they would be responsible for making him pay. They would be in a much better position than the wife to see that he paid. The wife would be without the problem of chasing around trying to bring an action against the husband. If the husband was unable to make sufficient funds available because he simply had not got the money the country should take the responsibility for providing for the wife.

Co-Chairman Senator ROEBUCK: Have you considered whether that would be within our jurisdiction?

Professor SKELLY: I think maintenance is normally tied up with the question of divorce. Your terms of reference were rather wide and I thought perhaps it would come within them, but I am wrong.

Co-Chairman Senator ROEBUCK: I am thinking of our constitutional jurisdiction. That would not be ancilarry to divorce, you know. The divorce might have been granted a long time before that and it might be quite separate from the divorce. True she is a divorced woman, but I do not think that would be close enough to the divorce itself to be ancillary to it, would it?

Professor SKELLY: I must admit that I am not an expert on Canadian constitutional law; I do not know sufficient about it to say. It seemed to me that it would be ancillary to divorce, but perhaps it might be argued that it was not. Again, perhaps if necessary that could go down as my statement rather than a recommendation to the committee. This is an idea that I felt could be applied usefully so as not to leave the deserted wife to have to chase around in order to get money from her husband; to make sure she always gets her money to keep the children and keep herself some body or organisation should be responsible for getting the money from the husband. This is what happens to a large extent now with welfare people; they often finish up maintaining the wife.

Co-Chairman Senator ROEBUCK: It is five past five, if you can bring it to a close now.

Professor SKELLY: In summing up, what I would like to say would be that we need reform; we need reform of our grounds of divorce, and I hope this in some way will help when legislation is drafted.

Co-Chairman Senator ROEBUCK: Do not take my interruptions as a criticism at all. I was only protecting the record, that is all. Are there some questions?

Mr. MCCLEAVE: Have you discussed this idea of the state paying alimony with any other people?

Professor SKELLY: No, I have not. It is an idea I get from England where, not necessarily in the case of deserted wives, wives who are left without any maintenance are maintained by the state and then the state recovers from the husband. It may cause many administrative problems, I do not know, but it did

seem that it would help the wife, who often has children to look after, and save her having to chase around to try to bring an action against the husband.

Mr. McCLEAVE: What has been the experience in England in seeing whether any of the tax moneys expended on the wives could be recovered from the husbands? How much recovery is there?

Professor SKELLY: I do not think it is very good. On the whole they do not recover a very large proportion. I am afraid I have not got any figures to hand, I was not able to obtain any. I know they are available in England but I was not able to obtain them here. They certainly do not get it all back; I would not say they got the majority of it back; I would say they lose quite a lot of money over it. The important thing I think is that we have to maintain the wife whatever happens; either the welfare people or someone else will be maintaining her and the state has a better chance of getting the money from the husband than the wife would have, because they have better machinery for dealing with these things.

Mr. McCLEAVE: Would you be able to find out in dollars and cents and send the figure to the chairman or the clerk?

Professor SKELLY: Yes, I could find it out. I have contacts in England who could obtain this information for me.

Co-Chairman Senator ROEBUCK: Is there anything further? If not I am going to call on my co-chairman to express our opinion of what we have been hearing.

Co-Chairman Mr. CAMERON: I would say, Mr. Skelly, that you have fully lived up to the advance notice given by Mr. Anderson of the Manitoba bar. We have all listened to your presentation with a great deal of interest. You have indicated a great human understanding of the problems involved. You have indicated some new and novel suggestions which the committee had not considered before, and all in all you have made a very, very splendid presentation. It will be very beneficial to the committee when they come to study the evidence and prepare a report. I am sure we are all very greatly indebted to you.

Co-Chairman Senator ROEBUCK: Then I think the chair can accept a motion to adjourn. We had some further matters on the program, and I think I headed them; that was some statements from those who had introduced bills, but it is ten minutes past five now and I doubt if we should go into that portion of our program at this late hour. What does the floor feel about that?

Mr. McCLEAVE: I think we could hear half an hour from our distinguished chairman and sponsor of Bill S-9. That would clear up the distinguished sponsor of Bill C-133 at the same time! They are identically the same bill.

Co-Chairman Senator ROEBUCK: I suggested some time since that Mr. McCleave should talk about that bill, but he threw it back on my hands. I have very little to say about it. That bill was introduced one year and a few days ago, and at that time I was endeavouring to be so conservative that I might get by. I introduced the grounds of divorce that have been experimented with and used in England so that we had behind it the jurisdiction of England. A whole year has gone by since then. We have heard a great many very valuable briefs and presentations, and surely we have learned something in the interval, so I am ready to forget that bill and look forward rather than back. Perhaps Mr. McCleave, who introduced an exactly similar bill in the commons, will have something to add to that, but that is all I wish to say about it.

Mr. McCLEAVE: Mr. Chairman, I think you have put our case in a nutshell. We decided these were the three most commonly accepted grounds for divorce among divorce reformers for many years, and that if quick action was wanted in this field of divorce reform we at least would have something with which parliament could work. However, since then we have seen a broadening of public climate in this matter and many other excellent grounds for divorce have been

suggested. I am wholly in accord with the views you have presented. I think we can come out from this committee with something of a much wider nature.

Co-Chairman Senator ROEBUCK: Mr. Brewin, would you like to address us on your bill now?

Mr. BREWIN: Mr. Chairman, to be very frank, in a way I would prefer to address the committee on some other occasion. I am prepared to go ahead, but it is nearly quarter-past five now. My bill covers a little unfamiliar ground in that all the other six or seven bills before us expand the grounds of divorce whereas my bill opts for the other approach. I have really tried to put into legislative form some of the recommendations on marriage breakdown.

Co-Chairman Senator ROEBUCK: Your bill is later in time.

Mr. BREWIN: It is quite a lot later in time, and I have had the advantage of listening to the proceedings in this committee. I am willing to proceed, but if the committee would prefer it I would not mind putting it off till the next or some other occasion.

Co-Chairman Senator ROEBUCK: I think you are right in doing that. The other one was Mr. Basford, but he is not here.

Co-Chairman Mr. CAMERON: He was here and I suggested that he come back at half-past four, but he has not come back so I assume he could not come.

Co-Chairman Senator ROEBUCK: In that case let us adjourn.

The committee adjourned.

APPENDIX "70"

SUBMISSION

to

THE SPECIAL JOINT COMMITTEE

OF THE

SENATE AND HOUSE OF COMMONS

ON

DIVORCE

by

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26th January, 1967.

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FOOTNOTES

APPENDIX I Cruelty

APPENDIX II Draft Bill

A. SUMMARY OF RECOMMENDATIONS

1. (a) Jurisdiction in Divorce proceedings should be based on either:
   (1) Residence of the Petitioner in the Province for a specified period; or
   (2) Domicile of the Petitioner in Canada.
   (b) Jurisdiction in Nullity proceedings should be on the same basis as in Divorce proceedings.

2. Legal Aid should be available in actions for Divorce, Annulment and Separation.

3. The Basis for Divorce should be either:
   (a) a combination of the Matrimonial Offence and a Non Fault ground; or
   (b) Marriage Breakdown.

4. The Grounds for Annulment should remain as they are at present, except that "Impotence" should be replaced by a wider ground, to be known as "Failure to Consummate".

5. Responsibility for the maintenance of divorced wives should be taken over by the State.

B. JURISDICTION

6. The concept of domicile and its development and application as a jurisdictional criterion has caused, and will continue to cause, a great deal of unnecessary inconvenience and frustration, and in some cases even prevent a person obtaining a divorce, who would otherwise be entitled to one.

7. Jurisdiction in divorce cases in Canada, based on Provincial Domicile is particularly unsuitable. In conjunction with the concept of the unity of domicile of husband and wife, great injustices are worked.

8. The basic rule is, of course, that the petitioner must be domiciled in the Province where he or she petitions. Because of the concept of unity of domicile, the critical question is always, where is the husband domiciled? This is often difficult to determine. If it can be determined it may be a Country or Province many miles from that in which the wife is resident.

9. The Divorce Jurisdiction Act 1930 (s.2) provides some assistance to the wife but to bring the facts of her case within it she must show that she was deserted by the husband from the place where he was domiciled. Also, two years must have elapsed before she can petition, and she will still only be able to petition in the place she was deserted from.

10. There are two solutions to this problem with their respective merits. Either create a Canadian Domicile for the purpose of Divorce, as Australia created an Australian Domicile for this purpose in 1959. Or make residence of the petition within the province sufficient to give the courts of that province jurisdiction.

11. The advantage of Canadian Domicile is that, assuming a uniform Divorce Act is passed for Canada, even if Quebec and Newfoundland do not set up divorce courts, this would not prevent the law being the same for everyone. A person normally resident in either of these provinces could cross the border into an adjoining province and the courts of that province would have jurisdiction. Also many of the problems connected with the concept of domicile would be eliminated.

12. The advantage of residence as a basis of jurisdiction is with regard to the recognition of foreign divorce decrees. Our basis of recognition is, of course, reciprocity. If residence was our basis of jurisdiction we would be able to recognize many decrees granted in the United States which we cannot at present recognize.

13. Not only is it essential that a change be made in our basis for jurisdiction in divorce matters, but also with regard to jurisdiction in nullity proceedings where the situation is far worse because the Common Law rules are so confused. It is suggested that whatever basis we adopt for divorce jurisdiction should also be applied to nullity proceedings.

C. LEGAL AID

14. A comprehensive system of legal aid for matrimonial actions must be available. Although a different economic situation may exist in England and Wales from that in Canada, nevertheless, I believe that the fact that out of approximately 41,000 divorce petitions in England and Wales in 1965, approximately 27,000 were supported by Legal Aid[1], is some indication of the need. The aid should be on a graduated basis according to the income of the parties involved, and a committee should decide whether valid grounds for relief existed before aid is given. It is important also that the fees paid to lawyers for such work is virtually equivalent to the fee a private individual would pay.

D. GROUNDS FOR RELIEF

15. The conventional development would, I suggest, be along the lines of the English Matrimonial Causes Act, 1937, which added cruelty, desertion, and insanity as grounds for divorce to the then existing ground of adultery. It also introduced the concept of what was called dissolution of the marriage where a person might be presumed dead subject to certain conditions if he or she had been unheard of for 7 years, and the marriage could then be dissolved for all purposes.

16. To this might be added what is called a "separation" ground which has been introduced in Australia and New Zealand and in 22 American States and may soon be introduced into England. By a separation ground we mean that after the parties have lived apart by consent for a specified period of years, a divorce may be granted subject to certain safeguards. The periods specified range from 2 to 10 years. This is a non fault marriage breakdown ground, the question of guilt and innocence having no application.

17. (1) *Modified Conventional.* Divorce should be possible where the respondent is guilty of either adultery or cruelty. The bars which at present exist with regard to adultery would be abolished.

18. In addition, I would advocate the introduction of a non-fault marriage breakdown ground, but wider than the separation one mentioned. Divorce should be possible where there has been no consortium between the parties for a period of three years or more immediately preceding the commencement of the proceedings.

19. To succeed a petitioner proceeding on any of the above grounds would have to show that there was no reasonable likelihood of a reconciliation being effected and that the granting of the decree would not prove "harsh and oppressive" to the respondent; and is in the best interest of the children of the family. (A decree would certainly not be considered in the best interest of such children if proper arrangements for their custody and maintenance had not been made). The court must refuse relief if any one of these is absent.

20. The third requirement is intended to emphasize that the interest of the children is paramount. The expression "children of the family" is chosen particularly because it has a wider connotation than simply children of the marriage. It includes not only a child of the parties, but a child of one of them who has been accepted as one of the family by the other.

21. A further restriction on the freedom of divorce is, I believe, desirable. In order to prevent people rushing into marriage and equally quickly rushing out again, it might be enacted that divorce shall not be possible during the first three

years of marriage except in a case of exceptional hardship suffered by the petitioner or exceptional depravity on the part of the respondent.

22. This provision was introduced into England by the Matrimonial Causes Act, 1937, and its retention recommend by the Morton Commission,[2] who stated that:

> The purpose of the restriction is to encourage husbands and wives to face and resolve their differences in the period of adjustment which necessarily takes place during the first few years of married life, and thus to reduce the number of broken marriages. Whether in practice it has had this effect can only be a matter of opinion, since the statistics available are of instances where the restriction has failed in its purpose and not of instances where it has been successful. We consider that on the whole the restriction has had a stabilizing effect on marriage... (para. 215)

23. Adultery would continue to have the meaning it at present has in Canada. The meaning attached to cruelty is dealt with in Appendix I. The meaning of the new ground, "Lack of Consortium" is dealt with below.

24. *Lack of Consortium.* What do we mean by consortium? Consortium is generally considered to mean living together as husband and wife and all that goes along with such a relationship. This is admittedly a vague term but lack of consortium would certainly cover a situation where the parties were living apart either with or without consent, and where they were living in the same house but neither performing any services for the other. The court would have to determine from then on how significant was the loss of a particular service or failure to allow a particular right or perform a particular duty, e.g. sexual intercourse, and whether this justified a divorce. It would be possible for the courts to take a harsh or liberal attitude to this built-in discretion, but it is hoped and expected that whatever interpretation they applied would reflect the attitude of society at that particular time to divorce.

25. This ground would be intended particularly to cover the three grounds of desertion, insanity, and separation wich are considered by some people to be the natural addition to adultery and cruelty to make up our new divorce grounds. Desertion covers situations where the parties are living apart against the will of one of them. Separation covers cases where the parties are living apart by consent. Insanity as a ground of relief as it exists at present in England suffers from one major disadvantage due to the scientific development which has taken place in the field of treatment of mentally disturbed people. The ground as it exists in England is that after your spouse has been under care and treatment for five years on your proof that he or she is incurable a divorce can be granted. The main problem which arises was discussed by the Morton Commission who pointed out the difficulty in most cases, of getting medical evidence to show that a person is incurably insane, in fact the present tendency amongst doctors qualified in this field appears to be to regard everyone as curable, it being just a question of time until they can be cured.

26. Under the ground suggested here it would in most cases be possible to show that there was no consortium between the parties and then it would be up to the court to decide whether there was any possibility of consortium being restored. It appears that in many cases expert medical witnesses are sympathetic to the petitioner's plight but are not prepared to state that the respondent is incurable. If, on the other hand, the onus is reversed, i.e. they were called upon to state that he is in fact curable, the likelihood of the courts granting a decree might be increased.

27. The grounds of desertion and separation taken individually are rather narrow and made inflexible by technicalities. In Australia in 1959 an attempt was made by the legislature to bridge the gap between simple desertion and

constructive desertion in which lies many of the worst situations described by A. P. Herbert as "holy deadlock". Even with the new provision there are still cases which do not come within the concept of desertion, and justice is only done by falling back on the separation grounds. In an article in 1963, Sir Stanley Burbury (C. J., Sup. Ct. Tas.) commented:

> The introduction of separation as a ground has I believe removed a strong incentive to perjury and in many cases has avoided the unreality under the label of desertion (actual or constructive) of attributing the breakdown of the marriage to the fault of one party.[3]

In many cases, however, you have to decide whether the separation is by consent or amounts to simple or constructive desertion. In either case it is necessary to show that the parties have lived separate and apart.

28. Instead of going through all the elaborate semantic exercises often required to show there is desertion, when the necessary degree of separation is not present, why not set out by removing the requirement for actual separation. If the parties can prove that the *consortium vitae* has been terminated, usually this will be by showing that they have lived apart, isn't this enough? Isn't this what we are really trying to determine? The Australian and New Zealand courts have become involved in the question of "is physical separation alone enough to come within the section? Can parties be separate and apart under the same roof?" The test proposed in one case was "Destruction of the *consortium vitae*". If this is the test used to determine whether the parties are living separate and apart, and living separate and apart is the test to see if their marriage has broken down, then we have a test for a test. Isn't it much more logical to have one test. Has the *consortium vitae* been destroyed. If it has, the marriage has broken down.

29. *Safeguards.* The first requirement, that the court must be satisfied that there is no reasonable likelihood of a reconciliation being effected, follows naturally from the idea that we are concerned here with marriage breakdown, and not the matrimonial offence. We have to ask ourselves "has this marriage broken down irretrievably"? Our test is, has there been any consortium between the parties in the last three years? If there hasn't then a presumption is raised that the marriage has broken down. If, however, it appears that there is a reasonable likelihood of a reconciliation, the presumption has been rebutted and the court must refuse relief.

30. The second safeguard is that the effect of the granting of the decree must not be unduly harsh or oppressive to the defendant spouses. This provision appears in the 1959 Australia Act where it is also an absolute bar.

31. What amounts to "harsh and oppressive" in this context has been discussed in several recent Australian cases. It is clear that the mere granting of the decree on the separation ground cannot *per se* be "harsh and oppressive" to the respondent or else the object of the legislation would be defeated. Also the respondents belief in the indissolubility of marriage, an agreement at the time of the marriage that it was "forever", and loss of status as a married woman by the respondent against her wish, have not been held sufficient to amount to "harsh and oppressive".

32. In the case of *Painter* v. *Painter*[4], the full court of South Australia stated that:

> ...whatever view one may hold with respect to the sanctity of marriage the laws ought not to regard the 'contract' as entitling either party to hold the other suspended, like Mahomet's coffin, in a state which is neither marriage nor freedom. The words "harsh and oppressive" are certainly emphatic, and, in our opinion they connote some grave or—at the least

—some substantial detriment, and some real—as opposed to a fanciful injustice to the respondent, following on the making of the decree.

Unless she will be seriously and unjustly affected it cannot be said that the decree is harsh and oppressive.

33. When therefore, will relief be refused on this basis? It has been held that it would be harsh and oppressive, where the effect was to deprive the respondent of rights that would accrue on the death of the petitioner under the Testators family maintenance legislation. But apart from financial hardship, which can be offset by financial adjustments at the time of the petition, when else might this arise? Possibly when a person's chance of employment would be affected by a decree, but it is difficult to envisage any other situation. It is a discretion given to the court to try to overcome the injustice which might result in the odd few unforeseen situations which may arise. A discretion helps the court keep up with changing social attitudes.

34. The discretion given to the court is not to withhold a decree if it feels that for some personal reason it should be withheld. The statute gives three reasons for withholding a decree. It is not a discretion to the court to do what it wants. If there is no chance of reconciliation and the decree would not be harsh and oppressive to the respondent and provided it is in the interest of the children, they must grant relief. Even though the Judge feels the husband is an absolute rotter who has taken advantage of the wife and now that it suits him to do so, seeks to repudiate the relationship, he must grant a decree if the facts justify it and if none of the bars arise.

35. Despite all that has been said, however, I believe this is not the ultimate answer to our problems. There are disadvantages to the above reform.

36. *Disadvantages.* One of the most obvious problems will be the introducing of a non-fault ground alongside offence grounds. The offence is based on guilt and innocence. There is usually no need to prove marriage breakdown, all that is necessary, e.g. is to show an isolated act of adultery. There is no need to show that reconciliation is impossible. But only the innocent spouse can petition. The non-fault ground is based on marriage breakdown; if the marriage has not broken down relief is not possible. It must be shown that reconciliation is not possible, but on the other hand either party may petition. There is no need to consider the quêstion of guilt or innocence.

37. An example of this problem can be taken from the Australian Law. Five years separation by consent and proof that resumption of cohabitation is impossible is necessary to get relief on the non-fault ground. However, two years desertion without proof of breakdown or that resumption of cohabitation is impossible is also sufficient. It also provided problems for the judiciary, evidenced in Australian cases where one day a judge may be dealing with guilt and innocence in connection with a matrimonial offence, and next with a non-fault ground where guilt and innocence are irrelevant. This particular problem would be reduced in the suggested reform for Canada.

38. A further criticism is that the use of a verbally formulated "ground" does tend to defeat its own object, i.e., to give relief on marriage breakdown. The tendency is to try to fit the facts to the particular formula as is the practice with the offence and not really to investigate whether or not the marriage has broken down. This can be seen particularly where a separation ground exists. If the necessary number of years separation have occurred the court tends to leave it at that. The reform suggested here would be less vulnerable to this because of its generality.

39. It is impossible to develop the matrimonial offence to cover all possible unfortunate situations that can arise. Even the addition of the non-fault ground suggested does not provide the ultimate answer. The Legislatures of Australia

and New Zealand and of many of the American States have attempted to provide such an extensive and comprehensive conglomeration of offences in an attempt to cover all possible contigencies but have found this impossible. The confusion caused by such a multiplicity of grounds of relief can easily be imagined.

40. Finally, and I believe, the most important criterion is that to add more grounds of divorce simply makes divorce easier without improving the law. If you regard the artificially formulated ground that we at present have, namely adultery, as a slot in a door, you are told by the law, try to push the facts of your case through that slot. It doesn't matter how much they are out of context or what the overall picture is, will they pass through that slot. If we revise the grounds for divorce all we are doing is producing more slots of different shapes. We now say, if it won't go through the slot marked adultery, try the one marked cruelty, etc. We are doing nothing to refuse relief where it is not justified. We are just making divorce easier.

41. The reform suggested would carry with it some attempt to prevent a divorce where the marriage had not broken down. A party would be prevented from obtaining a divorce unless he could show that there was no likelihood of reconciliation. But we would still be relying on artificially formulated grounds, and the tendency to apply the slot principle. It is hoped, however, that the consortium ground, being of a general nature might minimize this.

42. Despite these criticisms I believe the reform suggested would produce a situation in Canada so much better than the present situation that comparison is virtually impossible. It would be a very desirable and enlightened reform, relative to our present position.

43. II. *Marriage Breakdown.* The basic unit of our society is the family. The family of one husband and one wife and the children they seek to bring up. This unit is designed to bring to husband and wife the companionship most human beings need in life and the true united fulfillment of their sexual desires. Also in the partnership the husband is normally expected to bear the economic burden while the wife bears the domestic ones. Our object is to produce a stable, normal, happy environment, free as far as possible from tension, in which children may best be brought up.

44. Why do we grant a divorce? Logically we should only grant one where an attempt at such a state of affairs, as described above, has failed. (Where the marriage has completely broken down, if in fact there ever was a marriage to break down in the first place.) We would do this not simply to help the parties out of what may by now have become a hopeless plight, but to protect the institution of marriage itself. If a part of a plant becomes diseased you cut it off to prevent the whole plant being destroyed. If a cancerous growth appears in the human body you isolate it and destroy it if possible to protect the rest of the body. Lord Walker made this very point in his dissentient statement in the Report of the Morton Commission. He stated that:

> The true significance of marriage as I see it is life-long cohabitation in the home for the family. But when the prospect of continuing cohabitation has ceased the true view as to the significance of marriage seems to require that the legal tie should be dissolved. Each empty tie—as empty ties accumulate—adds necessary harm to the community and injury to the ideal of marriage. (Page 241.)

45. If a marriage has ceased to exist *de facto*, is it not eminently reasonable to suggest that it should cease to exist *de jure* too. Can anyone really suggest that if two people have accepted that their marriage is a hopeless failure and are now living completely separate lives, perhaps in common law unions, that the refusal of a decree by the courts will really turn this back into a living, useful productive marriage. If two people want a divorce badly enough they can always

find a way. They can arrange either that one of them commits adultery or perjury. But should they have to do this. What useful purpose can this serve? Can it really be argued that such a state of affairs makes marriage more stable. Can the turning of honest citizens into criminals really be justified on this basis? Isn't there something much more fundamental that has been overlooked. Shouldn't respect for the institution of marriage be created by work done prior to the marriage. Instil into people the idea of the sanctity of marriage before they enter into it. Perhaps raise the age at which a person may marry. But set out to produce good marriages. This is what will stabilize the institution; not refusing divorces to people whose marriage is a hopeless mess and who in many cases would marry again and perhaps produce a marriage which would be a credit to society.

46. It is an accepted fact that preventative measures are far more desirable than measures intended only to cure. When we refuse a divorce, however, we are, in the majority of cases, not providing even a cure but just a meaningless bar to a new life. It is not accepted that availability of divorce produces a major increase in the number of divorces granted. There will, of course, be an increase in the first year or two while the parties to the many broken marriages who have been denied relief in the past obtain release from what in many cases may have become a hideous meaningless bond, which has bound them together. As has been pointed out already, if two persons want a divorce badly enough they will find a way, but this raises a further point. How far does this wholesale evasion of the law adversely affect the general public's respect for the law. Law is a vital institution in society. It surely can do the law no good in the eyes of the ordinary member of the public when its attitudes are so far out of line with the present social ideas. What must be one of the most frequently quoted misquotes is becoming rather overworked. "The law is an ass."

47. The solution, I believe, is to give relief where it can be shewn that a marriage has irretrievably broken down. But how do we know when a marriage has broken down? This will be a question of fact in any particular case. To lay down rules as to when a marriage has or has not broken down would mean a return to "verbally formulated grounds" which we are trying to avoid. We do not want to get back to the position where we say, don't tell us whether your marriage has or has not broken down, just tell us whether the facts fit this artificial test or not.

48. The court would have to take on an inquisitorial function in order to discover all facts pertinent to the case at hand. It will be essential that all cases have been thoroughly examined and that this doesn't develop into a rubber stamp system which at present exists in many undefended adultery cases.

49. The object will be to try to put all the facts into perspective. Whereas at present, taken out of context, an isolated act of adultery may provide a ground for divorce, in context it may be far less significant. It may, in many cases, be evidence that the marriage has broken down but it will have to be looked at with all the other evidence available. The court will have to ask itself "has everything been done by these parties to make a go of the marriage? Have they consulted marriage counsellors, have they talked it over with anyone? Have they even talked it over with one another? Do they understand each other's problems?" If after considering all the possible angles, the court is satisfied that the marriage has broken down, then, with due regard for the welfare of any children, they must grant a divorce. If on the other hand they feel that reconciliation is possible they must refuse a decree.

50. There would thus be two major improvements on the present system. Divorce would only be allowed where it was really desirable to grant relief and would be refused where the parties had perhaps not given the matter proper

consideration or in general where reconciliation was, in the eyes of the court, possible. It would have the fundamental advantage that we were only making divorce easier for the people who really deserved it. It should be understood clearly that this is not to advocate divorce by consent. Divorce by consent essentially involves that the parties agree that they shall be divorced and that is the end of it. Here they can agree to all they like but it will be the courts who decide whether or not a divorce will be allowed.

51. One of the other major criticisms of all non-fault grounds is that it is unjust and inequitable to allow a "guilty" spouse to petition. We have to put "guilty" in quotes because the very theory of the breakdown (non-fault) ground is that guilt or innocence does not come into it. Nevertheless what is the answer to this criticism? This can best be answered by another question. Why do people oppose divorces? Basically there are two reasons—economic reasons and reasons of status. As far as economic reasons are concerned, the respondent can be protected by specific requirements that adequate financial arrangements be made before a decree is granted. The second, the loss of status of a married woman isn't quite so easy. It is not possible to provide a complete answer to this because of course no degree of financial compensation can help. The position must be kept in perspective, however, and it should be remembered that it is not common for all the wrong to be on one side, all the right on another. If the Court is satisfied that the marriage has irretrievably broken down, and they grant a decree thereby rendering the respondent a divorced person, is his or her lot really worsened? Society will quickly realize that divorce on the breakdown ground is not the same at all as on the old offense grounds. The stigma which may at present attach will soon be forgotten.

52. This idea of guilt, innocence, wrongdoing, innocent spouse only petitioning, etc., are products of the matrimonial offence doctrine. If the only way one could obtain a divorce for hundreds of years was on this basis, ideas become accepted which, when considered fully, don't naturally follow. This argument will of course apply to all non-fault grounds. It is now recognized in Australia, New Zealand, and I think in the light of the recent report of the Law Commission in England too, that a non-fault ground is an essential part of the divorce law. Society cannot have it both ways. Divorce is a very important matter and it is difficult to avoid some suffering.

The idea that there should be one ground for relief, i.e. marriage breakdown, is fine in theory, but can it work in practice?

53. *Practical Application.* I would suggest that it can work in practice and take support again from the Report of the Archbishop of Canterbury's Committee. The recent Law Commission[5], however, stated that in practice it would not work so that there is some opposition to this ground. The Law Commission stated that:

> it would not be feasible, even if it were desirable, to undertake such an inquest in every divorce case because of the time this would take and the cost involved. (Para. 120(5))

54. Is the time and cost really so important when such fundamental questions of human happiness are at stake. I do not think so. I am convinced that such a system could be successfully operated. In Canada we have two advantages in particular, over many other countries. The first advantage is that we have not committed ourselves to any definite development. Secondly, an advantage we have particularly over England is that we have far fewer divorces per year. While in England and Wales there were 32,052 decrees granted in 1963[6], in Canada there were only 7,681[7]. I believe it would be possible to establish enough courts to operate this system properly.

55. There are other practical questions, however, one of the glaring ones being, is it possible for a Judge to determine when a marriage has broken down? I believe it is. It is in fact the type of question that he has to decide every day. When he is asked, "do you think this person will suffer injury to health if this particular conduct is continued?" he is required to make a prediction on the facts before him: when he is asked to determine questions of cruetly and constructive desertion, with the legal semantics now involved in such questions he has a similar problem.

56. I believe, however, that the old attitude, procedures and rituals involved in obtaining a divorce on offense grounds must be dispensed with. Also, special training (e.g. in psychology, etc.) should be given to the persons who act as judges in these cases and such people should only be involved in this branch of the law. There must, in addition, be an abundance of well trained marriage counsellors readily available to give informal advice to parties whose marriage is in trouble. It is essential that these people be properly trained and that there be an adequate number and that an adequate amount of money is available in order free to consult a counsellor at any time without undue formality, without a marked car calling at the door, and without having to visit a building in which to obtain the best people possible for such work. People must be made to feel the courts are housed.

57. The success of the general ground of marriage breakdown is contingent on the development mentioned above. No expense should be spared to produce the necessary state of affairs. It will be a costly project but one which I believe is essential to the maintenance of our society.

E. GROUNDS FOR ANNULMENT

58. The distinction between void and voidable "marriages" should be retained. It is not considered that they can be treated in the same way. The grounds which render a marriage void, i.e. bigamy, consanguinity and affinity, lack of consent, and non-age and formal defect, are essentially public in that they represent directly society's interest in the institution of marriage. Impotence, which at present renders a marriage voidable is surely something which is the concern of the parties alone and hence cannot be regarded in the same way as the void grounds.

59. The only other question is whether wilful refusal to consummate should be introduced as a ground for rendering the marriage voidable, as it is in England. The present trend appears to be to treat it as a ground for divorce arguing that it is something which happens after the ceremony of marriage and not a defect at the time of the ceremony, as are the other nullity grounds.

60. The grounds of impotence and wilful refusal are so intimately related that it seems ridiculous not to treat them both in the same way. In Canada at present we interpret impotence very widely to cover any refusal to consummate which is not actually wilful. The answer, I believe, is to replace Impotence by failure to consummate as a ground rendering the marriage voidable. This would cover Impotence (mental or physical) and also wilful refusal.

F. MAINTENANCE

61. Many people obtain a divorce in order to remarry. If it is the wife who wishes to remarry this generally does not create financial problems, but if it is the husband who wishes to remarry it is often quite different. If the husband is wealthy he can afford to support two families. However, many men who wish to remarry do not have the means to support two families. Even if the husband does not want to remarry he may nevertheless be living common law with some woman and again may not be able to afford to support two families. He may be legally compelled to maintain his divorced wife but in reality he will support the woman he is living with.

62. If we make divorce available to all we must be prepared to make it possible for all to exercise fully the rights given by the decree and remarry if they so wish. It is also important to ensure that no one suffers as a result.

63. The Government should be responsible for the maintenance of divorced wives. This is not to suggest that they would not be entitled to claim as much from the husband as he could afford to pay, but the wife would receive her money from the State—she would not have to rely on her hudsband's paying the maintenance and bring an action or actions if he failed to do so. She would never be without money. If the husband failed to pay the Government would bring the action. It would be an offence against it, not the wife.

64. In reality this would change the present situation in one respect only, and that would be that the wife could rely on receiving her maintenance regularly and would not be without maintenance for many months while bringing proceedings or attempting to find her ex-husband to bring proceedings.

65. This type of procedure is employed by the Welfare Societies in England where wives are deserted. There is no reason why this should not also be done here under the same provisions.

66. In the unlikely event that the husband had, during the time of the marriage, been unable to support himself and had been supported by the wife, the state should again take over the responsibility with provision to collect from the wife where possible.

67. The amount of maintenance should be assessed by the Court granting the divorce, in the same way as at present.

68. *A Plea.* The Divorce Statute under which many of us operate has its 110th birthday on August 28 of Canada's Centennial year. The law in the Maritimes is even older. Because of the drastic change in social attitudes and conditions in this period, it is radically out of date.

We must have reform.

Respectfully submitted,
Stephen J. Skelly.

FOOTNOTES

[1] Civil Judicial Statistics for England and Wales.
[2] Cmd. 9678.
[3] (1963) 36 Aus. L.J. 283.
[4] [1963] S. A. S. R. 12.
[5] Cmnd. 3123.
[6] Registrar General's Statistical Review for 1963, Part III, table 28.
[7] Canada Year Book, 1965.

APPENDIX I

Cruelty

1. Cruelty as a matrimonial offence is not necessarily the same thing that the layman would refer to as cruelty. The English Court of Appeal has emphasized, however, that cruelty means conduct which is at least what the layman would call cruel and that the word has no esoteric Divorce Court meaning. No exact definition of cruelty has ever been formulated by the Courts nor any comprehensive list of situations where cruelty will be held to have taken place. The test is essentially a subjective one. Does this conduct by this particular man to this particular woman or vice versa, amount to cruelty. Nevertheless certain requirements have been laid down which must be satisfied before cruelty as a matrimonial offence can be established.

2. Cruelty as it is at present interpreted as a ground for relief is not confined to physical violence. It was at first considered that it consisted of three elements which had all to be present before a spouse could be said to be guilty of the matrimonial offence of cruelty. The first requirement was that the person complaining (the petitioner) had to have suffered injury to health (mental or physical). The only exception being where there was a reasonable apprehension of injury resulting if the conduct complained of was continued. This was established by the House of Lords in 1897 and is considered a fundamental requirement even today. Whether or not injury to health has resulted can be determined with relative certainty by medical evidence. It appears that any degree of injury is sufficient if medical evidence of its existence or likelihood is available.

3. The second requirement, which is attributed to the judgment of Lord Stowell in a decision in 1790, is that the conduct complained of must be "grave and weighty". This sounds a somewhat vague expression but it has been used to distinguish between conduct which is an element of cruelty, and that which is "the normal wear and tear of normal life". From two recent House of Lords decisions, *Gollins v. Gollins* ([1963] 2 All E. R. 966) and *Williams v. Williams* ([1963] 2 All E.R. 994) it would seem that the conduct must be such that no reasonable person would consider that the petitioner should be called upon to endure it.

4. The final requirement was that for there to be matrimonial cruelty there must be present a certain mental element. It was thought that before a spouse could be guilty of cruelty he or she had to intend to injure the other spouse. For many years various forms of legal gymnastics were performed to try to get around this requirement. In 1963, however, in the cases of *Gollins v. Gollins* and *Williams v. Williams,* the House of Lords faced squarely the question and decided by a majority of three to two that an intention to injure was not an essential requirement for there to be matrimonial cruelty. It is essentially a question of fact in any particular case whether there is cruelty or not. Conduct between two particular spouses may be considered amusing, insignificant or just good clean fun, whereas between two others it might result in injury to one of them.

5. In *Gollins v. Gollins* and *Williams v. Williams* various attempts were made by their Lordships to explain what was meant by cruelty. Bromley in his latest edition of Family Law, picks out two particular statements which I believe sum up the present situation. The first is Lord Pearce's statement that:

> It is impossible to give a comprehensive definition of cruelty, but when reprehensible conduct or departure from the normal standards of conjugal kindness cause injury to health or an apprehension of it, it is I think, cruelty if a reasonable person, after taking due account of the temperament and all the other particular circumstances, would consider that the conduct complained of is such that this spouse should not be called upon to endure it. (Page 992)

The other is the statement by Lord Reid that you would be guilty of cruelty:

> . . . if without just cause or excuse you persist in doing things which you know your wife will probably not tolerate, and which no ordinary woman would tolerate. . . whatever your desire or intention may have been. (Page 974)

The conclusion I think is that if the petitioner's health has been injured or there is a reasonable likelihood of this, if the respondent carries on in the way he has been doing, and if his conduct is sufficiently bad that it is deserving of the term grave and weighty, then the intention of the respondent is irrelevant. Such a case would be *Williams v. Williams* where the respondent was suffering from

insane delusions. In many cases however, the conduct may not itself be sufficiently grave and weighty unless a certain intention on the part of the respondent is present. Intention will in future go to the weight of the conduct rather than exist as a separate element of cruelty.

APPENDIX II

DRAFT BILL

SECTION 1. Any court having jurisdiction to grant a divorce *a vinculo matrimonii* may hear a petition for divorce or annulment, where the petitioner has been resident within the province in which the action is brought for a period of at least six months or more immediately preceding the presentation of the petition.

SECTION 1. (*Alternative*) Any court having jurisdiction to grant a divorce *a vinculo matrimonii* may hear a petition for divorce or annulment, where the petitioner is domiciled in Canada at the time of the petition.

SECTION 2. (1) Subject to Section 1, any court having jurisdiction to grant a divorce *a vinculo matrimonii* may hear a petition for divorce by either the husband or the wife on the ground that:

(a) the respondent has since the celebration of the marriage:
  (i) committed adultery; or
  (ii) treated the petitioner with cruelty; or

(b) there has been no consortium between the parties for a period of three years or more immediately preceding the presentation of the petition.

(2) The court *must* refuse to grant a decree if:

(a) there is a reasonable possibility of a reconciliation being effected; or

(b) the granting of the decree would prove harsh or oppressive to the respondent; or

(c) such a decree would not be in the best interest of the children of the family (e.g. A decree would not be in the best interests of the children of the family if proper arrangements for their custody and maintenance had not been made).

SECTION 2. (*Alternative*) (i) Subject to Section 1, any court having jurisdiction to grant a divorce *a vinculo matrimonii* may hear a petition by either husband or wife on the ground that the marriage has irreparably broken down.

(ii) The Court *must* refuse to grant a decree of divorce *a vinculo matrimonii* if such decree would not be in the interest of the children of the family. (e.g. A decree would not be in the interest of the children of the family if proper arrangements for their custody and maintenance had not been made).

SECTION 3. No decree nisi of divorce shall be made nor a decree nisi of divorce made absolute within the first three years of marriage, except where the petitioner has suffered extreme hardship or the respondent is guilty of exceptional depravity.

SECTION 4. A marriage will be voidable where it has not been consummated due to either Impotence, (physical or mental), or Wilful Refusal.

APPENDIX "71"

(*Extracts from the Debates of the Senate*)

THURSDAY, March 3, 1966.

DIVORCE (EXTENSION OF GROUNDS) BILL

SECOND READING—DEBATE ADJOURNED

Hon. ARTHUR W. ROEBUCK moved the second reading of Bill S-19, to extend the grounds upon which courts now having jurisdiction to grant divorce *a vinculo matrimonii* may grant such relief.

He said: Honourable senators, at the outset may I have your indulgence to say a word of welcome to the new senators who have joined us recently, and to express the hope that they will find satisfaction in the duties they have undertaken and pleasure in the good fellowship which they will find in this chamber. I wish them long life and success in their sojourn among us in their new environment, the Senate of Canada.

In addressing myself to the bill now under consideration, I would point out that this is not the first time an effort has been made in the Senate of Canada to widen the grounds upon which the courts of Canada may grant dissolution of marriage.

Hon. Mr. REID: Would you mind explaining what *a vinculo matrimonii* means?

Hon. Mr. ROEBUCK: The Latin word *vinculum* singular, or *vinculo* plural, means bonds, ties—I suppose in modern language we call it "handcuffs." So *vinculo matrimonii* are the bonds of matrimony or, more accuretely, the bonds of marriage. There are two types of decrees of courts, one from bed and board and the other from the bonds themselves. This is complete divorce in other words, *a vinculo matrimonii.*

I was going to say that as long ago as 1938 the late Senator McMeans introduced a bill entitled the Divorce and Matrimonial Causes Bill, and the debate on that bill you will find commencing at page 84 in the *Debates of the Senate* of that year. You may accept my assurance that it is well worth reading.

Senator Aseltine will remember that occasion, for he had the honour of seconding that bill as long ago as 1938, and he made an address in support of the bill—and, I need not add, an excellent one. Senator Farris spoke on that occasion, and my deskmate, Senator Hugessen, was a member of the committee that considered the bill. If my information is correct, they not only reported it but did so unanimously. Perhaps Senator Hugessen will correct me if my information is incorrect. The bill was passed by this house. What happened to it thereafter, I am not sure, but I think it probably died on the Commons Order Paper, for there seems to be no further record of it. Had I been a member of this chamber at that time I would, of course, have voted for that bill. However, I did not enter the Senate until 1945, some 21 years ago.

That bill was followed by another introduced in 1955 by Senator Aseltine, which was also entitled the Divorce and Matrimonial Causes Bill. It went a little further than the bill introduced by Senator McMeans, but it really was a similar bill. The debate on that bill you will find commencing at page 210 of the *Debates of Senate* of that year, 1955. I trust my colleagues will pardon me if I give a good

many reference as I go along so that the research I have done will be of use to those who may wish to read the material which I have read.

The motion for second reading of that bill was, of course, led by Senator Aseltine and in a masterly address. I have read what he said on that occasion and I am impressed with the mass of information he had marshalled and the breadth of his knowledge of the subject.

You will note the bill I have the honour to introduce is entitled the Divorce (Extension of Grounds) Act, 1966. It is not a matrimonial causes act, in the sense that it does not intend to enact a comprehensive matrimonial or divorce or marriage law for application in all Canada, as did those bills of my distinguished predecessors. Senator Aseltine's bill covered seven and a half pages, and it dealt with many phases of matrimonial relationships, such as the presumption of death, judicial separation, avoidance for non-consummation, and legitimacy; all, by the way, subject of consideration which I rather fancy we will later take up some time.

Mine, on the contrary, is a simple bill. It would not affect the law of Canada on divorce or other matrimonial matters as they exist today, with the exception only that it would extend the grounds upon which the courts now having jurisdiction to grant divorces *a vinculo matrimonii* to three further grounds: desertion for three years, cruelty, and of unsound mind, which I will describe late. And note, please, it has no application in the provinces of Quebec and Newfoundland.

I believe there is yet another difference between the bill which I have now laid before you and those introduced by my predecessors. Senator McMeans and Senator Aseltine produced a great deal of evidence of public opinion in favour of divorce reform, and there was undoubtedly considerable public support for it at that time, but it would seem from what later happened in Parliament, that they were in advance of their times. I am not so surprised at Senator Aseltine, for I have found him way out in front on many occasions.

Hon. SENATORS: Hear, hear.

Hon. Mr. ROEBUCK: And ably so, I hope that times now have caught up to me in the introduction of this bill because, honourable senators, it seems to me that public opinion, as I find it in Canada, is now such that the time has come for extending the grounds upon which the courts may grant divorces, and also that restricting the ground to this one item of adultery is archaic, that it produces many evil consequences, and that it denies to many suffering from broken marriages for which they are not responsible the relief they so greatly require; further, that it leads to many immoral practices, such as "common law" marriages, adultery for court purposes, and the fabrication of evidence—and I think I could add other things besides those.

Hon. Mr. CHOQUETTE: Perjury and collusion.

Hon. Mr. ROEBUCK: Yes, thank you for the addition—and a good many other things.

How many "commons law" marriages there are in Canada I, of course, do not know, and I think no one else does. The are no D. B. S. statistics on the matter.

When he was speaking in support of his bill Senator Aseltine estimated that there were 20,000, and someone in the Ontario Legislature quite recently, in a report published in the *Star* of February 23 last, estimated the number to be 250,000. Well, there are only four million marriages in Canada, so it seems to me that estimate is high.

Hon. Mr. ASELTINE: I think 50,000 is about correct.

Hon. Mr. ROEBUCK: Perhaps so; 50,000 is a substantial figure. It is impossible for us actually to know because we have taken no surveys of that nature. Fifty thousand "common law" marriages is something that should stop us for a moment to consider what it means from the human standpoint. Fifty thousand "common law" marriages in the dominion of Canada—I do not know how many there are in fact, but certainly there are very many, and very many too many.

I know from my own personal experience that there are simply thousands of people in this country who have been faced with living celibate for the rest of their lives, or the rest of the life of their opposite spouse, or, alternatively, firstly, of seeking divorce in the United States which is, of course, in almots all instances not recognized in this country, is very unsatisfactory, is illegal without question, and although in some respects socially recognized is to be avoided; secondly, of bringing about in some way an act of adultery on the part of the opposite spouse, or waiting to take advantage of such immorality on his or her part, or, as was just suggested tome a moment ago, fabricating the evidence; thirdly, of living themselves in adultery in what is euphoniously known as a "common law" relationship. I have not mentioned a possible fourth alternative—I do not know whether it is an alternative or not—of free love or promiscuous intercourse, for those who have a taste for that sort of thing.

I suggest to you that this is an intolerable condition of law in this counry. It is what this bill attempts in a modest way to correct, at least to some extent, by adding to this ground of adultery the further grouns of cruelty, desertion for three years, or five years of insanity while confined in an institution which I will define a little more fully later on. As I say, it will have effect in all provinces other than Quebec and Newfoundland.

I have in my hand a book entitled *Marriage Breakdown, Divorce, Remarriage—A Chirstian Understanding* in which, if you turn to page 113, you will read this passage:

> It is agreed:
>
> That this General Concil—

That is, the General Concil of the United Church of Canada.

> —urge the Federal Government to appoint a Royal Commission on Divorce to consider (a) Such grounds for divorce, in addition to adultery, as wilful desertion for three years, gross cruelty (both physical and mental, carefully defined), and insanity that fails to respond after five years of treatment in an institution.

I might tell you that I did not read that paragraph until after I had drawn this bill, but it does show a remarkable similarity of thought between myself and the General Council of the United Church of Canada.

Hon. Mr. CHOQUETTE: Except for mental cruelty. I was going to ask my honourable friend about paragraph (b) of clause 2 (1), which reads:

> has since the celebration of the marriage treated the petitioner with cruelty.

I was wondering there is it should not say "physical or mental or both."

Hon. Mr. ROEBUCK: May I leave the answering of that question to the time when I shall be discussing these particular features of the bill itself? A quick reply is that the added words are not necessary, because this clause is phrased in the very words of the English act, and we have a great mass of judicial decisions awaiting us that would apply in the interpretation of this clause. I might tell you that in the English Act and in the English administration both physical and mental cruelty are prohibited.

I have another book here that is perhaps not as impressive, but it is certainly well done. It is entitled *Canada's need for Divorce Reform,* by Rev-

erend C. Bernard Reynolds, M.A., B.D. of Victoria. I would prefer to leave a description of this book to Senator Farris who comes from that part of Canda and who, no doubt, knows Reverend Reynolds well. This book makes a most powerful case for reforming the situation as it now exists in Canada.

A somewhat similar resolution to that of the General Council of the United Church was passed recently by the Canadian Bar Association. There have also been many, many editorials on the subject in the newspapers. I have one here from the Toronto *Daily Star* which is headed: "Bring Divorce Laws out of Victorian Age." I will not go into it further because there are so many newspapers all over Canada which have expressed similar opinions.

The Toronto *Daily Star* reported—this is not an editorial but a report—on February 24, 1966 in these words:

> Justice Minister Lucien Cardin told a reporter that he has detected a new "climate of religious and social tolerance" towards divorce which would enable Parliament to liberalize the law.

I hope he is correct in that statement.

I have said that this bill will not change the law of divorce or of matrimonial causes other than in the additions which, up to this moment, I have only outlined. I think it would be useful in our consideration of the bill for me to say something as to what the law is now in the dominion of Canada, because it is complex and not without difficulty in both discovering it and understanding it. Let me commence, then, with the Province of Nova Scotia.

The law of Nova Scotia on divorce is expressed in two pre-Confederation statutes passed in 1864 and 1866. Honourable senators will find them set out, if they wish more detailed information, in *The Law and Practice of Divorce in Canada* by Cartwright and Lovekin at page 469. This a well-known textbook on divorce, and is an authority on the subject. You may take from the act cited there this phrase granting power to the courts of Nova Scotia prior to Confederation:

> The court shall have jurisdiction over all matters relating to prohibited marriages and divorce, and may declare any marriage null and void for impotence, adultery, cruelty, pre-contract, or kindred within the degrees prohibited in an Act made in the thirty-second year of King Henry the Eighth—

I do not wonder that somebody smiles to discover that the law of Canada relates back to an act passed in the reign of King Henry VIII.

Hon Mr. BENIDICKSON: On divorce.

Hon. Mr. ROEBUCK: Yes, on divorce at that. Well, he ought to know about it, of course.

Nova Scotia is the only province in Canada in which cruelty is a ground for dissolution of marriage. New Brusnswick, British Columbia and Prince Edward Island all rely on pre-Confederation law which continues in force by virtue of section 129 of the British North America Act.

Manitoba, Saskatchewan and Alberta operate under acts which were passed for their incorporation as provinces, and they all give authority to their courts in accordance with the law of England as it existed on the 15th day of July 1870.

An Ontario act was passed by the dominion Parliament enabling the Supreme Court of Ontario to annul or dissolve marriages in accordance with the law of England as of the 15th day of July 1870. That may be found in the Statutes of Canada passed in 1930. On the other hand, the courts of Quebec and Newfoundland have no jurisdiction whatsoever.

The law of England with regard to divorce, as it existed in July 1870, was enacted in the Matrimonial Causes Act of 1857, 20-21 Victoria, Chapter 85. It is set out practically in full in *The Law and Practice of Divorce in Canada*, by Cartwright and Lovekin, at page 540. It allows a wife to apply for a divorce against her husband on the following grounds: incestuous adultery, bigamy with adultery, rape, sodomy and bestiality. That is the law so far as the statutes are concerned which we read into the law of Canada.

We have not hesitated, honourable senators, to amend the Imperial Act of 1870, to remedy in part the barbarity of those times.

In 1925 Parliament passed the Marriage and Divorce Act, to be found in the Revised Statutes of Canada 1952, chapter 176, which allows a wife to sue her husband for divorce on the grounds of simple adultery, and not adultery mixed with some other cause, in those courts in Canada having jurisdiction to dissolve marriages *a vinculo matrimonii*; and it places the husband and wife on pretty much the same grounds in basic law.

By the way, that act also removed the marriage disability of brothers and sisters of deceased wives and husbands.

Now, while clause 26 of section 91 of the British North America Act gives jurisdiction to the dominion Parliament on marriage and divorce, yet Parliament has for the past 99 years refrained from passing any comprehensive legislation with respect to divorce. There are four acts, and four only, dealing with this subject of divorce in all that time. The first of these Acts is that already quoted, 176. The second Act is the divorce Jurisdiction Act, Statutes of Canada 1930, the Marriage and Divorce Act of 1925, Revised Statutes of Canada, 1952, chapter chapter 15, to be found in the Revised Statutes of Canada 1952, chapter 84.

That is an important act which we have used frequently in the Divorce Committee, and which is now being used here and elsewhere. It permits a married woman after two years of desertion by her husband to apply to the courts of her province on the ground of adultery, notwithstanding that her husband since the desertion has moved his domicile elsewhere. It is a humane and useful act.

The third act is the Divorce Act of Ontario, Statutes of Canada 1930, chapter 14, or Revised Statutes of Canada 1952, chapter 85, giving to the Supreme Court of Ontario power to dissolve or annul marriages in accordance with the law of England as it existed on the 15th day of July 1870.

Finally, there is a British Columbia Divorce Appeals Act, Statutes of Canada 1937, chapter 4, or Revised Statutes of Canada 1952, chapter 21, which gives to the Court of Appeal of the Province of British Columbia authority over the provincial courts of that province in divorce and matrimonial causes.

That is all; and does it not indicate hesitancy on the part of Parliament, having such broad powers to deal with a subject of such grave importance in the lives of our people?

Perhaps I may summarize in this way. There are four provinces that rely on pre-Confederation statutes—British Columbia, New Brunswick, Nova Scotia and Prince Edward Island; three that rely on provisions in the act of their own incorporation—Manitoba, Alberta and Saskatchewan; one, a special act, that of the Province of Ontario; then there are two where there is no jurisdiction.

Honourable senators, before turning to the bill itself, I should say that the bill was drawn in collaboration with Senator Croll—and it is unfortunate that he is absent from the chamber—who seconds the bill. He is entitled to the credit of initiating the present effort of the Senate to bring to many suffering souls in Canada, marital peace and a measure of common sense and humanity.

I understand that Senator Croll worked on this subject for two years, without my knowledge, notwithstanding the burden which he has borne as

Chairman of the Special Committee on Aging. This was before I had determined that the time was ripe for Senate action.

The bill was also drawn in collaboration with Mr. Robert McCleave, M.P., who until the change of Government in 1963 was Chairman of the Private Bills Committee in the Commons, having charge of divorce bills. I worked in closest association with him in those difficult times, and I owe a debt of gratitude for the co-operation he gave us in the Senate. Mr. McCleave has introduced in the Commons a bill similar in all respects to mine, and he has described it as such.

Hon. Mr. BROOKS: How many bills of this nature have been introduced in the Commons this session?

Hon. Mr. ROEBUCK: Eight—and this is the ninth. I will come to that in a moment.

Let me now turn to the bill itself. You will note that the title as I have described it is, "Divorce (Extension of Grounds) Act, 1966". It is not a matrimonial causes act, changing in a comprehensive way the law of marriage and divorce throughout Canada. It is not that and is not intended to be that.

Honourable senators, you will observe that clause 2 affects only those courts having jurisdiction to grant divorce *a vinculo matrimonii*, that is those provinces other than Quebec and Newfoundland.

Hon. Mr. DESCHATELETS: Would the honourable senator permit me a question?

Hon. Mr. ROEBUCK: Yes.

Hon. Mr. DESCHATELETS: It has to do with the Provinces of Quebec and Newfoundland. Those provinces have no courts with jurisdiction to deal with divorce matters. If this bill passes, will a citizen from Quebec or Newfoundland be able to take advantage of these new grounds through a private bill, as is done now?

Hon. Mr. ROEBUCK: No. I think the answer is no, but it must be a qualified no. You will understand that a bill of divorce passed by the Parliament of Canada may be on any grounds, or no grounds at all, limited only by the practice which we have observed. We have complete power to do as we please in this matter, because the British North America Act gave us that power. So far we have exercised the power only in accordance with the law of England as it was on the 15th day of July, 1870. We have seldom, if ever, stepped aside from those grounds; that is, nullity because of non-consummation caused by the inability of one or other of the parties, and divorce on the grounds of adultery, sodomy, bestiality. We have never yet, as far as I know, passed a bill on the grounds of desertion or cruelty.

Hon. LIONEL CHOQUETTE: May I intervene? I do not think my honourable friend has grasped the question of the honourable Senator Deschatelets. What he wants to know is this, as I gather from his question: If this bill passes both houses, will anyone from the Province of Quebec or the Province of Newfoundland be able to avail himself of any of those four grounds? I think the answer would be "yes".

Hon. Mr. ROEBUCK: The answer is no. As far as the bill is concerned, and so far as the new act, if the bill becomes an act, is concerned, they will not be able to avail themselves of it, except in this way, that I do hope that the widening of the grounds to a more reasonable extent will result in honourable senators, such as the honourable senator who asked me the question, taking action on behalf of their provinces amending this bill to extend it to those provinces.

We in this chamber, and in the Commons as well, have been careful in the years gone by never to pass laws which seem to be oppressive to the Province of

Quebec. It is not our desire to force anything on any province. I am fairly confident that we have public opinion with us in the common law provinces. I hope we have it with us also in the provinces of Quebec and Newfoundland. I am anticipating some action on behalf of the representatives of those provinces in connection with this matter. Does that answer the question?

Hon. Mr. DESCHATELETS: Yes.

Hon. Mr. CHOQUETTE: Not to my satisfaction, I must say.

Hon. Mr. ROEBUCK: Where have I lapsed?

Hon. Mr. THORVALDSON: Honourable senators, so as to clarify this somewhat further, may I ask a supplementary question? Supposing this bill passes Parliament and supposing Quebec and Newfoundland continue to apply to Parliament for divorces, will these grounds apply to those two provinces?

Hon. Mr. ROEBUCK: No.

Hon. Mr. HOLLETT: Why not?

Hon. Mr. BENIDICKSON: May I ask the honourable Senator Roebuck this question: would the Senate Standing Committee on Divorce not be influenced by the passage of this bill?

Hon. Mr. ROEBUCK: I think the answer is no. The committee so far and, as I forecast, in the future, will grant divorces according to law and according to the practice of the past. That is what we have tried to do over the years. Observe this, that these resolutions which I have been laying before you in such great numbers of late, are passed in accordance with the Act of Parliament passed in 1963, the Dissolution and Annulment of Marriages Act, which limits us to the causes expressed in the English act of 1870, and in the Canadian act which I have already referred to, which however adds no grounds to the English act. All those cases that you see here are limited, and all within the four corners of the law of England of 1870, and we have no power to go beyond that. We have the power, as I have just said, to pass a bill on any grounds that we see fit, because we are supreme in the Parliament of Canada; but so far we have restrained ourselves in that respect and have observed our limitations carefully and rigidly, as we are with regard to the resolution powers provided in the Act of 1963.

Hon. Mr. ASELTINE: Would it not clarify the whole problem if the word "now" were inserted after the word "court", to make it read "in any court now having jurisdiction"? It could not possibly apply to Quebec and Newfoundland.

Hon. Mr. ROEBUCK: No, it does not apply to those provinces because of the insertion of the word "now".

Hon. Mr. ASELTINE: That is the question that has been asked—does it apply to Quebec or Newfoundland? It would put it beyond all question if in the first line of paragraph 2 the word "now" were inserted after the word "court".

Hon. Mr. ROEBUCK: So as to read "In any court now having jurisdiction to grant divorce *a vinculo matrimonii*"?

Hon. Mr. ASELTINE: Yes.

Hon. Mr. ROEBUCK: That would make it still more sure that it did not apply to the Provinces of Quebec and Newfoundland, which I think a complete reading of the clause also makes clear.

Hon. Mr. ASELTINE: In the bill that you mentioned which I had something to do with, it was described that way. It did not apply to Quebec or Newfoundland, either.

Hon. Mr. ROEBUCK: Let me read the clause:

> In any court having jurisdiction to grant divorce *a vinculo matrimonii* any husband or wife may commence an action praying that the marriage may be dissolved, on the following grounds in addition to any ground upon which the marriage may now be dissolved, namely—

Hon. Mr. CHOQUETTE: That does not include the Senate. We decided some time ago that the Senate committee hearing divorce petitions is considered as a court; and I say that it is absolutely useless to pass this measure if we have only in mind to say to the provinces which are already dealing with divorces: "We are giving you the privilege of accepting these grounds"—such as we said in 1930 in the case of Ontario, for instance. We can delegate our power to Ontario courts to deal with divorces. Now, is that the procedure you intend to follow for those who are interested in this bill, to pass these grounds and offer them wholesale to the provinces who are already dissolving marriages?

Hon. Mr. ROEBUCK: Yes.

Hon. Mr. CHOQUETTE: I think the people are under the impression that we want to add to the grounds right here in the Senate to start with.

Hon. Mr. BENIDICKSON: For Newfoundland and Quebec.

Hon. Mr. CHOQUETTE: Yes. That would be the purpose. May I add one more word? I am sure that my friend has already explained that the Senate has unlimited powers, and surely they will accept these four additional grounds. What is the use of saying no?

Hon. Mr. ROEBUCK: I intend to move later on that this bill be referred to a committee, and if my friend will move in that committee to extend these grounds to Quebec and Newfoundland, and if I feel that there is public opinion in those provinces which justifies my action, I would be delighted to vote for it.

It is not included in this bill because I am very careful not to do anything that looks like coercion with respect to those two great provinces. Now, let me go on.

Hon. Mr. GROSART: Could I ask the honourable senator one question in that connection? I have understood him to say many times in the Senate that the basis of the granting of a divorce by the Senate, to take a short cut, is the right of the individual to petition the Crown. Does the honourable senator suggest that by the passage of this measure we will be in the situation where a petitioner from Newfoundland or Quebec petitioning the Crown will be told, "We have a different law for the rest of the country and a different law for you"?

Hon. Mr. ROEBUCK: That is what we have now and have had since Confederation.

Hon. Mr. GROSART: My understanding is that the petitioner from Newfoundland or Quebec now petitioning the Crown is being put in the same position in respect to the right to dissolve a marriage as any other Canadian. Is that not the situation now?

Hon. Mr. ROEBUCK: You mean that there is a public opinion in these provinces that desires to be placed on the same grounds as the rest of Canada? Is that what you are asking me?

Hon. Mr. GROSART: No. I am suggesting that that is the situation now, that a petitioner from Quebec or Newfoundland proceeding by way of petition to the Senate is actually obtaining the same rights with regard to the dissolution of marriage as any other Canadian citizen.

Hon. Mr. ROEBUCK: He is not on the same ground at all. The citizen of Ontario goes to the courts of Ontario and, while the rules are much the same, his right to divorce is just as it was in England in July, 1870. If he is domiciled in these other two provinces he may come to the Senate and get pretty much the same decision.

Hon. Mr. GROSART: May I try to make my question clear. Are we not at the present time by our procedures in the Senate granting to these petitioners the right to be treated exactly the same as any other Canadian? Is not that the present situation?

Hon. Mr. ROEBUCK: Yes, from one point of view that is right. In all these provinces divorce is granted only on the grounds of adultery, with the exception only of the Province of Nova Scotia.

Hon. Mr. BROOKS: And we in the Senate cannot deal with questions relating to children.

Hon. Mr. ROEBUCK: We can. We have not done so up to this time. I am perfectly satisfied that the care of children, the division of property between the parties and alimony are ancillary to divorce. We have never exercised that power for the reason that the courts of the provinces in question have been dealing with this subject satisfactorily, and there is no need for us to go into it. Furthermore, we have no machinery here for enforcing our decrees. Therefore, in common sense, we have left these matters to the courts of the provinces.

Hon. Mr. HOLLETT: Could we not include a definition of the word "court" to include the Senate of Canada? After all a citizen of Newfoundland should be able to get a divorce on these particular grounds as well as a citizen of Ontario. Why not include the Divorce Committee of the Senate of Canada in the definition of the word "court"?

Hon. Mr. ROEBUCK: I would be delighted to do so if there is a demand for it from your province.

Hon. Mr. WALKER: I think the honourable Senator Roebuck is very wise in refraining from including Quebec in his bill at this time. They have their own feelings there in this matter and I am glad that they have not been included in this bill.

Hon. Mr. ROEBUCK: Thank you.

Hon. Mr. GROSART: May I continue to try to clarify my question. Would the effect of this bill not be that the Crown, acting through the Senate Committee on Divorce, would be almost obliged to grant these petitions on the same grounds as govern divorce in the other provinces? Would not that be the effect? I should make clear that I am not opposing the bill, but I want to be clear in my own mind that the consequences of this would be that petitioners from Quebec and Newfoundland would, in effect, be getting dissolution of marriages on the same ground. Would that be the effect?

Hon. Mr. ROEBUCK: I hope it will be the effect, but it would require an amendment to the act. We are not doing that now, but we may have to amend it, and perhaps before we conclude this debate.

Section 2 of the bill sets forth three additional grounds. These words are taken holus-bolus, almost verbatim, from the Act of the Imperial Parliament as it is now in force in England and as it was in force back in 1870. It is the act which has been in force in England since 1937 when Colonel A. P. Herbert, whom some of you may recognize as the author of the book *Holy Deadlock,* introduced his Matrimonial Causes Act. The substance of Colonel Herbert's bill is now embodied in the Matrimonial Causes Act of 1950, which is to be found in *Rayden on Divorce*, ninth edition, page 1381.

The purpose of using the wording of the English act is twofold. First, we in Canada have learned by long experience the wisdom of following the British draftsmen. They have proved themselves very skilful in the choice of words, and they have produced much wise and effective legislation. Secondly, there has developed in the United Kingdom since 1937 a vast body of jurisprudence interpreting and applying this legislation. Drawing this legislation the same wording, we feel will be of great assistance to our courts which, no doubt, will use and undoubtedly follow the English jurisprudence on this question, but in the interpretation of the words and in the administration of the act.

Honourable senators, let us look now at the grounds themselves. The first is:

> "(a) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition;"

There is no difficulty in understanding what desertion means and it does not require much interpretation. It has been held in the leading case of *Froud v. Froud* (1904) Probate 177, that "desertion" and "desertion without cause" are the same offence. I recall when we were discussing Senator Aseltine's bill he agreed that that meant unjustified desertion. There is no difficulty in applying that phrase. The second ground is

> (b) has since the celebration of the marriage treated the petitioner with cruelty;

Now, *Rayden on Divorce* says that the law of cruelty is comprehensively defined by the House of Lords in *Collins v. Collins* (1963) 2 *All England Reports*, 966, and *Williams v. Williams* (1963) 2 *All England Reports*, 994.

As I read these cases I picked this statement made by Lord Reid, one of the distinguished members of the Court of Appeal in England at that time. In *Collins v. Collins*, at page 969, Lord Reid said—

Hon. Mr. HUGGESSEN: Is he interpreting the word "cruelty" under the English bill?

Hon. Mr. ROEBUCK: Under the same wording as in the English act. He said:

> No one has ever attempted to give a comprehensive definition of cruelty, and I do not intend to try to do so...if one spouse sets out to hurt the other and causes injury to health, the means whereby that happens can hardly matter.

He adds that it is something "well beyond the ordinary wear and tear of married life." He says further that "you cannot define cruelty; but you can recognize it when you see it." In this case "a husband fully responsible for his conduct, knowing that it was injuring his wife's health and yet persisted in it, not because he wished to injure her but because he was so selfish and lazy in his habits that he closed his mind to the consequences."

This is a borderline case, and there are many, of course, but I submit that any Canadian judge of normal intelligence would find no difficulty in recognizing conduct which would fall within this definition of "cruelty" on the part of one spouse which is intolerable to the other spouse and which makes continued cohabitation reasonably impossible.

The last ground is unsound mind, and I shall read it:

> (c) is intractably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition.

I will read the next clause in a moment.

The Oxford Dictionary in volume 1 at page 1035 defines "intractably" as: "Uncontrollable, refractory, an unmanageable person." The Imperial Act says: "Incurably of unsound mind."

But it seems to me that this is pledging the future. Who can say what medical science will produce in the years to come and what may be accomplished? Five years in a mental institution in an intractable condition of mind should, I think, be sufficient to release the bonds of an unfortunate marriage.

Subsection 2 defines the care and detention required by the act:

> For the purposes of this section a person of unsound mind shall be deemed to be under care and treatment only while he is
>
> (a) detained in pursuance of an order or inquisition completely made or had under authority of a statute in force in the province concerned or as a criminal lunatic; or
>
> (b) receiving treatment as a voluntary patient pursuant to any statute in force in the province concerned, being treatment which follows without any interval a period of such detention as aforesaid.

It seems to me if any person is detained for five years as an intractable lunatic, that should be sufficient for us to act without trying to forecast the future.

Hon. Mr. PEARSON: May I ask a question?

Hon. Mr. ROEBUCK: Yes, senator.

Hon. Mr. PEARSON: Does that mean, at least five years?

Hon. Mr. ROEBUCK: Yes, at least five years.

Hon. Mr. WALKER: May I ask a question of the honourable senator? Dealing with clause 2, subsection (1) (b), "cruelty", is the definition which you read from Lord Justice Reid's judgment, to be considered under the circumstances to include habitual drunkenness?

Hon. Mr. ROEBUCK: I do not know.

Hon. Mr. WALKER: Because that is not included in the English act, is it?

Hon. Mr. CHOQUETTE: It would open the door to many such things, I suppose. It would open up the door to incompatibility, as far as that goes.

Hon. Mr. ROEBUCK: I said I did not know. If a drunken man abused his wife, the fact that he was drunk would not influence any judge in deciding that he was guilty of cruetly. If he just becomes a sot, it might be something different, but I do not know. However, you will notice there are many causes expressed in the newspapers and elsewhere that are not included in this bill, for obvious reasons. I have tried to make it a simple bill. If we can pass this bill the time may come when amendments may be made to it intelligently, modifying or extending it. In the meantime, it is the English act as simply as it can be expressed.

Of course, it is necessary to provide the opposite pleas. Section 3—which, by the way, is taken directly from the English act—says:

> If the court is satisfied by the evidence that the case of the petitioner has been proved on any of the grounds added by section 1, and, where the ground of the petition is cruelty, the petitioner has not in any manner condoned the cruelty, and that the petition is not presented or prosecuted in collusion with the respondent, the court shall pronounce a decree of divorce, but if the court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition: Provided that the court shall not be bound to pronounce a decree of divorce and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery, or if, in the opinion of the court, the petitioner has been guilty
>
> (a) of unreasonable delay in presenting or prosecuting the petition; or
>
> (b) of cruelty towards the other party to the marriage; or

(c) where the ground of the petition is cruelty, of having without reasonable excuse deserted, or having without reasonable excuse wilfully separated himself or herself from, the other party before the cruetly complained of; or

(d) where the ground of the petition is unsoundness of mind or desertion, of such wilful neglect or misconduct as has conduced to the unsoundness of mind or desertion.

These are quite close to the pleas that are well established in petitions based on adultery.

Hon. Mr. BROOKS: May I interrupt the honourable senator?

Hon. Mr. ROEBUCK: Certainly.

Hon. Mr. BROOKS: This is very interesting, and I know all honourable senators are very much interested in it, but it seems to me there is considerable further explanation the honourable senator would like to make. I know there is a previously arranged meeting some honourable senators wish to attend shortly after 5 p.m., and it occurred to me that the honourable senator might adjourn the debate.

Hon. Mr. ROEBUCK: Far be it from me to stand on any rights under such circumstances.

Hon. Mr. BROOKS: It is a very important matter, I may say.

Hon. Mr. ROEBUCK: I do not like to divide an argument, but if I could be placed first on the Order Paper tomorrow, I will move the adjournment of the debate.

Hon. Mr. BROOKS: Thank you.

On motion of Hon. Mr. Roebuck, debate adjourned.

TUESDAY, May 10, 1966.

DIVORCE (EXTENSION OF GROUNDS) BILL

SUBJECT MATTER REFERRED TO JOINT COMMITTEE ON DIVORCE

On the Order:

Resuming the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for second reading of Bill S-19, intituled: "An Act to extent the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief".—(Honourable Senator Croll).

Hon. John J. CONNOLLY moved in amendment:

That the bill be not now read the second time but that the subject-matter thereof be referred to the Special Joint Committee on Divorce in Canada and the social and legal problems relating thereto.

The Hon. the Acting SPEAKER: It is moved by the honourable Senator Roebuck, seconded by the honourable Senator Croll:

That Bill S-19, intitutled "An Act to extent the grounds upon which courts now have jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief" be now read a second time.

In amendment, it is moved by the honourable Senator Connolly (Ottawa West), seconded by the Honourable Senator Hugessen:

That the bill be not now read a second time, but the subject matter thereof be referred to the Special Joint Committee on Divorce in Canada and the social and legal problems relating thereto.

Is it your pleasure, honourable senators, to adopt the motion in amendment?

Hon. Arthur W. ROEBUCK: Honourable senators, of course I thoroughly approve the amendment to my original motion. It is what I asked for in the course of my address when I brought the matter to the attention of this house. I asked that the Government, the Commons and ourselves, join in a joint committeee for a thorough study of this matter.

Speaking to the amendment—and I hope that the lines of the rules will not be too closely drawn—I would like to make some general observations and in particular answer a number of questions that have been raised in the course of this long debate.

In the first place, let me express my thanks to all those who have taken part in this debate for the effort they have made to throw light upon our future path, for the thought they have given and the interest they have shown in this very important subject, and to those who have asked questions concerning the matter, for the concern they have manifested.

It has been a matter of great satisfaction to me that all those who have spoken have, I believe without exception, expressed approval of the effort that we are making to improve what is generally agreed among us is an unsatisfactory situation in a good many, if not all, respects. I do not mean that they approve in any way of the principle of divorce. That is not the principle of this bill. Were this bill to become law, it would affect only those jurisdictions which now have courts in operation enforcing certain rules with regard to divorce, and which have recognized this principle of divorce for a great many years.

The principle of this bill, as I see it, honourable senators, does not touch the question of divorce itself. The principle of the bill is the improvement of the administration of the law with respect to divorce. It is to remove certain abuses in the administration of the law and to make it more reasonable, more considerate and more honest. For the sympathy that has been expressed for the effort that we are making, I am grateful. I am also grateful for the approval that has been expressed in the press almost generally all over Canada. I am also grateful for the approval that has been expressed in many letters which I have received—and the correspondence has been fairly heavy—since this bill was introduced. There seems to be an overwhelming sentiment throughout Canada at the moment for what is the substance—with little exceptions here and there—of the bill which I have had the honour to introduce.

Honourable senators have no doubt noticed that the Anglican Synod met in London a short time ago and passed a resolution which I may say without going into too much detail, in general approves the substance of this bill. And I have no doubt that all here have recognized what took place in the State of New York very recently. From time immemorial the State of New York has restricted its grounds of divorce to adultery only, and very recently that ancient and, I think, archaic restriction has been abolished and the State of New York has adopted, in many respects a more liberal, shall I call it, rule than would be the case were this bill of mine to be adopted.

I trust that those honourable senators who have spoken and asked questions will pardon me if I fail to respond to all the comments that have been made in the course of this fairly long debate. Of course, my time is limited in reply by common sense, but some vital points have been raised which I think call for a somewhat comprehensive rejoinder on my part.

The first one I shall mention is not so insistent, but Senator Aseltine, ,having assured me that he would support this bill one hundred per cent, added that he thought the bill which he introduced in 1955 was a better bill than mine. Well, I am very ready to admit that that bill was well and skilfully drawn. I am not much interested in comparisons between these two bills, but I am interested in the reasons that Senator Aseltine advanced as to why his bill was better than mine, and I wrote down a list of some twelve matters which he mentioned in the course of his address. They were as follows: rape; sodomy; beastiality; death; judicial separation; avoidance by non-consummation; unsoundness of mind; alimony; venereal disease; pregnancy of the bride; domicile; certain procedural rules and regulations. He said that these were all mentioned and dealt with in his bill but were not to be found in mine.

Honourable senators, let me tell you why these matters are not to be found in my bill. To begin with, rape is adultery on the part of the aggressor—not, of course, on the part of the victim—and is considered as such by the courts and I am sure would be so considered by us. So it is not something we need to legislate on now; it is already covered.

Let us take next sodomy and bestiality. I suppose it is not generally known among us, but the fact is that both these matters are included in the grounds for divorce in the English law of 1870, and in consequence are within the jurisdiction of the Senate at the moment under the Dissolution and Annulment of Marriage Act, and they are within the jurisdiction of all the provincial courts which rely upon the English law of that day. So there is no need for us to touch that at all at the moment. They are very seldom used, but they are there.

The next is the right to declare a missing spouse to be dead. That is within provincial jurisdiction, and it is not at all necessary for us to consider it here. It is now dealt with, I think, in all the provinces. I know that in the Province of Ontario applications are frequently made for a declaration of the decease of a certain person, and those are dealt with by the courts under provincial legislation.

The next matter was that of judicial separation. That may be within federal jurisdiction, but I do not know. It has always been considered to be within provincial jurisdiction, and has been so dealt with by the Province of Quebec for many years. The Province of Ontario has avoided any rules with regard to judicial separation, and has relied on agreements of separation. I am not sure about the other provinces, but I am sure that practice and law and a proper understanding of the British North America Act would place the matter within provincial jurisdiction.

Voidance on the gounds of non-consummation is also within the law of England of 1870, and is a matter that has come before this body many times. It is already dealt with, by both the Senate Committee and also by the provincial courts which rely on the law of England, as most of them do.

Soundness of mind was differently expressed in my bill as compared with that of Senator Aseltine of 1955, but it is dealt with.

Venereal disease is horrible, but due to the advances made in medicine it is not now the incurable curse it was some years ago. It may be evidence of adultery on the part of the spouse accused. Should the committee to which the substance of this bill is referred consider that venereal should be included, then I

would have no objection to its doing so, although I do not think we would have very many applications on that ground.

The next item was pregnancy on the part of the bride for which the groom was not responsible and which was unknown by the groom at the time of the marriage. I suppose a good deal could be said on both sides of the question as to whether divorce should be granted on such a ground. There are those who think that marriage cures the past and that the parties embark on a new course. If it can be shown that there is a substantial demand for the addition of this ground, then I would not not have any serious objection to it. However, I do think that the bill goes far enough without taking in matters of that kind.

Alimony, in my opinion, is a matter ancillary to divorce. The words of the British North America Act are "marriage and divorce", which are placed within dominion jurisdiction. Alimony is ancillary to the granting of divorce. But, on the other hand, alimony has been taken care of by the provincial courts all over Canada ever since Confederation, and they have done a satisfactory job with respect to it. There would be various serious objections from the Province of Quebec and the other provinces if after all these years we intervened and took this matter into our own hands. Furthermore, let me say, we would be undertaking something for which we have no machinery. There are no sheriffs or sheriff's officers, or other such machinery of the courts, attached to the dominion Parliament. It is quite clear, and I feel sure that most honourable senators will agree, that we should leave that matter alone.

Then comes the question of domicile. Senator Aseltine had some very fine paragraphs in his bill with respect to it. It does seem to be most unfair that the general rule be that the domicile of the husband is the domicile of both the husband and wife, and certainly it is unfair that when a man deserts his wife her domicile whould follow him like his shadow. This has been appreciated by the dominion Parliament, and in 1930 there was passed the Divorce Jurisdiction Act, which provided that when a woman has been deserted for two years, although the rule is that domicile follows the husband, she may nevertheless claim divorce from him in the courts in the province in which she still resides and in which she was deserted.

The Divorce Committee has always recognized the right of the woman, if she has been deserted for more than two years, to claim divorce in any of the provinces. There is no objection taken now to the delay of two years, but if it is thought to be too unjust, and I can see some serious objections to it, the proper procedure is to amend that act. It should not be included in a bill such as that now before us.

Those are all the differences that have been mentioned between the bill of 1955 and this one of 1966. I am perfectly sure that were Senator Aseltine and I to sit down together to draw up a bill there would be very little difference between us.

A good deal has been said in the course of this debate, and elsewhere for a long time, about the fabrication of evidence and collusion in cases before the courts. In my opening remarks I said that generally speaking, with some inconsequential exceptions, the one ground for divorce in all of Canada was adultery. I was taken severely to task by a critic whose name I need not mention. I was told I was wrong, that there were two grounds. I questioned this, and was told that in the first place there is adultery, and in the second place there is perjury.

I will not agree for one moment that perjury is a ground for divorce. I will concede, however, that it is a means sometimes used, very wrongly and fraudulently, to obtain a decree of divorce on the grounds that are recognized. But I ask you: Is not the frequency with which collusive and perjured cases

come before our courts and before our own Commissioner very much exaggerated? It is so easy to throw out general charges of this kind.

It was said on the floor of this house that 50 per cent of the cases were collusive and were decided on perjured evidence. I intervened at the time to say that that percentage was much too high. Feeling that it was an unnecessary downgrading of our courts, I asked our Commissioner to make an investigation in order to separate the goats from the sheep.

It is perfectly obvious that when we find people living together in what has always been known as a common law relationship—although there is no common law about it; that is the phrase used—there is no suspicion of collusion or perjury when the facts showing how they are living together are laid before the court. When adultery is proven to have taken place on repeated occasions in the home of the respondent or the co-respondent, it is not a matter you would suspect of having been concocted. It is in these one-night stands in hotel and motels that suspicion is aroused. For that reason, I asked for an analysis of how many cases of that kind are or are not reasonably open to suspicion and this is what our Commissioner had to say:

> As requestd by you I have made an analysis of the last 200 uncontested divorce petitions which I have recommended for approval, this being a sufficiently large number to provide a representative sample, with a view to determining how many of these would be based on evidence of one-night adultery in a motel or hotel and which could conceivably have been arranged by connivance between the parties.
>
> I classified the evidence into four categories as follows:
>
> Cases where there is a common law relationship or evidence of continuing adultery with the same co-respondent—134.
>
> Cases where adultery took place on one or more occasions with the same co-respondent either in respondent's own residence or in that of co-respondent—33.
>
> Cases where the adultery took place in a hotel or motel, the husband being the respondent—28.
>
> Cases where the adultery took place in a hotel or motel with the wife being the respondent—5.
>
> These figures proved surprising even to me, since it is apparent that in 67 per cent of all cases there is a common law relationship or continuing adultery. In adition to this, although it would not of course be impossible for collusive adultery to take place at the residence of respondent or co-respondent, this is certainly less likely, and such adultery was proved in 33 cases or 16.5 per cent. Furthermore although there may always be some suspicion where the husband is respondent and the adultery proven is a one-night adultery in a hotel or motel, I think you will agree that it is much less likely to be collusive when the wife is respondent as it is unlikely that she would deliberately provide evidence of adultery against herself to enable her husband to get a divorce, so we can probably rule out these five cases. This leaves only 28 cases or 14 per cent of the total where there would appear to be a reasonable possibility that the evidence might be collusive.
>
> This is not to say of course that I believe that the evidence was collusive in 28 cases out of 200, since had I been convinced of this in any of these cases I would not of course have made a favourable recommendation. In all these cases the evidence indicated the likelihood that the adultery was committed as alleged, and it is certainly not difficult to believe that a man who picks up a woman with intent to have sexual

relations with her would take her to a hotel or motel rather than to his own residence or to her residence which might be impractical if not impossible in many cases. It would certainly be wrong to assume therefore that all evidence of adultery in a hotel or motel is fabricated.

To conclude, therefore, I would doubt whether there was any connivance in as many as 10 of the 200 cases, and even in these cases it could not be detected from the evidence. It would appear therefore that a maximum of 5 per cent of all petitions might involve connivance or collusion, which is a far cry from the 50 per cent figure which one sometimes hears mentioned.

One of the reasons for the introduction of this bill, of course, is to make the courts of the land more honest in this regard. However, I do not like to see a grossly exaggerated estimate that seems to downgrade our courts. I think it is worth while to assure my fellow senators that a reasonable view of what takes place is that not more than five per cent of all the cases presented are open to this suspicion.

Senator Choquette, on March 4 last, during the course of this debate raised a most important and somewhat difficult question. He asked whether the Commissioner's proceedings were not that of a court, and therefore whether this bill should not be amended if we wished to exclude the provinces of Quebec and Newfoundland from its operation.

Section 2 of the bill reads:

In any court having jurisdiction to grant divorce *a vinculo matrimonii* any husband or wife may commence an action praying that the marriage may be dissolved—

And so forth. My friend suggested that that might include the Commissioner's court, and therefore this chamber.

On that occasion, Senator Choquette said:

I recall that a few years ago there was a case heard before the Senate Standing Committee on Divorce in which two private detectives were alleged to have committed perjury. Subsequently, they appeared before Magistrate Strike in the City Magistrate's Court, and he had no difficulty in finding them guilty of perjury. Then their solicitor appealed to the Court of Appeal of Ontario, and that court decided that these witnesses had not committed perjury in the sense that they had not been before a tribunal or properly constituted court; therefore, the appeal was allowed and the action dismissed.

Then my friend, the sponsor of the bill now before us, decided to remedy that situation by introducing a bill, which was subsequently passed, to the effect that henceforth the Standing Committee on Divorce would be considered a court and a tribunal for every purpose.

That bill of some 12 or 13 years ago, providing that thereafter the committee would be considered a court in which someone who gave false evidence could be found guilty of perjury, having been passed, I ask this question: Does the Senate committee—and the more so now that a judge of the Exchequer Court is appointed the Commissioner—hearing divorce actions constitute a court? If it does, then I say the phrase "in any court having jurisdiction" will include the Senate Divorce Committee and all petitions that are heard by the committee or by the Commissioner may invoke any of the new grounds proposed in this bill.

If that is not so, then I suggest that this bill should be amended to read: In any provincial court having jurisdiction to grant divorce...

In the light of the facts I have outlined, it would be most ambiguous to say "in any court".

It is my opinion that the Senate Committee on Divorce has been constituted and recognized as a court for some 12 or 13 years, and that this bill would entitle people in the two provinces that are excluded to come to the Senate and ask for a divorce on these extended grounds. My question is, am I correct in so thinking? I hope I have made myself clear.

I replied that he had made himself very clear, but I reserved my right to consider it further. I said I thought he had raised a point.

Well, remember that it was 12 years ago and one's memory fades to some extent on details of this kind, but in the interval that has passed between the senator's question and this, on reviewing this matter and refreshing my memory, I find: first, that the detectives were not charged with perjury; and, second, that in the amendment to the Criminal Code which we made—at my suggestion—we did not make the Senate or the Senate Commissioner a court, or to use my friend's words, "a court and a tribunal for every purpose". Thirdly, we did not do that and, accordingly, the bill as drawn would not affect the Province of Quebec or the Province of Newfoundland.

And now, in view of the misunderstandings and perhaps the fogginess of memory, I think it is necessary that I make clear just what the situation is. What is the true character of our Commissioner and his proceedings and his status?

It is correct that on November 24, 1954, two private detectives were convicted in an Ottawa court, not of perjury, but rather of fabricating evidence .Let me be perfectly specific on this: Two private detectives were convicted as follows:

With intent to mislead a court of justice did unlawfully attempt to fabricate evidence by means other than perjury or subornation of perjury.

The charge was laid in pursuance of section 117 of the Criminal Code, which reads as follows:

Every one who, with intent to mislead, fabricates anything with intent that it shall be used as evidence in a judicial proceeding, existing or proposed, by any means other than perjury or incitement to perjury is guilty of an indictable offence and is liable to imprisonment for fourteen years.

The accused appealed their conviction and the Ontario Court of Appeal quashed the conviction on the ground that the proceedings before the Senate, or a committee thereof, was not a court of justice within the meaning of the Criminal Code.

We proceeded to cure that matter, and I have the case here which I think is interresting. I refer to *Regina* vs *Pichette* and *Santerre,* found in Canadian Criminal Cases, volume 3 of 1955 at page 403.

This is what the judge says with regard to our status, and it is important that we understand our real status.

Chief Justice Pickup:

The appellants are two private detectives who appeal to this Court from their conviction on November 24 ,1954 ,by His Worship Magistrate Strike at Ottawa. The charge was that the appellants, "with intent to mislead a court of justice, did unlawfully attempt to fabricate evidence by means other than perjury or subornation of perjury—

The facts of the case may be simply stated. The appellants, desiring to obtain evidence for the purpose of enabling a married woman to secure a divorce, planned to trap the husband into a false position from which adultery might be inferred or found if evidence was later given in some

proceeding for divorce. This plan was to have a woman go to a room in an hotel, register under an assumed name, and give the room the appearance of the bed having been occupied. She was not required to do anything more. The husband was to be lured by a pretext to the room and, when there, would be found by the two appellants, who would then be in a position to give evidence as to his being found there with the woman. In carrying out this plan, the appellants arranged with woman "A" to obtain the hotel room and perform her part of the plot, which she did. In the meantime, the appellants arranged with woman "B" to call the husband, under an assumed name, which was the name which woman "A" was to use at the hotel, and invite him to come to the room. This was done by woman "B", but the husband was suspicious. Woman "B" claimed to be a friend of the husband's sister, and the husband took the precaution of calling his sister as to the friend whose name he had been given over the telephone. Instead of going to the hotel room as invited the husband went to the police, with the result that the plan at that stage miscarried and it was the police who went to the hotel room, instead of the two appellants who were endeavouring to mislead someone.

The first ground of appeal is that the Crown failed to prove the intent necessary to constitute the crime charged. It is argued that it was necessary, under the charge as laid, to prove an intent to mislead a Court of justice, and that the intent proved in this case was not an intent to mislead a Court of justice but, at most, an intent to mislead the Divorce Committee of the Senate, and Parliament which might act upon a recommendation of the Divorce Committee... This ground of appeal, therefore, turns upon whether or not the Senate committee and Parliament are a "court of justice" within the meaning of s. 177. In my opinion, they are not. The expression "Court of Justice", in the sense in which it is used in this statute, in my opinion, should be given the meaning attributed to the word "court" in Murray's New English Dictionary, vol. II, p. 1091, column 1, under item 11, from which I quote the following: "An assembly of judges or other persons legally appointed and acting as a tribunal to hear and determine any cause, civil, ecclesiastical, military, or naval."

Senator Choquette was correct, that I initiated the amendments of the Canadian Criminal Code to correct that situation. Let me say what we did. In consequence of this decision, we amended the Interpretation Section, which affected section 117 of the Code to include the Senate and such parliamentary bodies in the prohibition against the fabrication of evidence.

Section 99 of the Criminal Code as amended, reads as follows:

"judicial proceeding" means a proceeding (ii) before the Senate or House of Commons of Canada or a committee of the Senate or House of Commons, or before a legislative council, legislative assembly or house of assembly or a committee thereof that is authorized by law to administer on oath,

It is clear, therefore, that the Code as a result of *Regina vs Pichette* and *Santerre* did not constitute the Senate or its committees a court, nor the Commissioner or his proceedings—which by the way, were not in existence or contemplation at that time. Nor does the dictionary do so.

The Oxford dictionary defines "court" as follows:

An assembly of judges or other persons legally appointed and acting as a tribunal to hear and determine any cause, civil, ecclesiastical, military or naval.

Hon. Mr. CHOQUETTE: Now that we have changed the system and we have our Commissioner who does not render a decision but only makes a recommen-

dation, could anyone who takes an oath before him be brought up for perjury and convicted?

Hon. Mr. ROEBUCK: I will go through that a little more fully, because I think it is important to understand our own status.

When the Dissolution and Annulment of Marriages Act was before our Standing Committee on Banking and Commerce on August 2, 1963, the Deputy Minister of Justice, Mr. E. A. Driedger, said that the function of the Senate Commissioner when he is hearing evidence in support of divorce petitions and making recommendations to the Senate is legislative and not judicial in character. I have the report of the committee of that time, and this is what the Deputy Minister said:

> In the first place I tried to take particular care to frame this bill so that it would provide for a legislative dissolution rather than a judicial dissolution. One of the very important reasons for that was that if the proceedings are judicial, then they might well be subject to the prerogative writs such as *mandamus*. prohibition, *certiorari* and so on; but if the bill is framed purely as a legislative process then the internal machinery, the internal procedure, is of a legislative character and therefore will be outside the scope of prerogative writs. It we were to put in a clause to the effect that nothing in this bill shall be construed as altering or changing the jurisdiction of some courts, then we are half confessing that it really is a judicial procedure rather than a legislative procedure. By inserting such a clause the courts might say that this man is a judicial officer rather than a legislative officer, because such clause makes it clear that he is and therefore is subject to the prerogative writs.

Senator Power asked:

> Mr. Chairman, I would like to know what definition Mr. Driedger gives of legislative action as against judicial action.

This is Mr. Driedger's answer:

> My answer, Senator Power, would be this. If it is a judicial act you have preordained laws and the tribunal finds the facts and applies those laws. In the case of a legislative act the tribunal makes the laws, taking into account such facts as it considers desirable. As a legislative act I would include not only acts of Parliament but regulations of the Governor in Council or a minister. Those are what I call legislative acts...
>
> The power to dissolve marriage is conferred onthe Senate by resolution, and section 3 has a limitation, an administrative limitation on the recommendations that the officer can make...he does not actually apply a law.

He only makes a recommendation.

The power and authority of the Senate Commissioner under this act is set out in section 3 of the Dissolution and Annulment of Marriages Act. It reads as follows:

> The Senate shall adopt a resolution for the dissolution or annulment of a marriage only upon referring the petiton therefor to an officer of the Senate, designated by the Speaker of the Senate, who shall hear evidence, and report thereon, but such officer shall not recommend that a marriage be dissolved or annulled except on a ground on which a marriage could be dissolved or annulled, as the case may be, under the laws of England as they existed on the 15th day of July, 1870, or under the Marriage and Divorce Act, Chapter 176 of the Revised Statutes of Canada, 1952.

I pointed out that our Commissioner has no power except as he finds it in these rules and as set out in the act. He can recommend to the Senate only, but the Senate has no obligation to accept his recommendations. And if the Sen-

ate does dissolve a marriage, it does so in a legislative capacity and by legislative means, not by a decree of a court. If the Senate dissolves a marriage it is the Senate's act and it is not that of a Commissioner. In consequence, I would say to my friend who raised this difficult question that there is absolutely no question whatsoever that the bill as it is now drawn does not extend to the Commisisoner or add to his powers.

Now let me attack the question that the honourable senator has just raised: Is the Senate a court in that case? Of course it is not. The bill said, in any court having jurisdiction to grant divorces *a vinculo matrimonii*. Certainly, our Commissioner has no such power. It is true that we may, by passing a resolution, conform in procedure to an act of our own, but it is a legislative act. Of course Parliament has the power to do anything, and so any act of ours will not add to Parliament's jurisdiction. That fact is immaterial at the moment to the question before us.

Honourable senators, if after what I have said with regard to our status as a legislative body rather than a judicial one, if after what the Deputy Minister of Justice, Mr. Driedger, has said, and if after what has been found by the Court of Appeal in Pichette and others, anyone still thinks that we are a court, or that the Senate is a court, or that the Commissioner is a court so that he is included in this phrase, I would be quite willing to add certain words when we get to committee. I think it totally unnecessary, but if it laid the question so that there was no further argument about it, I would be willing to add such words as these:

> Nothing in the Act shall affect or be deemed to affect the operation of the Dissolution and Annulment of Marriage Act or to extend the grounds on which the Officer of the Senate designated thereunder may recommend to the Senate resolutions for the dissolution or annulment of marriage.

I say that is quite unnecessary, but if there is anyone who still thinks there is any confusion in this phrase, "a court having jurisdiction" and so on, I would suggest that the committee add this phraseology to the bill.

Honourable senators, I am sorry it has taken so long, but I felt it necessary to put on record what the facts are with regard to our status, whether we are a court or a legislative body or what we are, because I know there is a great deal of confusion, and when the question was raised I was not ready with my answer.

Senators Grosart, Baird and Hollett would like the Senate to be included in this bill, and if my friend was right in his question I suppose it would be. I would also like to see these provinces included, and I would like to see the Senate Commissioner included in the wider powers to be found in this bill, but not until the province of Quebec or its authorities, or the Province of Newfoundland, so intimate to us. If they will do that, I will be very glad to see the bill amended accordingly.

Senator Haig says that one consequence of the bill would be an increase in the number of divorces. I have one comment in that regard. There would, of course, be an increase in the first year or so, because there are those who are waiting for such an opportunity to settle their domestic affairs.

But, let me point out that many of those who would be included in this bill have in the past found means of complying with our restrictive procedures, so that there is not such a large backlog as one might otherwise imagine. There will be an increase, but let us be as realistic in this as we are in other things. It will not be overwhelming.

There is only one thing more I need say. I am sure my fellow senators would like some intimation as to why we are not making better progress. Before we adjourned at the beginning of the Easter recess I did my best to arrange a meeting of the joint committee. Both houses had agreed to it, each one having appointed its members, but I was unable to arrange a meeting because I was told a quorum could not be obtained in the Commons. Immediately we returned I tried to activate the matter, and the chief of our committees branch saw the chief of the committees branch of the other place and asked for immediate action. I was told that he went through the roof, and said that there were so many committees over there that they could not handle them, and they were not going to try to handle any more because they had neither the staff nor the reporters, and that it was impossible to obtain members for another committee.

I sent our Chief clerk of Committees back to tell them that if a meeting was held for just one half an hour, or even ten minutes, we could appoint the chairmen and a steering committee, and we could then go to work organizing the basic task of the committee, so that it would be ready for the time when the Commons would be in a position to carry on this work. I received word shortly after from the co-ordinator of the Commons committees that even that would not be done. I went then to the highest authority and engaged his co-operation in the matter, but still nothing is done. I am hopeful, however, that as soon as one or other of the committees of the Commons has completed its work, which should be quite soon, we may then be able to proceed with the sittings of this committee. I want all honourable senators to know that any delay in connection with the bringing together of this committee is not due to the fault of the Senate or any member of it.

Honourable senators, I thank you for your patience in listening to me. My remarks have been longer than I intended, but I think they were necessary.

Hon. WALTER M. ASELTINE: Honourable senators, I did not know that this motion was going to be put today. I did not know either that my honourable colleague, Senator Roebuck, was going to give us this learned argument, but I want to congratulate him on the manner in which he has done so.

My sole object in rising is to say that I am entirely in favour of the motion. It would be a mistake if the Senate were to divide on this issue at this stage before this bill and others have been considered carefully by the special joint committee.

I was interested in the criticism, if I may call it that, of the bill which Senator McMeans and I introduced in 1938, a duplicate of which I introduced in 1955. I am not going to argue with the honourable senator on all the points he has raised. His remarks indicate that he is convinced that a number of the twelve points I raised in my speech are covered in his bill.

I am only going to say that when we drafted the bill in 1938 we copied it almost entirely from the English act that had been passed in 1937. When we inserted those grounds—if you may call them that—in the 1938 bill, which actually passed this chamber but which was not given second reading in the other place, we were merely following what had taken place in England. It was our opinion that if those things were already in the law as it stood in 1870, the English Parliament would not be passing the bill that it did pass in 1937. That is the reason why I included those twelve points in the bill I presented to this house in 1955.

I think nothing more should be said about these matters at this time. We should leave them to the special joint committee which will be able to obtain expert legal opinions on them. When a measure is brought in, if the committee so decides, I believe the bill will be satisfactory both to Senator Roebuck and to myself.

The Hon. The ACTING SPEAKER: Honourable senators, it is moved by honourable Senator Roebuck, seconded by honourable Senator Croll, that Bill S-19, intituled: "An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief", be read the second time.

In amendment it is moved by honourable Senator Connolly, seconded by honourable Senator Hugessen, that the bill be not now read the second time, but that the subject-matter thereof be referred to the Special Joint Committee on Divorce.

Is it your pleasure, honourable senators, to adopt the motion in amendment?

Hon. Mr. ROEBUCK: So far as the debate on the motion is concerned, I wish to adjourn it. This bill still remains. What we are considering now, as I understand it, is the adoption of the amendment to refer the subject-matter of this bill to the special joint committee. I am in agreement with that. What are we going to do with the bill?

Hon. Mr. HAYDEN: It just stands.

Hon. Mr. ROEBUCK: It is before us. I want the bill to stand, and I move that it be adjourned.

Hon. Mr. CHOQUETTE: In other words, the soul departs and the body remains?

Hon. Mr. ROEBUCK: Yes, that is it.

The Hon. The ACTING SPEAKER: As I understand it, the amendment was moved by honourable Senator Connolly, and Senator Roebuck was speaking on the amendment.

Hon. Mr. ROEBUCK: That is right.

The Hon. The ACTING SPEAKER: I am now reading the amendment I have before me. Does any honourable senator object to it?

Hon. Mr. CONNOLLY (*Ottawa West*): I think Senator Roebuck is concerned about whether this bill will appear on our Order Paper again after the committee has reported.

Hon. Mr. ROEBUCK: That is all I am asking.

The Hon. The ACTING SPEAKER: Is it your pleasure, honourable senators to adopt the motion in amendment?

Hon. SENATORS: Agreed.

Motion agreed to.

APPENDIX "72"

First Session, Twenty-Seventh Parliament, 14-15 Elizabeth II, 1966.

The Senate of Canada

Bill S-19

An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief.

Read a first time, Thursday, 24th February, 1966.

Honourable Senator ROEBUCK.

1st Session, 27th Parliament, 14-15 Elizabeth II, 1966.

The Senate of Canada

Bill S-19

An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief.

Short title

1. This Act may be cited as the *Divorce (Extension of Grounds) Act, 1966.*

Additional grounds for divorce

2. (1) In any court having jurisdiction to grant divorce *a vinculo matrimonii* any husband or wife may commence an action praying that the marriage may be dissolved, on the following grounds in addition to any ground upon which the marriage may now be dissolved, namely, that the respondent

"Desertion"

(a) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition;

"*Cruelty*"

(b) has since the celebration of the marriage treated the petitioner with cruelty; or

"Unsoundness of mind"

(c) is intractably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition.

(2) For the purposes of this section a person of unsound mind shall be deemed to be under care and treatment only while he is

(a) detained in pursuance of an order or inquisition completely made or had under authority of a statute in force in the province concerned or as a criminal lunatic; or

(b) receiving treatment as a voluntary patient pursuant to any statute in force in the province concerned, being treatment which follows without any interval a period of such detention as aforesaid.

Duty of court

3. If the court is satisfied by the evidence that the case of the petitioner has been proved on any of the grounds added by section 1, and, where the ground of the petition is cruelty, the petitioner has not in any manner condoned the cruelty, and that the petition is not presented or prosecuted in collusion with the

respondent, the court shall pronounce a decree of divorce, but if the court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition:

Proviso

Provided that the court shall not be bound to pronounce a decree of divorce and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery, or if, in the opinion of the court, the petitioner has been guilty

(a) of unreasonable delay in presenting or prosecuting the petition; or

(b) of cruelty towards the other party to the marriage; or

(c) where the ground of the petition is cruelty, of having without reasonable excuse deserted, or having without reasonable excuse willfully separated himself or herself from, the other party before the cruelty complained of; or

(d) where the ground of the petition is unsoundness of mind or desertion, of such wilful neglect or misconduct as has conduced to the unsoundness of mind or desertion.

Rules of court

4. The court may make such rules of court as it may deem desirable or expedient for the exercise and application of the jurisdiction conferred by this Act.

Coming into force

5. This Act shall come into force on a day or days to be fixed by proclamation of the Governor in Council.

EXPLANATORY NOTES

The purpose of the present bill is to add to the existing grounds on which a Canadian court now possessing jurisdiction to grant divorces *a vinculo matrimonii*, the further grounds upon which the High Court in England, pursuant to the *Matrimonial Causes Act, 1950,* may now grant divorces. No change is made in the jurisdiction of the courts of Quebec or Newfoundland, nor is the jurisdiction of Parliament or the application of the *Dissolution and Annulment of Marriages Act* (chapter 10 of the statutes of 1963) in any way affected. Moreover, the *existing* jurisdiction of the courts in the provinces and territories other than Quebec and Newfoundland is not affected: additional jurisdiction is however conferred in that new grounds are added to the grounds upon which such courts may now grant divorces.

Clause 2: Adds desertion for three years, cruelty and intractable insanity to the existing grounds for divorce.

Clause 3: Deals with the responsibility of the court in considering petitions for divorce on any of the added grounds.

Clause 4: Authorizes the making of the requisite rules of court.

Clause 5: Provides for the coming into force of the Act on a day or days to be fixed by proclamation.

APPENDIX "73"

C-133.

First Session, Twenty-Seventh Parliament, 14-15 Elizabeth II, 1966

The House of Commons of Canada

Bill C-133

An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief.

First reading, February 25, 1966.

Mr. McCLEAVE.

1st Session, 27th Parliament, 14-15 Elizabeth II, 1966.

The House of Commons of Canada

Bill C-133

An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief.

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Short title

1. This Act may be cited as the *Divorce (Extension of Grounds) Act, 1966.*

Additional grounds for divorce

2. (1) in any court having jurisdiction to grant divorce *a vinculo matrimonii* any husband or wife may commence an action praying that the marriage may be dissolved, on the following grounds in addition to any ground upon which the marriage may now be dissolved, namely, that the respondent

"Desertion"

(a) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition;

"Cruelty"

(b) has since the celebration of the marriage treated the petitioner with cruelty; or

"Unsoundness of mind"

(c) is intractably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition.

(2) For the purposes of this section a person of unsound mind shall be deemed to be under care and treatment only while he is

(a) detained in pursuance of an order or inquisition completely made or had under authority of a statute in force in the province concerned or as a criminal lunatic; or

(b) receiving treatment as a voluntary patient pursuant to any statute in force in the province concerned, being treatment which follows without any interval a period of such detention as aforesaid.

Duty of court

3. If the court is satisfied by the evidence that the case of the petitioner has been proved on any of the grounds added by section 1, and, where the ground of the petition is cruelty, the petitioner has not in any manner condoned the cruelty, and that the petition is not presented or prosecuted in collusion with the respondent, the court shall pronounce a decree of divorce, but if the court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition:

Proviso

Provided that the court shall not be bound to pronounce a decree of divorce and may dismiss the petition it if finds that the petitioner has during the marriage been guilty of adultery, or if, in the opinion of the court, the petitioner has been guilty

(a) of unreasonable delay in presenting or prosecuting the petition; or

(b) of cruelty towards the other party to the marriage; or

(c) where the ground of the petition is cruelty, of having without reasonable excuse deserted, or having without reasonable excuse wilfully separated himself or herself from, the other party before the cruelty complained of; or

(d) where the ground of the petition is unsoundness of mind or desertion, of such wilful neglect or misconduct as has conduced to the unsoundness of mind or desertion.

Rules of court

4. The court may make such rules of court as it may deem desirable or expedient for the exercise and application of the jurisdiction conferred by this Act.

Coming into force

5. This Act shall come into force on a day or days to be fixed by proclamation of the Governor in Council.

EXPLANATORY NOTES

The purpose of the present bill is to add to the existing grounds on which a Canadian court now possessing jurisdiction to grand divorces *a vinculo matrimonii*, the further grounds upon which the High Court in England, pursuant to the *Matrimonial Causes Act, 1950*, may now grant divorces. No change is made in the jurisdiction of the courts of Quebec or Newfoundland, nor is the jurisdiction of Parliament or the application of the *Dissolution and Annulment of Marriages Act* (chapter 10 of the statutes of 1963) in any way affected. Moreover, the *existing* jurisdiction of the courts in the provinces and territories other than Quebec and Newfoundland is not affected: additional jurisdiction is however conferred in that new grounds are added to the grounds upon which such courts may now grant divorces.

Clause 2: Adds desertion for three years, cruelty and intractable insanity to the existing grounds for divorce.

Clause 3: Deals with the responsibility of the court in considering petitions for divorce on any of the added grounds.

Clause 4: Authorizes the making of the requisite rules of court.

Clause 5: Provides for the coming into force of the Act on a day or days to be fixed by proclamation.

APPENDIX "74"

BRIEF to the Special Joint Committee of the Senate and House of Commons on Divorce, submitted by the Canadian Association of Social Workers, 185 Somerset Street West, Ottawa 4, Ontario.

Summary of Conclusions and Recommendations

1. Canada's divorce laws require immediate reform to meet the present day needs of individuals and families.

2. Enlightened divorce legislation could do much to promote the dignity of individuals and families, whereas the present divorce laws frequently and unnecessarily humiliate and degrade one or all parties involved.

3. Conflicts within marriage which cannot be resolved should not mean a lifetime of unhappiness, stress, strain and deprivation for the husband, wife or children.

4. Present legislation is costly and complicated and the procedures encourage deception, dishonesty, extramarital relationships, common law marriages and perjury.

5. The children are the real losers when a divorce is granted without proper counselling and appropriate planning for all persons involved; and they may be the losers if a divorce is not granted when the marriage has deteriorated beyond repair.

6. Grounds for divorce should be broadened to include breakdown of marriage and insanity as well as offences such as cruelty and willful desertion.

7. No divorce decree should be granted until the court is completely satisfied that suitable arrangements have been made for the care and upbringing of dependent children.

8. No divorce decree should be granted until there has been careful and skillful counselling to determine whether or not the marriage can be saved, or if it should be saved.

9. The divorce laws should be amended as quickly as possible so that wise changes in legislation will allow dignified legal relief for those who wish to use it to fulfil their needs and those of their children, but at the same time, will not offend those who do not consider divorce an acceptable solution to a dysfunctioning marriage.

Introduction

10. The Canadian Association of Social Workers is a national organization of professional social workers with a membership in excess of 3,000. It has members working in the social welfare field in all provinces and territories of Canada. Members of this Association occupy professional positions in a variety of organizations and agencies, both Government and voluntary.

11. Strengthening personal and family life has always been a primary objective of the Canadian Association of Social Workers. It has always supported those measures which advance physical, social and emotional security for Canadian citizens and which reflect genuine respect for the dignity and worth of each individual.

12. Members of the Canadian Association of Social Workers have a long history of service to families when and where there are marital or parent-child conflicts. The Canadian Association of Social Workers has been in the vanguard in support of social legislation and community services that are designed to bring about a better ordering of our basic social institutions and which offer opportunities for every member of society to contribute to the utmost of his capacity.

Social workers in all sections of Canada are actively promoting programs of family life education and marriage counselling which will help to develop responsible attitudes to marriage, to parenthood and to family relationships.

The Basis for the Canadian Association of Social Workers' Views on Divorce

The Association welcomes the opportunity to present the following views on divorce legislation which are based on many years of work with individuals and families in Canada.

13. Divorce cannot be discussed without considering the most important institution known to our society, the family. It is through the family that the growth of children is fostered and the accumulated culture passed on to new generations. The well-being and health of the family in our society is essential for the continuance of the health of our country in generations to come. It is therefore of the utmost importance that social legislation always be in tune with the current needs of the family.

14. Divorce laws should be changed to immediately wipe out the concept of a guilty party and place the emphasis on planning in the best interests of the family and all of its members.

15. Divorce legislation, in itself, cannot provide the answer to the problem of marriage break-down. It is essential that, along with the legislation, there be an expansion and strengthening of counselling services which will assist couples to work through marital difficulties and prevent the breakup of marriage where this is possible.

16. Marriage counsellors, working in conjunction with the divorce courts, are needed in order to help determine whether or not the marriage can be saved or should be saved. Therefore, they must have the very best qualifications and have already demonstrated their skill in marriage and family counselling.

17. Every effort must be made to protect the children affected by divorce. Planning for proper physical care of the children is not enough. Marriage break-down presents special emotional difficulties for the children involved. Frequently children are torn in their feelings of loyalty and love towards one or both parents when a divorce is granted. Wise legislation, combined with skillful counselling, would help children retain respect for both parents, should divorce be granted, and keep the sense of deprivation to a minimum.

18. Enlightened divorce legislation, bringing it in line with present day needs and values, would serve to strengthen family life, not undermine it. Divorce does not break up a marriage—it merely confirms in law what has, in fact, already happened.

19. Changes in our divorce legislation should provide relief with dignity for innocent persons, including the dependent children who, under our present legislation, are often in distress for reasons of antiquated laws.

March 9, 1967.

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March 9, 1967.

First Session—Twenty-seventh Parliament
1966-67

PROCEEDINGS OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON

DIVORCE

No. 22

TUESDAY, MARCH 14, 1967

Joint Chairmen
The Honourable A. W. Roebuck, Q.C.
and
A. J. P. Cameron, Q.C., M.P.

WITNESS:
Professor Julien D. Payne, Faculty of Law,
University of Western Ontario.

APPENDICES:
No. 75.—The Very Reverend Dr. Pierre Popesco (*Orthodox Church*).
No. 76.—The Ontario Welfare Council.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1967

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First Session—Twenty-seventh Parliament
1966-67

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DIVORCE

No. 22

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University of Western Ontario.

APPENDICES:

No. 75.—The Very Reverend Dr. Pierre Popesco (*Orthodox Church*).

No. 76.—The Ontario Welfare Council.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1967

26053—1

MEMBERS OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

FOR THE SENATE

Hon. A. W. Roebuck, Q.C., Joint Chairman

The Honourable Senators

Aseltine	Connolly (*Halifax North*)	Flynn
Baird	Croll	Gershaw
Belisle	Denis	Haig
Burchill	Fergusson	Roebuck—(12)

FOR THE HOUSE OF COMMONS

A. J. P. Cameron, Q.C., *(High Park)*, Joint Chairman

Members of the House of Commons

Aiken	Forest	McQuaid
Baldwin	Goyer	Otto
Brewin	Honey	Peters
Cameron *(High Park)*	Laflamme	Ryan
Cantin	Langlois (*Mégantic*)	Stanbury
Choquette	MacEwan	Trudeau
Chrétien	Mandziuk	Wahn
Fairweather	McCleave	Woolliams—(24)

(Quorum 7)

ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the House of Commons:
March 15, 1966:

"On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—that a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee."

"By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring to subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-18, an Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).
be discharged, and that the subject-matter of the same bills be referred to the Joint Committee of the Senate and House of Commons on Divorce".
March 16, 1966:

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce".

"By unanimous consent, on motion of Mr. Stewart seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce."

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with

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them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Goyer, Honey, Laflamme, Langlois (*Mégantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams."

LÉON-J. RAYMOND,
Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate and House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

March 29, 1966:

"With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, namely, the Honourable Senators Aseltine, Baird, Belisle, Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig and Roebuck; and

That a Message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—
Resolved in the affirmative."

May 10, 1966:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19 intituled: "An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief".

The question being put on the motion—

In amendment, the Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative."

J. F. MACNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

TUESDAY, March 14, 1967.

Pursuant to adjournment and notice, the Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3:30 p.m.

Present: For the Senate: The Honourable Senators Roebuck (*Joint Chairman*), Aseltine, Baird, Belisle, Burchill and Gershaw—6.

For the House of Commons: Messrs. Cameron (*High Park*) (*Joint Chairman*), Aiken, Forest, Honey, MacEwan, McCleave and Peters—7.

In attendance: Peter J. King, Ph. D., Special Assistant.

Professor Julien D. Payne of the Faculty of Law, University of Western Ontario resumed explanation of his brief.

(*See Proceedings No. 17 dated February 21, 1967*

for Professor Payne's earlier testimony and

Appendix No. 46 of the same issue for his brief)

Briefs submitted by the following are printed as Appendices:

No. 75.—The Very Reverend Dr. Pierre Popesco, (*Orthodox Church*).

No. 76.—The Ontario Welfare Council.

At 5:40 p.m. the Committee adjourned to the call of the Joint Chairmen.

Attest.

Patrick J. Savoie,
Clerk of the Committee.

THE SENATE

SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

EVIDENCE

OTTAWA, Tuesday, March 14, 1967.

The Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3.30 p.m.

Senator ARTHUR A. ROEBUCK and Mr. A. J. P. CAMERON (*High Park*), Co-Chairmen.

Co-Chairman Mr. CAMERON: Gentlemen, we have a quorum. We have as our witness today Professor Julien D. Payne from the Faculty of Law at the University of Western Ontario. Professor Payne gave us a great deal of valuable information the last time he was before the committee. We are now going to deal, I understand, Professor Payne, more or less with the second part of the brief which you had submitted to the committee. Without further ado I will ask you to carry on.

Professor Julien D. Payne, Faculty of Law, University of Western Ontario: Before continuing on with the brief, I would like to draw the attention of the members of the committee to section 30 of the Matrimonial Causes Act, (Australia) 1959. This section deals with desertion as a ground for divorce.

Incidentally, you will not find what I am saying in my brief, I am afraid. It is an addition I made since I first appeared before the committee. I should like to have it included as an addendum to page 35 of the brief, where I discuss desertion as a ground for divorce.

Now, section 30 of the Matrimonial Causes Act, (Australia), 1959, permits desertion to begin, notwithstanding the existence of a separation agreement between the parties, if one of the parties has made a bona fide request to resume cohabitation which is refused by the other party without reasonable justification, which justification may be based on conduct before or after the execution of the separation agreement.

You may well ask why I refer to this section at this juncture. The position in Canada today is as follows: desertion does not constitute a ground for divorce, and where marriages have broken down it is not uncommon for solicitors to advise their clients to enter into separation agreements. If desertion were introduced as a ground for divorce in Canada, such a separation agreement might well preclude a finding of desertion, even though it was entered into at a time when desertion was not existing as a ground for divorce.

That is to say there might well be parties today who would be denied a remedy, if desertion were introduced as a ground for divorce and no provision were introduced corresponding to section 30 of the Australian Act to which I have referred.

As I indicated last time I appeared before you, if any questions do arise, I think it might be simpler for the questions to be posed during the course of my presentation rather than at the end of the presentation.

I would next refer to page 44 of the brief. The heading is Restrictions on Petitions for Divorce within Three Years of Marriage. In 1937, with the introduction of extended grounds for divorce in England under the Matrimonial Causes Act, (England), 1937, a

provision was introduced under this act, whereby the presentation of a petition for divorce during the first three years of marriage is precluded. Certain qualifications are admitted to this restriction. To avoid injustice resulting from an arbitrary application of the restriction, the court is authorized by the statute to grant leave to a petitioner to present a petition for divorce within three years of marriage where the nature of the case is such as to indicate that exceptional hardship would otherwise be suffered by the petitioner or exceptional depravity exists on the part of the respondent.

This restriction was the subject of criticism in the evidence presented to the Royal Commission on Marriage and Divorce, and it is my submission that the denial of a right to proceed for divorce during the first three years of marriage can be justified only if it affords a real opportunity to the spouses to establish or to re-establish their marriage on a firm foundation.

Withholding matrimonial relief during the first three years of marriage will not itself lead to stability of marriage, and accordingly I would recommend that if such a restriction on petitions during the first three years of marriage is introduced in Canada, then this restriction should be re-enforced by the State's assumption of a more positive role in promotiong marriage guidance and matrimonial conciliation. I think it is important that we do not merely introduce a prohibition against matrimonial relief. If a restriction is introduced, it is essential that it be supplemented by positive steps taken by the State to aid parties in the resolution of their marital difficulties.

Co-Chairman Senator ROEBUCK: If you cannot establish the one, then it is not necessary to go into the other.

Professor PAYNE: That would be my inclination.

Senator BURCHILL: Surely three years is a short enough period.

Professor PAYNE: I think it depends on the relationship. It may be excessive in some situations. If you merely have a prohibition and do nothing else to help the parties you may be aggravating their difficulties. Witnesses presented evidence to the Royal Commission on Marriage and Divorce and expressed the opinion that this restriction proved less than effective as a means of promoting stability of marriage in the absence of supporting counselling services.

Co-Chairman Mr. CAMERON: Have you any observations to make as to what may have happened in the United Kingdom during this period of 29 years when this restriction was in force?

Professor PAYNE: The Royal Commission, when they examined this restriction, recommended its retention in future English legislation. This recommendation has been respected by the English Parliament. On the other hand, the case for retention is open to question in the light of testimony submitted by persons experienced in marriage counselling and other disciplines. It is for this reason that I emphasize the need for supporting counselling services.

Co-Chairman Senator ROEBUCK: As the English provision now exists, what would be the situation if a girl married a husband and found he was not of unsound mind but very abnormal in many ways, or supposing he continued to live with another person at the same time so that he was guilty of adultery or guilty of any of the other offences such as cruelty? She could do nothing for three years?

Professor PAYNE: There may be a situation where a particular fact pattern could establish a case of exceptional hardship or exceptional depravity. The difficulty is that not much guidance can be obtained as to the way in which a court will exercise its discretion by ordering the petition to proceed. Here I think is the real difficulty which was adverted to in the testimony submitted to the Royal Commission.

Co-Chairman Senator ROEBUCK: But why exceptional hardship or exceptional depravity? Would not hardship or depravity be enough?

Professor PAYNE: Not under the English statute.

Co-Chairman Senator ROEBUCK: But if we were considering it would it not be enough? I am not impressed by the desirability at the moment, but would not hardship or depravity be sufficient if we were to consider it?

Professor PAYNE: That would make it rather difficult for the court to refuse the right to petition during the first three years of marriage. The court might well, if a case of adultery has been made out, consider that the adultery in itself constitutes depraved conduct, or in a case of cruelty, the offence itself might be regarded as leading to hardship. But the English courts have stated that cruelty or adultery *simpliciter* will not constitute a reason for allowing the petition to proceed. I think it might be necessary to apply the formula that is adopted in the English law if you were in favour of any restriction. Otherwise it would be difficult to differentiate between the cases that should be permitted to proceed and those which should be denied a right to proceed for three years.

Co-Chairman Senator ROEBUCK: I hesitate to close the doors of the court unless a very good case is made out for doing so.

Co-Chairman Mr. CAMERON: It would be a case of justice denied.

Co-Chairman Senator ROEBUCK: Justice deferred is justice denied.

Professor PAYNE: This again is an opinion shared by witnesses appearing before the Royal Commission. I advert to that in my brief at paragraph (109):

> "... It was suggested that the restriction ignores the fundamental precept that where there has been a wrong, the law should not withhold a remedy. It was also suggested that the restriction does nothing to encourage spouses to attempt a reconciliation and does not deter them from taking divorce proceedings; where a matrimonial offence is committed by one spouse during the three year period; the other spouse merely waits for the period to elapse before instituting proceedings. The enforced waiting period may also drive both spouses into illicit unions. Moreover, in those cases where leave is given to present a petition within the prescribed period, the cost of obtaining the divorce is greatly increased by the extra proceedings required."

If I may now direct your attention to heading 3 on page 45—Protection of Children in Matrimonial Proceedings—it is my submission that in pursuit of a decree of divorce or annulment parents may and frequently do subordinate the interests of the children to their personal interests and a judge may not be sufficiently informed of all the material facts to avoid any resulting hardship to the children. I accordingly draw to the attention of this committee the legislation enacted in section 33 of the Matrimonial Causes Act, (England), 1965, which is set out in paragraph 113 of my brief. I think it might well be argued that this legislation should constitute a model for Canadian legislation, and perhaps it would be helpful if I read the particular section.

Section 33 of the Matrimonial Causes Act, (England), 1965 reads as follows:

> "(1) Notwithstanding anything in Part I of the Act but subject to the following subsection, the court shall not make absolute a decree of divorce or nullity of marriage in any proceedings begun after 31st December 1958, or make a decree of judicial separation in any such proceedings, unless it is satisfied as respects every relevant child who is under sixteen that—
>
> (a) arrangements for his care and upbringing have been made and are satisfactory or are the best that can be devised in the circumstances; or
>
> (b) it is impracticable for the party or parties appearing before the court to make any such arrangements.

If you look at subsection (2) of the same section you will see that a general power is given to the court to proceed without observing the requirements of subsection (1) if the court is of the opinion the circumstances make it desirable that a decree should be made absolute without delay and the court has obtained a satisfactory undertaking from either one or both of the parties to bring the question of the arrangements for the children before the court within a specified time.

Senator ASELTINE: Has the Dominion Parliament jurisdiction?

Professor PAYNE: I think the Dominion Parliament does have jurisdiction to enact legislation of this kind. I think it can be regarded as incidental to the right of Parliament to legislate in the field of marriage and divorce. What we are doing here is introducing legislation which limits the right to divorce.

Co-Chairman Senator ROEBUCK: This only says a divorce shall not be given unless these conditions have been fulfilled. That is within our powers.

Senator ASELTINE: I do not think so. I made a note in the margin when I was reading the brief to bring that point up.

Professor PAYNE: It is my opinion that it would be constitutional.

Senator ASELTINE: I think you are correct in stating that is one of the conditions.

Co-Chairman Senator ROEBUCK: Yes.

Professor PAYNE: I might perhaps have mentioned that in applying this section the English courts have held that if a decree is granted inadvertently because the court has not been made aware of the existence of children, then such decree shall be null and void. I think this sanction is rather important.

Co-Chairman Senator ROEBUCK: But rather dangerous.

Professor PAYNE: I think it is essential to have this sanction if one is to give effect to section 33 and the underlying philosophy of the section.

I would further suggest that consideration be given to the possibility of empowering the court to order a follow-up inquiry—that is to say, an inquiry in respect of the children following issue of the decree absolute, the court having been satisfied at the time of the decree so far as the arrangement for the children are concerned.

In this connection I would draw to the attention of the committee opinions which have been expressed by Dr. Olive M. Stone, Reader in Law at the University of London in England, who in an article to be published in Volume 6, *Western Law Review,* page 53, said this—and she was speaking of section 33 of the English act—

Co-Chairman Senator ROEBUCK: Is that in your brief?

Professor PAYNE: No, it is not in the brief. I was only made aware of the article some three or four days ago, so I am adding to the brief in this particular context.

Commenting on section 33, Dr. Stone said:

> Unfortunately, however, these provisions do not seem to have fulfilled the expectations of those who enacted them. In its recent report on Reform of the Grounds of Divorce, The Field of Choice, the Law Commission states that the provisions have been widely criticized as inadequate, both in their scope and in the way that they are working in practice, and that the Commission proposes as soon as possible to institute an investigation into this. Uneasiness appears to exist particularly in regard to two aspects of the provisions. In the first place, there seems to be some evidence that the divorce judges rarely probe deeply into the arrangements proposed by the parties for the children, and if these arrangements seem prima facie reasonable they are usually approved. The Law Commission points out that, even in respect of the alleged facts on which the petition is based, "In ten minutes, the average time of a hearing in an undefended case, the Judge obviously cannot carry out a thorough inquisition." This

would seem to apply a fortiori to the arrangements for the children. Secondly, there is no adequate follow-up machinery to ensure that the arrangements approved for the children work satisfactorily, or even that they are adhered to. The Report of a Group appointed by the Archbishop of Canterbury, published in July 1966 recommended that the court should have a duty always to notify the children's department of the appropriate local authority of custody arrangements for children after divorce.

Neither the Archbishop's Group nor the Law Commission is satisfied of the practicability or desirability of attempting to differentiate radically between marriages with children and those without. The Law Commission favours more detailed pleadings and regards the possibility of the intervention of counsel to represent the interests of the public or the children as feasible.

I draw this opinion to the attention of the committee because I think it does point out that if legislation is adopted in Canada on the model set out in section 33, then it might be desirable to include therein specific provision for follow-up inquiries and for a guardian *ad litem* to be appointed to represent the children in the matrimonial proceedings.

Co-Chairman Senator ROEBUCK: Is there not a fundamental difference between the situation in England and the situation here? Here, when we grant a divorce, we do not alter the obligation of the parents towards their children and the care of the children. The jurisdiction over the children under the Children's Act, for instance, for the Province of Ontario is all in Ontario. Long after the divorce has been issued, the jurisdiction over the children is in the province and not in our jurisdiction.

Professor PAYNE: I concede this could be a real problem, and one might consider that a change in the constitution would be required to authorize a follow-up inquiry. Furthermore, the sanction attaching to section 33, namely, the unavailability of a decree, is clearly inappropriate in cases where the parents, subsequent to the decree, fail to live up to their undertakings in respect of the children. I appreciate that this is a problem, and perhaps you cannot take it further.

On the other hand, I think the appointment of a guardian *ad litem* would be constitutionally feasible, although I suspect it would be more likely for such an appointment to be authorized by rules of court rather than by a general divorce statute.

It may be that you cannot travel too much beyond the present terms of section 33. Even if you favour that section it seems that it is not a panacea for all ills, although I do think it is a step in the right direction. The direction we are seeking is a direction which will promote the best interests of the child in a situation where the marriage has broken down, and a divorce should ensue.

Co-Chairman Senator ROEBUCK: We could have an official of the Department of Justice made the guardian *ad litem* whenever the court thought fit.

Professor PAYNE: That might be a solution.

Co-Chairman Senator ROEBUCK: I was thinking of our own parliamentary divorce. I do not know what that would mean in Halifax or Vancouver.

Co-Chairman Mr. CAMERON: When the Hon. Mr. McRuer was before the committee he suggested that jurisdiction in divorce could be given to county court judges with great advantage. I think that one of the advantages that was in his mind was that the county court judge who lives in the county where the children and the family are residing could from that very fact alone have some knowledge of what was going on. He might be appealed to with respect to seeing that any arrangements that had been made were being carried out.

Professor PAYNE: I would doubt whether the county court judge would be aware of the circumstances of a particular family. On the other hand, I think there are good

reasons for introducing jurisdiction over divorce into the county courts if—and this is by way of alternative—it is not feasible to establish specialized family courts. My own preference would be the establishment on a regional basis throughout Canada of special family courts to assume jurisdiction in matrimonial causes. If this cannot be done then certainly I would favour conferring such jurisdiction upon the county courts. I think that that is quite feasible under the Canadian Constitution. Perhaps I can refer to that later in the brief.

Mr. AIKEN: May I ask a supplementary question, Mr. Chairman?

Co-Chairman Mr. CAMERON: Yes.

Mr. AIKEN: Did I understand you to say, Professor Payne, that you would give the family courts direct jurisdiction—

Professor PAYNE: I did not say I would give to the family courts—

Mr. AIKEN: No, but to a type of family court.

Professor PAYNE: Yes, there would be a special type of family court. You could not give the present family courts that jurisdiction.

Mr. AIKEN: Did I understand you to mean that these courts would actually grant the decree?

Professor PAYNE: Yes, that is right. They would have the jurisdiction to decree divorce in appropriate circumstances.

Mr. AIKEN: Have you thought about the possibility of giving jurisdiction to refer ancillary matters to the existing family courts?

Professor PAYNE: I think you will have difficulties if you introduce a reference system, not the least of which would be the problem of delay. However, I think it is certainly a possibility that should be examined. I do not think it is an ideal solution. I doubt, on the other hand, whether an ideal solution is going to be attained having regard to the present division of jurisdiction between the federal Parliament and the provincial legislatures.

Co-Chairman Senator ROEBUCK: You see, our problem here is that we have no family courts except in certain cities. In some provinces there are almost no such arrangements at all. Nor do we have at hand a staff of trained people who can conduct such courts even if they were established. The development of the family courts is a matter of time. I think that they will develop in the course of time, but they are not ready yet to take the place of the county courts, which are to be found in every county of every province.

Professor PAYNE: I think extra judicial appointments will be necessary in any event. It is largely a question of whether you want to locate more judges in the Supreme Court of the County Court on in a specialized family court. I concede that there are problems in establishing special family courts. It may be possible to establish pilot projects for a concilation type of court, and introduce them into certain major centres. This is something to which I will refer later when I examine the general problems of marriage counselling and conciliation procedures.

I refer next in my brief to the subject of alimony and maintenance, and I point out that the present legal position obliges the husband to support his wife, and there is no reciprocal obligation imposed upon the wife. She is under no obligation to support her husband, regardless of the facts.

I refer to the judgment of Mr. Justice Hofstadter in the case of *Doyle* v. *Doyle*, and I draw this decision to your attention. It is referred to at pages 48 to 50 of my brief. I think I can leave it to you to read these comments rather than deal with them at the present time.

The point I would make would be that at the present time the courts tend to determine questions of alimony by reference to the issue of fault, and it is my

submission that the courts should never permit fault to be decisive in applications for alimony and maintenance. At the present time fault is decisive since, in order to obtain the right to alimony or maintenance the wife must establish a matrimonial offense. So, for example if a husband, albeit wealthy, succumbs to insanity, no right to alimony or maintenance will vest in the wife in that situation. Other illustrations can no doubt be given.

I think a strong case could be made for the revision of the present legal regime relating to alimony and maintenance, and I think such revision should require fault to be reduced as a factor in applications for alimony or maintenance.

I do not know whether you want me to dwell on this at the present time. I could mention that not only does fault constitute the only basis for an application for alimony or maintenance, but also under certain provincial statutes the fault of the petitioner, and particularly the commission of adultery by the wife, will bar her right to alimony or maintenance regardless of mitigating circumstances, unless her adultery was connived at, condoned or conduced to by the conduct of the husband.

I do not know whether you wish to present any questions to me on this issue.

Co-Chairman Senator ROEBUCK: It is important in this way, that if we decide to exercise our ancillary rights, they would be chiefly with regard to alimony, the custody of children, maintenance, and the division of property, so that that question as to the inadequacy of the original arrangements with regard to alimony is very important to us. I read your brief on this with a great deal of interest, and particularly the thought that alimony should not be based entirely on the fault of the husband, but that the interests of the public should be considered.

Co-Chairman Mr. CAMERON: Probably you could develop it a little bit further, professor.

Professor PAYNE: I was wondering how best to develop it other than by referring to my brief. I think the arguments which favour the view that fault should not constitute the decisive factor appear in my brief at paragraph 119, and in the judgment of Mr. Justice Hofstader in the case of *Doyle v. Doyle* which is reproduced in paragraph 120.

In the first of these two paragraphs I observe—and I think it is a fair observation—that any decision on the issue of fault tends to be somewhat arbitrary since there is usually a substantial conflict in the evidence introduced before the court, and it is difficult, if not impossible, to evaluate the degree of fault attributable to either spouse. Secondly, regardless of the conduct of the spouses, society has an economic interest in alimony and maintenance proceedings since, if the wife, because of her own misconduct, is barred from receiving alimony or maintenance, public assistance may become necessary, and the economic burden is thereby shifted from the husband to the taxpayer.

I would suggest that if revision of the law relating to alimony or maintenance is contemplated, then serious consideration be given to the observations of Mr. Justice Hofstader in *Doyle* v. *Doyle*.

Incidentally, in the second paragraph of page 48 of my brief, you will observe that the learned judge states that from a procedural standpoint there is a dire need for an integrated court properly staffed and equipped with social aids to handle family matters so that the court dealing with the family will be able to prescribe comprehensive and final relief rather than piecemeal and temporary palliatives.

I am sure that those of you who have practised at the bar will be familiar with problems arising in cases where jurisdiction is seised in two or more courts in a single province concerning the single family. An integrated court would have the advantage of terminating the possibility of a conflict of jurisdiction. It would also have material advantages in providing in one centre or court a staff which is equipped to handle the needs of the parties in terms of counselling, conciliation and advice as to legal remedy.

Mr. Justice Hofstader refers to other procedural requirements, which appear in my brief at page 49, such as the need for sworn financial statements, etc. He further observes that procedural changes are not sufficient in themselves, and suggests that three factors should be taken into consideration in applications for alimony or maintenance: First, the fault factor; second, financial capacity, and third, need.

He observes that alimony should not be a reward for virtue nor a punishment for guilt, and that the element of fault should be de-emphasized. He further states that misconduct of the petitioner should not be a bar to alimony, except in cases of gross culpability, such as infidelity or abandonment.

I am not prepared to concede that the infidelity of the petitioner should necessarily constitute a total bar to alimony or maintenance. It is recognized that where marriage breakdown occurs the fault often rests with both spouses, and it is therefore proper to reduce the significance of the fault factor not only in relation to defences or bars to the remedy but also in relation to the grounds upon proof of which alimony may be ordered.

Mr. Justice Hofstader says that a practical approach in awarding alimony would be to proceed on the basis of what he calls "net need" which would require an examination of the wife's actual financial need less her current assets and earnings potential in relation to her husband's capacity to pay.

It is obvious that on applications for alimony the court must have regard to the totality of the facts in the particular case. Only if this is done, can we avoid the problem of "alimony drones", as certain alimony recipients have been labelled in American jurisdictions.Mr. Justice Hofstader emphasized this. Alimony was devised to protect married women because they had no power of ownership or earning capacity. The position has changed radically. The status and the rights of married women have undergone fundamental changes in the past 70 or 80 years. Mr. Justice Hofstader observes that inflated alimony awards are frequently not only disastrous to the man but psychologically deleterious to the woman. With this I agree.

For these reasons, then, I would suggest that consideration be given to revision of the law of alimony and maintenance.

Co-Chairman Mr. CAMERON: You advocate a more equitable principle?

Professor PAYNE: A more equitable principle and a more realistic principle which would give to those in need and at the same time would not promote a state of indolence on the part of alimony recipients.

I should observe that in paragraph 21, I point out that under the present law there is inequality between the spouses since the husband is under an obligation to support his wife but no reciprocal obligation is imposed on the wife. I recommend that legislation should be introduced imposing upon the wife an obligation to support her husband and the children of their family in cases where the husband is not able to make such provision. Such legislation has already been introduced in England and also in certain jurisdictions of the United States.

Senator BAIRD: I suppose in a case, for instance, where the husband is disabled?

Professor PAYNE: This is the point I am making, yes. Although, I think one could make a case for introducing a total reciprocal obligation leaving it to the court to exercise its discretion in the light of the totality of the facts of the particular case.

Co-Chairman Senator ROEBUCK: You say the present law does not impose on the woman an obligation to support the children?

Professor PAYNE: In practice, subject to—

Co-Chairman Senator ROEBUCK: It is not so in the Criminal Code.

Professor PAYNE: But the code is not really of too much assistance in this context, because the Criminal Code does not empower a court to make a financial award. It may penalize a parent who is neglecting his family, but it does not—

Co-Chairman Senator ROEBUCK: Or her family.

Professor PAYNE: Yes. It does not authorize the court to make a maintenance award.

Co-Chairman Mr. CAMERON: Are there any more questions, before Professor Payne leaves this part of his brief?

Co-Chairman Senator ROEBUCK: This is something which should interest you, Dr. Gershaw, this problem of alimony and support, particularly of the children.

Professor PAYNE: I might add that limited power does vest in the court to vary marriage settlements; and in certain jurisdictions, and indeed under the Imperial Act of 1857, a power vests in the court to order a wife to make payments to the children in certain circumstances. I believe this is referred to in my footnotes.

Co-Chairman Senator ROEBUCK: We could regulate the rights of the parties on the granting of the divorce as ancillary to the divorce and then leave the administration or leave the enforcement of those rights to the courts and the jurisdiction of the provinces.

Professor PAYNE: I think this is true. In respect of children, however, I think it must be recognized that you are going to have difficulty in enforcement unless you repose the responsibility with a special agency or a special guardian appointed by the court.

Co-Chairman Senator ROEBUCK: You cannot do that; that is provincial.

Professor PAYNE: That is uncertain. The constitutional issue arising in this context is difficult to resolve with any certainty.

I turn next to the brief:

5. MARRIAGE GUIDANCE AND MATRIMONIAL CONCILIATION

(122) It is submitted that the State should take positive steps to prevent marriage breakdown by providing for the development and expansion of marriage guidance and matrimonial conciliation services.

EDUCATION AND PREPARATION FOR MARRIAGE

(123) The stability and success of marriage and family life will depend in large measure upon the outlook of persons entering into marriage. Education for marriage and family life is, therefore, of fundamental importance.

(124) The Committee on Procedure in Matrimonial Causes, (Eng.), 1946-1947, has expressed the following opinion:

> "We have been much impressed by the evidence of experienced workers in this field that the basic causes of marriage failure are to be found in false ideas and unsound emotional attitudes developed before marriage, in youth and even in childhood. The right time to correct those ideas and attitudes is before marriage. There is a need for a carefully graded system of general education for marriage, parenthood and family living to be available to all young people as they grow up, through the enlightened co-operation of their parents, teachers and pastors, and in addition specific preparation of engaged couples to give them instruction and guidance to ensure the success of their marriage. Valuable work is already being done on these lines and its extension is much to be desired."

It is submitted that difficulties encountered in married life can frequently be forestalled by education and preparation for marriage. Education for marriage and family life should, therefore, be recognized as being no less important than education for a profession or trade. Although specific programs providing education and preparation for marriage are already sponsored by various social agencies and by the churches, there is a great need to co-ordinate and expand these programs so as to make them available to all persons throughout Canada.

It is a rather tall order, but I am convinced that if the State is so disposed, it would be easy to co-ordinate more effective programs in this respect.

Co-Chairman Senator ROEBUCK: Are we not into the celebration of marriage now?

Professor PAYNE: I do not think so. You are into divorce and marriage breakdown avoidance. I think it would be quite proper for the federal Government to assume the responsibility for providing training facilities for social workers and stimulating the development of programs for marriage education by financial subsidy. I do not think that the provinces would be too concerned about the constitutional right of the federal Parliament to invest moneys in marriage counselling and conciliation. It is my opinion that the state should take more positive steps to educate the average Canadian to the responsibility of marriage.

Co-Chairman Mr. CAMERON: How would you work that out in detail?

Professor PAYNE: Are you asking me what sort of program I would envisage?

Co-Chairman Mr. CAMERON: The purpose is laudable, but how would you accomplish it?

Professor PAYNE: I do not feel especially competent to define what the content of the program should be. The expertise is available in Canada to develop such a program and co-ordinated scheme. The social work agencies and other interested organizations and disciplines could be relied upon to make their contribution. Incidentally, I should have included the churches in this context.

Co-Chairman Mr. CAMERON: Most of it would be voluntary?

Professor PAYNE: It would be voluntary but unless it gets some financial subsidy the likelihood is that the work will not be done, or will not be done in the most effective way.

Co-Chairman Mr. CAMERON: Does this mean that if one wants to get married one would have to produce a certificate of having gone through such a course and having understood the responsibilities?

Professor PAYNE: I feel that education for marriage might be developed as an integral part of the school curriculum. This would be one approach, but there are other devices, including the use of mass media. The need for marriage guidance or education is evident. My impression is that many persons enter into marriage, with romantic illusions or romantic delusions and fail to appreciate the responsibilities which are tied to the rights which accrue. For this purpose, education is necessary.

Co-Chairman Senator ROEBUCK: The City of Toronto and the Province of Ontario have published a marriage guidance book. The Toronto book is largely concerned with child culture but both books have some chapters on the responsibilities of marriage. They have recognized that as a provincial responsibility rather than a dominion one.

Professor PAYNE: There is a danger, if you say it is a provincial responsibility, that the provinces will not invest the necessary time and money. If it is a purely constitutional question, I would think that the general power of the federal Parliament to deal with matters of marriage and divorce and to legislate in these fields would entitle the federal Parliament to assume responsibility for developing marriage guidance and educational services.

As I said earlier, perhaps the problem is not very serious when viewed as a constitutional issue. I do not envisage the provinces being averse to receiving financial subsidies for such programs.

Mr. FOREST: There is certainly a need for marriage guidance and marriage education courses but I do not see that the provinces would have no objection to the federal Government promoting these courses. I think it is a purely provincial affair.

Professor PAYNE: It is a nice question and the issue should be put to the test.

My brief continues:

MATRIMONIAL CONCILIATION

(126) It is submitted that the State should seek to promote reconciliation between spouses who encounter disharmony in their marital relationship and that to achieve this result it is essential that the existing facilities for marriage guidance and matrimonial conciliation in Canada be expanded.

It is recommended that on every petition for matrimonial relief, the court should be required to consider the possibility of a reconciliation of the spouses through counselling and, where the court is satisfied that there is a reasonable prospect of reconciliation, it should be statutorily empowered to adjourn the proceedings and designate an agency or suitable person with training and experience in marriage counselling to assist the spouses in reconsidering their position. The court should also be empowered to make interim orders for the maintenance of a spouse and/or for the custody and maintenance of any child of the family where an adjournment is ordered for the purpose of affording the spouses an opportunity to become reconciled.

I recognize that this last recommendation tends to fly in the face of a measure which is designed to promote reconciliation. Nevertheless, I think it would be necessary.

In this context, I might say that legislative provision exists in Australia and New Zealand. Under the Matrimonial Causes Act, (Australia), 1959, and under the Matrimonial Proceedings Act, (New Zealand), 1963, the court is empowered to adjourn proceedings and refer parties for counselling to approved agencies or persons.

This power is not in fact exercised very frequently. I suggest that in many situations, once litigation has gone so far that the parties are appearing in court, the prospects of reconciliation are reduced. It is far more desirable to counsel the parties long before they are contemplating obtaining a decree of divorce. Nevertheless, in the exceptional case, it would be advisable for the court to have statutory power to refer the parties to counsellors with a view to reconciliation.

I might reiterate that in Australia in the last five years this power has been exercised very infrequently. The Law Commission in England observed that the power to adjourn proceedings and refer parties to counselling with a view to reconciliation has only been exercised in Australia fifteen times since 1951.

The Law Commission nevertheless recommends that this power be introduced in the English courts. Perhaps it will save only a few marriages, but on the basis of saving a few rather than no marriages, it is commendable. It is for this reason that I endorse the opinion that a power be given to the Canadian courts to adjourn proceedings and refer the parties to counsellors where the court considers that there is reasonable prospect of reconciliation.

I should perhaps emphasize that the effectiveness of any such legislation will in the final resort turn upon the availability of well qualified and trained personnel to act as counsellors and marriage conciliators. Marriage conciliation cannot be secured on the cheap. I do not think it is enough merely to have a statutory provision empowering the court to refer the parties to counsellors. One must ensure that counselling services are in fact available to effectively implement the purpose of such legislation.

On page 54 of the brief I adopt the reasoning expressed by the Royal Commission on Marriage and Divorce which sat in England from 1951 to 1955, which in turn adopted the reasoning expressed in the Report of the Denning Committee on Procedure in Matrimonial Causes, which sat in England in 1947, where it was emphasized that if counselling and conciliation is to be effective and successful, then it must take place in a frank and uninhibited atmosphere, and each spouse must have complete assurance that nothing he or she says will be disclosed or used to his or her prejudice in any subsequent matrimonial proceeding, except by consent.

These respective committees accordingly were of the opinion that communications made between a spouse and a marriage counsellor or conciliator should be privi-

leged—and I would share this opinion, and recommend that any such legal privilege should attach not only to the spouses but also to the counsellors or conciliators to whom the communications or admissions are made.

Provisions to this effect already exist under the Australian Matrimonial Causes Act and also under the New Zealand act.

I further observe that matrimonial conciliation may well be best secured through the existing voluntary agencies that devote their time and attention to marriage guidance and conciliation. There is reason to believe that these agencies may have restricted their programs because of the limited monetary resources available to them, and I would recommend that the voluntary agencies which presently engage in marriage guidance be encouraged to expand their services and, if such expansion is hampered by the lack of necessary funds, then these approved agencies should receive financial aid from the state.

I further suggest that the law of condonation and collusion should be revised, and I spoke to this on the occasion of our last meeting. I therefore recommend that condonation and collusion should constitute discretionary and not absolute bars to relief in matrimonial proceedings.

The next issue to which I direct my attention is the question of which court should exercise jurisdiction in matrimonial causes. At the present time jurisdiction in matrimonial causes is vested in the superior courts in each province. Obviously one must accept qualifications to this general statement in light of the fact that divorce procedures are not available at present through the judicial process where the parties are domiciled in Quebec or Newfoundland. An extensive and important jurisdiction in matrimonial proceedings is nevertheless exercised throughout Canada by Juvenile and Family Courts or by Magistrate's Courts. A valuable feature of these courts of summary jurisdiction is that they have attached to them trained probation officers and counsellors who often succeed in promoting reconciliation between disputing spouses. My suggestion is that, if jurisdiction in matrimonial causes continues to be vested exclusively in the Superior Courts, then adequate counselling and conciliation services should be available to persons who have recourse to these courts for matrimonial relief.

I am contemplating here not a massive influx of counsellors in these courts, but more in the nature of a skeleton staff which would be responsible for diagnosis with a view to referring the parties to outside counselling and consultation agencies.

I further submit that an examination should be undertaken to consider the feasibility of establishing throughout Canada special family courts to exercise an exclusive jurisdiction over all issues affecting and arising from the marital or familial relationship.

At this point I would state my objections to the superior courts retaining exclusive jurisdiction over matrimonial causes. The principal objections which may be raised against the exclusive exercise of jurisdiction over matrimonial causes by the superior courts are as follows. First, the procedure in the superior courts is involved and expensive. I might add that for domiciliaries of Quebec and Newfoundland, the legislative procedure is no less involved and is more expensive. Secondly, the superior courts are unfamiliar to most people and the procedure and atmosphere of these courts is not conducive to a therapeutic or conciliatory approach to marital or familial problems.

I would now point out what I consider to be the advantages of special family courts exercising exclusive jurisdiction over all issues affecting and arising from the marital or familial relationship.

The establishment of family courts to exercise an exclusive jurisdiction over all matters affecting the marital or familial relationship would have several advantages. In the first place, a single court with an exclusive jurisdiction over matrimonial and familial proceedings could be better equipped at less cost with expert counselling staff

and this would facilitate a therapeutic and conciliatory approach to marital and familial problems and thus place a greater emphasis upon reconciliation as an alternative to a legal decree.

I am fully aware of the fact that at this late stage of the proceedings reconciliation may not be the order of the day. On the other hand, I am not prepared to concede that the opportunity for reconciliation should be disregarded and that the procedure available should militate against the prospect of reconciliation which is quite clearly the case under the existing regime.

The second argument in favour of a family court is that a single court with an exclusive jurisdiction over matrimonial and familial proceedings would eliminate conflicts of jurisdiction where two courts in the same province are seised of the same problem and would also facilitate the more effective preparation of family case histories which would be of substantial value to the court in the disposition of proceedings for matrimonial or familial relief.

I accordingly submit the following recommendations:

It is recommended that all courts which exercise jurisdiction over matrimonial and familial proceedings should be provided with an adequate counselling staff and conciliation machinery. I have already observed that the family courts exercising summary jurisdiction in certain provinces have counselling staff, though not necessarily sufficient staff. My recommendation is that a divorce court—whichever court may be given jurisdiction in this context—should be provided with at least a diagnostic staff so that one could seek out the possibility of effecting reconciliations.

I draw the attention of the committee to the experience of certain jurisdictions in the United States where the conciliation court or family court—and they are not by any means identical—has been used to advantage even at the later stages when the parties have presented petitions for divorce. In Los Angeles County the rate of reconciliation achieved by the Conciliation Court is considerably higher than the national average—offhand I would suggest a figure of 50 per cent knowing full well that this is certainly a conservative estimate of its success in achieving reconciliation. In Toledo, the record of success in achieving reconciliation is less substantial than that in Los Angeles, being in the region of 30 to 35 per cent. Furthermore, the experience in these courts where conciliation and counselling services are utilised is that the end result is to reduce the problems not only in cases where reconciliation between the parties is achieved, but also in the cases where parties go on to obtain a divorce decree. Ancillary matters such as custody of children, visitation rights, and support are often worked out between the parties without the usual rancour which generally goes hand in hand with the more traditional and conventional divorce procedures.

I further recommend that specialised family courts should be considered as a possible means of dealing with the problem of the broken home today, and that such courts might be established on a regional basis to exercise exclusive jurisdiction in matrimonial and familial proceedings.

I recognize that this proposed reform is somewhat radical and its implementation may even be somewhat impracticable at the present time, by reason of the division of legislative powers under the Canadian Constitution. However, if its implementation is not considered desirable and/or practicable at the present time, it is my view that the county courts should exercise exclusive jurisdiction in undefended matrimonial causes, and in defended matrimonial causes with the consent of the parties. That is to say, in a defended cause either spouse should be empowered to insist upon a trial in the Supreme Court. In all cases—whether tried originally in the Supreme Court or the County Court—there should be a direct right of appeal to the court of appeal of the province.

Mr. HONEY: With reference to this may I point out that the former Chief Justice of Ontario, Chief Justice McRuer, who appeared before the committee, suggested that the jurisdiction might be concurrent; that county courts might have jurisdiction even in defended actions. I appreciate that your suggestion is substantially the same, but it may not be quite in line with what the former Chief Justice suggested. Do you have any comment on that?

Professor PAYNE: Well, the effect of my recommendation is that you might have concurrency to some extent. It may be that a case could be made out against my submission that a party should have the right to demand trial in the Supreme Court. I recall the submission of Mr. McRuer but I cannot recall the reasons he gave. To the extent that I differ from him, I would hope I might be given time to examine his submission before being asked to express an opinion as to how I would resolve our conflict, if any.

Co-Chairman Senator ROEBUCK: Mr. Justice McRuer also said that we should not take away the right of the individual to trial in the Supreme Court if he so desires. Do you think he was making a distinction between one and the other?

Professor PAYNE: I think it is arguable that the party who defends should have a right to insist on trial in the Supreme Court. If the party does not defend, I would doubt that such party would be justified in making a plea for trial in the Supreme Court rather than in the county court. The factor of costs is not irrelevant. It may be that Mr. McRuer and I do not really differ in the final analysis.

Co-Chairman Senator ROEBUCK: I imagine that one of his reasons for wanting to bring this within the jurisdiction of the county court is the fact that in some cases the Supreme Court judges visit the localities only twice a year, and to reach the Supreme Court otherwise it is necessary to travel to Toronto, in the case of Ontario, and to other similar centres in the cases of the other provinces.

Professor PAYNE: If I interpret your statement correctly, this might suggest that a right of trial in the Supreme Court should not be available as of right in a defended matrimonial cause. I think the difference between Mr. McRuer and myself may lie in my recommendation that there should be a right vested in a party in a defended cause to have the trial in the Supreme Court. I defer to his view to the extent that the county court should be authorized to exercise jurisdiction so that ancillary matters and interlocutory proceedings can be more effectively handled.

Co-Chairman Senator ROEBUCK: In ordinary litigation if an action is commenced in the county courts which, because of the amount of money involved, could also be within the jurisdiction of the Supreme Court, either of the litigants can move to have it tried in the Supreme Court.

Professor PAYNE: On such financial consideration, I believe so.

Co-Chairman Senator ROEBUCK: If the financial amount involved exceeds a certain amount. Could we not have that same provision apply in the case of a divorce action?

Professor PAYNE: I am not sure how it would apply in a divorce action. We must remember that attendant upon marriage breakdown, there is a distribution of matrimonial property, which not infrequently is of substantial value.

Senator ASELTINE: Is not this entirely a provincial matter? We have no jurisdiction in this.

Professor PAYNE: No, it is a federal matter.

Senator ASELTINE: We have no right to say to the Province of Ontario that under their act they cannot have a divorce action commenced in the county court.

Co-Chairman Senator ROEBUCK: We have done that. In giving jurisdiction to the courts in the Province of Ontario in the act of 1930 we specified that it should be in the Supreme Court. Now if we did that, we certainly have the right to specify that the right shall be in the county court or that the jurisdictions shall be concurrent.

Senator ASELTINE: They gained their jurisdiction by that act. Saskatchewan, Alberta and Manitoba—they are outside. They could make whatever regulations they wanted without coming to Parliament.

Professor PAYNE: British Columbia has already done so.

Senator ASELTINE: How about Nova Scotia?

Mr. MACEWAN: There is concurrent jurisdiction with the Supreme Court.

Co-Chairman Mr. CAMERON: I don't think there is any question about the right to put such a clause in any bill granting extended jurisdiction—that they could be tried by the supreme or the county court, and the Supreme Court or the County Court judges having concurrent jurisdiction. All we are debating now is whether they should be tried only by a Supreme Court judge when they are defended, and any difference of opinion between the Honourable Mr. McRuer and the witness is really minimal.

Professor PAYNE: Yes, I think so.

Senator BURCHILL: From the standpoint of the petitioner, how would the costs compare?

Co-Chairman Mr. CAMERON: They would probably be much less in the County Court.

Professor PAYNE: The next issue to which I directed my attention—

Senator ASELTINE: Is domicile the next?

Professor PAYNE: Yes.

Co-Chairman Mr. CAMERON: That is the big question.

Co-Chairman Senator ROEBUCK: We are pretty well agreed on it.

Professor PAYNE: I confine my submissions and inquiry to the question of jurisdiction in divorce. I do want to emphasize that my submissions are restricted to domicile as the basis for jurisdiction in divorce—and not other—proceedings. I do think it is important to recognize that distinctions presently exist between the jurisdictional bases for divorce, nullity and judicial separation. I did not refer to nullity and judicial separation in my brief, but if the committee so desires I could speak to this in due course.

In the brief, I first considered domicile as the basis of jurisdiction in divorce proceedings, and observed that the general rule in Canada today is that a court may exercise jurisdiction over divorce proceedings only if the parties are domiciled in the province wherein the proceedings are instituted. A married woman automatically acquires the domicile of her husband on marriage and retains his domicile so long as the marriage subsists. Since the cumulative effect of these rules would result in substantial hardship to a wife whose husband has deserted her and established a domicile in a foreign jurisdiction, section 2 of the Divorce Jurisdiction Act, R.S.C. 1952 Ch. 84 provides that a married woman who has been deserted by her husband for a period of two years and upwards may institute divorce proceedings in the courts of the province wherein the husband was domiciled immediately prior to the desertion.

The concept of the unity of domicile between spouses derives from the former common law doctrine whereby the husband and wife were regarded as one person—and, as is well known, the husband was the one. This doctrine has been eroded by the legal, social and economic emancipation of the married woman, and is no longer in accordance with modern trends. I accordingly recommend that the unity of domicile rule should be abolished. It might be considered that the hardship resulting from this rule to the married woman was effectively mitigated by the Divorce Jurisdiction Act to which I have already referred. However, it is submitted that more effective protection would be afforded to married women if legislation were adopted in Canada empowering the married woman to establish an independent domicile for the purpose and for this purpose only—of instituting matrimonial proceedings, including proceedings for the dissolution of marriage. I am not suggesting here recognition of the married woman's right to establish an independent domicile for all purposes, but only her right to do so for the purpose of bringing proceedings in a matrimonial cause before the provincial courts.

Co-Chairman Senator ROEBUCK: Would you mind reading paragraph 139 on page 58?

Professor PAYNE: I further submit that the provincial concept of domicile might well be replaced by a national concept, and that either spouse who is domiciled in Canada should be entitled to institute matrimonial proceedings in any province, provided that such spouse has resided in the province wherein relief is sought for not less than one year immediately preceding commencement of the proceedings.

There are two recommendations, then: the first, empowering the wife to establish an independent domicile; and the second, which is independent thereof, the establishment of a national concept of domicile to replace the existing provincial concept.

If I may bring your attention to the first one, the right of the wife to establish an independent domicile, I have observed that you might well contend that she is already effectively protected by the Divorce Jurisdiction Act, but I think it is questionable whether this Act would be as effective in according protection to the married woman as a statute empowering her to establish an independent domicile for the purpose of instituting matrimonial proceedings.

By way of example, I visualize a case where a woman leaves her parents' home in Ontario and marries a man who is domiciled in the Province of Nova Scotia. She goes to live with him in the Province of Nova Scotia. Thereafter he deserts her, leaves that province and acquires a domicile in the Province of Saskatchewan. In this situation, providing the wife remains in Nova Scotia, she will have adequate protection under the Divorce Jurisdiction Act because her husband was domiciled there at the time he deserted her. But consider the possibility of her returning to live with her parents.

Senator ASELTINE: She might have deserted her husband.

Professor PAYNE: Yes, but I am assuming the situation where the husband deserts the wife.

Senator ASELTINE: What position is the poor husband in then? He has to follow her to the new jurisdiction and pay all the costs of the action in that jurisdiction.

Professor PAYNE: The husband has no problem because he takes the domicile with him. The wife has a problem because not only does the husband take his domicile to where he goes, but he takes the wife's with him too.

Senator ASELTINE: I do not think it is as easy as all that.

Professor PAYNE: I am not sure it is all that difficult to prove a change of domicile, particularly in undefended actions which represent more than 90 per cent of all divorce petitions. I have sat through a number of applications both in English and Canadian courts, and very rarely is the issue of domicile mooted at length before the courts. It may be that this would indicate the problem is not as substantial in fact as it might appear to be in theory. To return to my hypothetical case, however, it would be quite possible to visualize the wife returning to her own parents in Ontario who might help out caring for the children while the wife goes to work. She could thus return to the Province of Ontario, and her right to sue for divorce would only be exercisable in the Province of Nova Scotia under the Divorce Jurisdiction Act, and in the Province of Saskatchewan where the husband is presently domiciled. In a situation like this, empowering the woman to establish an independent domicile would be more effective in protecting her rights.

On the issue of national domicile, I think strong arguments can be made to favour the recommendation which I have set out in paragraph 139.

Mr. HONEY: Is there any substantial difference between the two recommendations, because when you speak of national domicile you qualify it by saying the spouse must reside in a province for at least a year.

Professor PAYNE: Residence should not be equated with domicile.

Mr. HONEY: But to acquire domicile, under your second suggestion, the spouse must reside for a year in the province.

Professor PAYNE: To acquire domicile, no. My recommendation favours a national concept of domicile. Let us assume that a divorce petition is brought before the Ontario courts; the court would ask: "Is the petitioner or the respondent domiciled in Canada?"

Co-Chairman Senator ROEBUCK: That is, has she the intention of remaining permanently in Canada?

Professor PAYNE: Yes.

Co-Chairman Mr. CAMERON: Domicile is always based upon intention.

Professor PAYNE: I do not think anyone should identify the concept of residence with that of domicile. What I suggest is that, if you have a national concept of domicile, it would be desirable to qualify the right to proceed for divorce by imposing a further provincial residential requirement. One would therefore need to be domiciled in Canada and would also have to prove one year's residence in the province wherein the proceedings are instituted.

Senator ASELTINE: It seems to me to be a matrimonial—

A MEMBER: —muddle?

Senator ASELTINE: It naturally follows that when a person gets married he has to take that chance.

Professor PAYNE: I am sorry, but I do not follow your point.

Senator ASELTINE: Well, his wife might leave him and bring an action against him in the Yukon while he is living in Nova Scotia. He would have to follow her there in order to defend himself. He has to take the chance that that might happen when he gets married?

Co-Chairman Mr. CAMERON: You have to take that chance now.

Mr. PETERS: Mr. Chairman, I fail to understand what purpose, if any, that residence clause has. I am in complete agreement with a Canadian domicile, but if you have a Canadian domicile you have to establish that you are domiciled anywhere in Canada. By establishing Canadian domicile you are really, as I see it, providing the benefits of any provincial court to any person who may wish to bring an action. The residence clause is a restriction that is not necessary in our present domicile structure. You do not have a residence clause. You have to establish your domicile, but you do not establish residence necessarily with domicile.

Professor PAYNE: The additional requirement of residence is to prevent forum shopping.

Mr. PETERS: What?

Professor PAYNE: Forum shopping. In other words, if you have a national concept that applies then any person domiciled in Canada could obtain a remedy in any Canadian divorce court. Thus a prospective petiitoner, when contemplating divorce, may not concern himself with the grounds—we will assume them to be uniform throughout the country—but may well say: "It is better from a financial standpoint that I proceed in the Province of Saskatchewan rather than the Provinces of Alberta, Ontario or Quebec." The object of the one-year residence clause is to restrict as far as possible forum shopping by a prospective litigant.

Mr. PETERS: You are assuming, firstly, that the provinces are going to have different divorce legislation and, secondly, that this person is a sort of a rich tourist who can visit around for this purpose. I would think that you are attaching this residence clause to some specific proposal, and it is not likely to be one of—perhaps I should ask you: Is it your intention that the residence clause should stand by itself no matter what happens in relation to any of the other divorce changes that may take place?

Professor PAYNE: If you mean: Should residence stand alone—

Mr. PETERS: Not residence, but domicile—the Canadian domicile recommendation.

Professor PAYNE: I think the Canadian domicile recommendation could be approved even if one disapproved of the previous recommendation concerning the married woman's right to acquire an independent domicile. On the other hand, I think you could accept both. You could accept both or either of them.

My comment on paragraph 139 is in part premised on the possibility of different divorce grounds in the Canadian provinces. Perhaps there might be different grounds in the province of Quebec. But, I think the important consideration is that forum shopping might exist not only for the purpose of establishing your grounds for divorce, but also for the purpose of securing superior property rights or support rights. On these ancillary matters, unless the federal Parliament sets out a general code, differences will exist in the various provinces, and I am prepared to concede in some circumstances that the parties will have or will find sufficient funds to enable them to select the best jurisdiction.

Co-Chairman Senator ROEBUCK: May I say a word here because I thoroughly agree with the speaker? The purpose of domicile as a condition of applying to the courts of Canada is to see that we do not become another Reno for people who live to the south, because domicile involves the intention of remaining—not so much the necessity of staying for a period, but the intention of becoming Canadian citizens or Canadian residents, and staying here permanently. That would keep the people who are shopping around for a divorce from leaving the United States and coming up here in the same way that people who live in Canada go to Mexico and other places.

Now, the idea of residence as a condition for access to the courts is this: Supposing a couple are living in Halifax, and the husband decides to get a divorce, and he commences his action in British Columbia or, perhaps, the Yukon, as might be the case if he is entirely free to enter any court he likes. If you restrict the plaintiff to the place of residence then at least you have some *bona fides* in the choice of the court. So, you exclude the possibility of Canada being a divorce shop, and if you adopt the proposal that he must reside in the province in which his action is taken you stop either of them taking an unfair advantage of the other by starting the action in some distant province.

Mr. PETERS: Mr. Chairman, is it true that a man now by his domicile would be able to do just what you have suggested? He would be able to take his domicile by certain established principles, and without the residence clause. He would be able to establish himself in a new domicile. The only advantage we have in having a Canadian domicile is not for the husband, because he carries his domicile with him, within limits, but we are providing the wife with a Canadian domicile for this specific purpose and thus allowing her to separate her domicile from that of her husband. This is not likely to work in the reverse. I think you would have to meet quite a number of conditions. In other words, it is the wife's protection that we are providing by this Canadian domicile rather than the husband's.

Co-Chairman Mr. CAMERON: What we have been discussing is all based on the protection of the wife, so far as I can understand it, because, as you say, the husband has his domicile and it goes with him when he moves from one province to another with the intention of residing permanently in the province to which he moves. This is not the case with respect to the wife.

Mr. PETERS: So really the domicile arrangements that we would make under the Matrimonial Causes Act would be—

Professor PAYNE: My recommendation would also benefit the husband to some extent. There are a number of cases wherein it has been impossible for the court to identify a husband petitioner with a particular province, although not at all difficult to

identify him with a country. My recommendation could well prove advantageous to the husband in such circumstances. So, it is not a one-way street, although I agree that most of the advantages would accrue to the married woman having regard to the nature of the present regime and the recommended change.

The next item in my brief is under the heading of, "Void and voidable marriages." In paragraph 140 I summarize the conditions which render a marriage void for want of capacity. In paragraph 141 I point to the fact that in New Zealand and Australia, statutory provision has been enacted whereby a marriage shall be void *ab initio* on proof of certain facts.

In Canada, legal capacity to marry is still set out in the common law. For example, the law relating to the effect of duress or mistake or insanity upon the marriage contract is regulated by the general common law of Canada and has not been reduced to statutory form. I question whether the Canadian Parliament should not favour the adoption of legislation corresponding to that set out in section 7 of the New Zealand Matrimonial Proceedings Act of 1963, which is reproduced on pages 58 and 59 of my brief.

You might note that that under section 7, subparagraph (b) there is a provision relating to the formalities of marriage. In Canada, such a provision would fall exclusively within provincial competence.

The other items under section 7 of the New Zealand act relate to the legal capacity to enter into a valid marriage, and the provision reads or declares that a marriage shall be void where at the time of the ceremony of marriage either party to the marriage was already married. Secondly, a marriage is void where, by reason of duress, mistake, insanity or otherwise, there was at the time of the marriage an absence of consent by either party to marriage to the other party. And, thirdly, a marriage is void where the parties to the marriage are within the prohibited degrees of relationship set out in the Marriage Act (New Zealand), 1955.

You might question whether there is any need to introduce similar legislation in Canada. Why not be satisfied with the common law of Canada? Well, problems can arise. At present, for example, it is questionable in Canada whether duress renders a marriage void or voidable, and this may have important consequences. This question is clearly resolved in New Zealand, since the Matrimonial Proceedings Act expressly declares that the marriage shall be void if by reason of duress there is absence of consent to the marriage.

On the question of marriage between persons within the prohibited degrees, section 7 (a) (iii) of the New Zealand Act expressly declares such marriages void. In Canada, today, however, such marriages are governed by provincial statutes which are by no means uniform. It is submitted that such marriages should be governed by legislative statute enacted by the Parliament of Canada and that such statute might be modelled on the provisions of the New Zealand act.

I now refer specifically to the age of marriage, and make the observation that there appears to be a relatively high incidence of marriage breakdown in cases where a spouse is married at a very early age. It is accordingly recommended that legislation should be enacted by the federal Parliament of Canada, raising the minimum legal age for marriage to 18 years. I further recommend that such legislation should provide that where a marriage has been celebrated between parties, one of whom has not attained the age of 18, it should be voidable at the instance of the person who was under age at the time of marriage.

I recognize that such legislation will not necessarily in itself be sufficient to reduce the incidence of marriage breakdown amongst persons marrying at an early age, and that it would be necessary to supplement it by more adequate provision for marriage education and guidance.

I am aware that bills have been introduced in the Parliament of Canada stipulating a minimum legal age to marry. I believe the age adopted in such legislation is generally 16.

Co-Chairman Senator ROEBUCK: I do not think it is within our jurisdiction as a committee to go into that. We are charged with the study of divorce, and certainly the age of marriage does not come within that definition.

Professor PAYNE: The reason I included it in my brief was because I looked at it from the standpoint that divorce represents a legal means of resolving a marriage breakdown situation. If the age of marriage is relevant to the incidence of marriage breakdown, then I feel it is a matter that could be brought before this committee. I do not really know whether your committee has authority under its terms of reference to consider this. My own feeling is that this committee might perhaps express an opinion on this point to Parliament, because what we are dealing with is the issue of marriage breakdown and the age of the parties at the time of the celebration of marriage is relevant to that issue. I think it is a matter on which this committee might express an opinion.

Co-Chairman Mr. CAMERON: We might comment on it, but we would not have jurisdiction or the right to make recommendations. I think we can comment on anything that would be an improvement in the situation regarding marriage and divorce in this country.

Professor PAYNE: I might turn to another matter which may be regarded as outside the terms of reference—I am not sure—namely, the question of capacity to marry a divorced wife's sister of divorced a husband's brother. Under sections 2 and 3 of the Marriage and Divorce Act, R.S.C., 1952 Ch. 176, a man may marry his deceased wife's sister and a woman may marry her deceased husband's brother. Perhaps I should point out that these sections also extend to other relationships.

In the light of conflicting decisions in *Re Schepull and Bekeschus and Provincial Secretary* [1954] O.R. 67 and in *Crickmay v. Crickmay* (1966) 57 D.L.R. (2d) 159 (B.C.), it is uncertain whether the relationship of affinity is terminated by divorce so as to entitle a man to marry his divorced wife's sister and a woman to marry her divorced husband's brother. It is recommended that legislation should be enacted to resolve this uncertainty and that such legislation should take the following form:

> "When a decree for divorce has been made absolute, it shall be lawful for the respective parties to marry again as if the prior marriage had been dissolved by death."

Perhaps I might advise you that this provision, or something corresponding to it, appears in the New Zealand Matrimonial Proceedings Act. Offhand, I do not know if it appears in the Australian statute.

Mr. PETERS: May I ask why this was in the act in the first place? You said it is a bar to marriage. In what way, and why?

Professor PAYNE: Are you asking me where this originates? This goes back presumably to the old English law.

Senator BURCHILL: Is that the Canadian law?

Professor PAYNE: As far as consanguinity and affinity is concerned, in Canada, you will find it under the provincial statutes—the Marriage Acts—although one might question whether it is proper for the provincial legislatures to enact such legislation since it deals with capacity to marry.

Co-Chairman Senator ROEBUCK: Is that not covered by the act of 1930?

Professor PAYNE: The act of 1930 only specifies deceased wife's sister, and not divorced wife's sister. My submission is that a man should be statutorly empowered to marry not only his deceased wife's sister but also his divorced wife's sister. Such legislation would resolve the judicial conflict which apperars in the Schepull case and the Crickmay case which I have already cited.

Co-Chairman Mr. CAMERON: Is there a legitimate reason why this is under ecclesiastical law? I know it is a biblical restriction.

Professor PAYNE: I am reluctant to suggest any historical explanation. One must realise that at the time when the degrees of affinity and consanguinity were established, the ecclesiastical law did not recognize the dissolubility of marriage. A conflict exists, however, in the judicial decisions of Ontario and British Columbia. I think it should be resolved one way or another. I would resolve it by empowering a man to marry his divorced wife's sister as well as his deceased wife's sister.

Mr. PETERS: Was it a problem at one time?

Professor PAYNE: The distinction was not made in the old tables of degrees, because they derive from the ecclesiastical law, which did not admit of the possibility of dissolution of marriage and therefore, in a sense, it is a problem which has only arisen since divorce was made available through the judicial process.

The problem does exist, but it is not very significant. I am thinking in terms of numbers. I think an opportunity might be taken, however, to clarify the uncertainty existing by reason of conflicting Canadian decisions.

Co-Chairman Mr. CAMERON: You have not dealt with voidable marriages.

Professor PAYNE: On voidable marriages, I make no recommendations, and merely draw attention to section 9 of the English Matrimonial Causes Act, 1965, which supplements the common law ground of impotence, which renders a marriage voidable. It provides that a marriage shall be voidable in England on the ground of wilful refusal to consummate, on the ground of insanity, and on the ground of—

Senator ASELTINE: I wonder if the witness could tell us what is the common law now in so far as Canada is concerned with regard to these matters.

Professor PAYNE: With respect to voidable marriages, impotence renders a marriage voidable in Canada—beyond that point, we are in a realm of uncertainty.

Senator ASELTINE: Refusal to consummate the marriage?

Professor PAYNE: Wilful refusal to consummate the marriage does not render a marriage voidable in Canada: it does in England.

Senator ASELTINE: I have a case on that point right now.

Professor PAYNE: In Canada, the position is that wilful refusal may be regarded as being of evidential value in a case of alleged impotence. Certainly, where wilful refusal has continued for a period of time, the courts will be inclined to infer impotence from the fact of such refusal.

It has been suggested by the Canadian Bar Association—on the basis of a resolution which I drafted—that wilful refusal to consummate the marriage should be a ground for divorce. The Canadian Bar Association met in Winnipeg. Little time was spent in discussing this recommendation. It would be my contention that wilful refusal to consummate the marriage should not be introduced in any circumstances as a ground for divorce.

I think that to introduce wilful refusal as a ground for divorce, while retaining impotence as a ground for annulment, can only lead to difficulty.

I do not think that serious problems are presently encountered in cases of wilful refusal. In petitions for annulment today, wilful refusal to consummate the marriage may be regarded as evidence of incapacity to consummate, or impotence.

Co-Chairman Senator ROEBUCK: May I ask if marriage breakdown is made a part of our recommendations, would it be possible to give a divorce on the ground that marriage breakdown was occasioned or caused by a wilful refusal to consummate?

Professor PAYNE: My own inclination would be to say that, if one wishes to recognize marriage breakdown as a criterion for divorce, then there are two alternatives.

The first is to stipulate marriage breakdown as a ground for divorce, without qualification. I think that would present problems, especially if it provided the exclusive criterion for divorce, since it requires the court to undertake a thorough inquiry, sometimes called an inquisition, in all cases, both defended and undefended. It further requires that expertise be available either in the court, or to the court. At present, in Canada, I do not think we have this required expertise.

In the alternative, I have suggested that this committee consider the possibility of recognizing separation for three years as a ground for divorce, subject to certain provisos which are included in my brief and of which I spoke the last time I was here.

I would oppose any statutory formula which specifically stipulated that divorce should be granted "on proof of marriage breakdown due to drunkenness, insanity, wilful refusal to consummate, imprisonment, commuted death sentence, etc." It is impossible to stipulate a comprehensive list of the causes of marriage breakdown and any list which is not comprehensive will result in denial of relief in certain cases where the remedy of divorce should be available. It is for this reason I recommend separation for three years as a ground for divorce, recognizing that separation for such a period of time reflects the fact of marriage breakdown.

Co-Chairman Mr. CAMERON: You include some remarks on sociological research.

Professor PAYNE: They might fall outside the terms of reference of the committee. It is my thought that more research should be undertaken to determine the character of the family in Canada and to ascertain certain matters which are at present merely a subject for conjecture.

Mr. PETERS: In this regard, would you recommend to the committee the establishment of a permanent family sociological study that would report to Parliament periodically, every ten years, on the changing environment as viewed in divorce. It would show how divorce has changed from 30 years ago, to some degree. I gather from your study that to make it effective it would have to be brought to the attention of Parliament on occasions, for a decision. Would you be prepared to recommend that this be done on a formal basis to the Senate every ten years?

Professor PAYNE: I have reservations about recommending any detailed program. There exists now the Vanier Institute of the Family, which is collecting data on the family. I would not seek to impose an obligation on this Institute to report to Parliament. If its research leads to the formulation of recommendations for change in the legal or social structure, I would hope that interested parties would bridge the communication gap between the Institute and the Parliament of Canada. I am by no means assured that this will happen.

Mr. PETERS: Are you not, in studying this matter—and you have studied it in very great detail—struck with the fact that this sociological change in the atmosphere of our social structure has been much faster than our legislation has been able to keep up to it? Are you not struck by the fact that there will be no change in this aspect so long as there is not some machinery whereby we will be able to face the problem in a limited period, or within certain limitations?

Professor PAYNE: I would hope that there will be established some means of communication between the Vanier Institute on the one hand and Parliament on the other.

I would emphasize that it is extremely difficult to carry out sociological research on the family in Canada. There are indeed very few sociologists in Canada who specialize in the Canadian family. I would hope, however, that the Government might take steps to provide more comprehensive statistics relating to the family in Canada. At the present time, statistics are not readily available and are limited in their scope. Without adequate statistics, it is extremely difficult to undertake effective sociological inquiry.

Mr. PETERS: I am still of the opinion—and I think maybe other people have the same opinion—that unless a recommendation is made for a periodic review and becomes part of our legislation, we will have to wait until a crisis develops before we again face this problem.

I am thinking of something that happened recently where we had a commitment from the Government that the Senate divorce situation would be reviewed in five years. We did not insist on this being part of the law, and though we had a firm understanding that this would be done, I am doubtful if it will be. Provided this committee does not eliminate the need for it, I am doubtful if that review will take place, and this is why I am wondering why you are reluctant to recommend that there be a periodic review.

As an example, the Bank Act says that there will be a review of it every ten years, whether it is needed or not. If nothing new is available at the time, then you just reindorse it; if something is new, you look at it. But there is a necessity outside of Government initiation of having that review take place.

Professor PAYNE: Well, I favour review. I am reluctant to specify a particular program or period for review, probably because I recognize that sociological research in this particular context is going to be slow to evolve. It is not going to be appearing overnight. There is a backlog of work to be done.

Mr. PETERS: Let us provide a hypothetical case. Let us say we pass the marriage breakdown theory with no terms at all. Is it not your opinion that the Bar Association within a matter of a year will be able to make recommendations as to whether or not further change should take place? I am thinking of Australia where that happened, and New Zealand where that happened and England where they had a review within a matter of three years. They made major changes, really.

Professor PAYNE: If you are contemplating a radical departure from the present procedures, and I am not suggesting you should not, then you must distinguish the situations in England, Australia and New Zealand. In England the laws have evolved gradually. The big breakthrough occurred in 1937 when they added more faults grounds, namely desertion and cruelty, and the non-fault ground of insanity. The next major breakthrough in England, if it proves acceptable to Parliament will likely be the recognition of the breakdown principle through a separation clause which the Law Commission advocated in its recent report.

In Australia, legislation is modelled on the experience which existed in all the states. Indeed, I think you will find that the grounds for divorce are modelled on former state laws with minor variations being introduced, but no totally new grounds being introduced. The major change effected by the Australian Matrimonial Causes Act was that it introduced a national policy in respect of the laws of divorce and other matrimonial causes. But it built upon earlier foundations, namely, the laws on which the states had proceeded for many years.

If one were to introduce the marriage breakdown concept in Canada without qualification as to exclusive criterion for divorce, although I have much faith in the various organizations in this field, I have no reason to believe that they would be in a position to rectify the problem if that criterion proved fundamentally ineffectual, or impracticable. I think you would be back where you are today.

It may be that I am being conservative here, but in preparing my brief and my submissions to this committee concerning divorce grounds and other matters, I applied criteria similar to those applied by President Kennedy in respect of legislation. First, will they work? I suggest that my recommendations have been put to the test. You may not accept them in toto; you may reject them in toto. Nevertheless, it can be seen from the experience in Australia, New Zealand, England and the United States, that they work. The next question is will they help? I think it is quite clear that they will help. Will they pass? This is a matter for this committee and the Parliament of Canada.

Will the marriage breakdown theory work as the sole criterion for divorce? I have reservations when I face this first question. I have no reservations on the second question. I am convinced it will help, if it will work. The third question is one on which I have more reservations, though.

Co-Chairman Senator ROEBUCK: Would it be acceptable?

Professor PAYNE: I think this would go to the third question.

Mr. HONEY: Did the witness say he had more reservations on the third question?

Professor PAYNE: I have more reservations. That is to say, speaking personally, I have serious doubts as to whether the marriage breakdown theory would be acceptable to the federal Parliament, notwithstanding that several organizations have submitted recommendations to this effect. The primary question, however, is simply how does it work, if at all. My submission is that the cost of implementing the breakdown theory as the exclusive criterion for divorce would be excessive, because this theory by its nature implies an inquest into every matrimonial cause—not just into the defended cases which today represent only 7 per cent of all divorce cases. And it requires expertise which at the moment we do not have in Canada.

Mr. PETERS: I am still of the opinion that, when you make this suggestion for the fact that we should—and I have no argument with it because I think it is a much better system than using a legislative process of crises producing legislation, which is what always happens with legislation—if you use the idea of either the Vanier Family Society or social reform of institute, or whatever it may be, I would see a great advantage, if you were just to agree to carry your proposal to the extent of attaching this to the legislation so that there would be an opportunity on a regular basis of reviewing the social conditions of our nation in the light of what our experience has been, rather than our closing the legislation until—I mean I cannot see your recommending that we engage in the social study, no matter who does it, unless you are willing to tie that to the legislative process that, in my opinion, should flow from that study, either negatively or backwards or forwards.

We are plagued with the problem now of social change moving so rapidly that legislators just do not keep up to it. You can look at all this social legislation and it will fit into this category. It seems to me that recommendations to the committee might be worth while.

Professor PAYNE: I am in favour of Parliament doing everything possible to encourage and promote studies of sociological changes in the family. I do not consider that divorce legislation enacted in 1967 or 1968 will represent a final decision to be handed down from generation to generation. It will necessarily require consideration and reconsideration. I hesitate to lay down a specific program or a particular period within which I would call upon an institute or parties to report. I might perhaps draw to you attention that in New York they have a standing committee of the legislature which deals with matrimonial and family laws and it issues an annual report to the state legislature.

Co-Chairman Mr. CAMERON: Would this be a good point to terminate our discussion? Have you any further question, Mr. Peters?

Mr. PETERS: No, I was just thinking that the Canadian Bar Association had reported that 500,000 people in Canada were living common law, before any changes take place. It seems to me that the Bar association might be well advised to make a recommendation that would be more formal than just the recommendation to the agencies, which I have not heard mentioned before. But it should be able to make a recommendation which would be tied to the legislative process without the Government having to take the responsibility of making the review.

Co-Chairman Senator ROEBUCK: I think the figure was 200,000 and not 500,000, and in my view that is four or five times the actual number.

Professor Payne, it is my responsibility to express on the part of this committee our indebtedness to you and our gratitude for what you have done for us. As you know already, because I have said it two or three times to you, I consider your brief to be a monumental piece of work; it is comprehensive, it is clear; it is practical and it will be of the greatest service to us when we are preparing our report. If we had had to hire somebody to produce a document of this kind it would have been worth many hundreds of dollars. It is really a very valuable piece of work based, as it is, upon very long experience and, I would add, experience of the right type. You have been engaged for years in lecturing on this subject and you have been thinking and discussing the philosophy that is behind the subject that we are investigating, as well as the practical application of the law. Your knowledge of the subject in England, in New Zealand, Australia and the United States and Canada is simply immense.

I express, rather poorly I know, on behalf of every one of the members of this committee our admiration for the brief and for the contribution you have made. I hope we will be able to accomplish something as a result of it.

The committee adjourned.

APPENDIX "75"

Submission to the Special Joint Committee of
the Senate and House of Commons on Divorce

DIVORCE IN THE ORTHODOX CHURCH

by

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The Orthodox Church is that company of faithful Christians who are subject to the patriarchs of Constantinople, Antioch, Alexandria, Jerusalem, Moscow, Belgrade, Bucharest, to the Church of Greece, Georgia, Cyprus, Albania, Poland, Czechoslovakia, Finland and the Church of the Dispersion and Missions.

The present structure of the Orthodox Church is one of decentralization, founded both on the secular traditions of ancient Eastern patriarchs and on certain realities of the modern world.

Mutual relations between the autocephalic churches are governed by a historic hierachy, in which the ecumenical patriarch of Constantinople is regarded as the undisputed head of the Orthodox Church.

The present occupation of the ecumenical See is His Holiness Patriarch Athenagoras I.

The Orthodox Church has more than 180 million members, follows the same liturgy translated into the language of each people and accepts the teaching of the first eight centuries of Christianity as the exclusive rule of faith.

The Orthodox Church in Canada has 320,000 members, Christians.

Sources of Orthodox Church Canon Law are, besides the Holy Scriptures and Tradition, the canons contained in the Nonocanon composed in the year 833 which, over a long period of time, was ascribed to Photius.

These canons are:

1. The Apostolic Canons.
2. The canons of the Nicaean Ecumenical Synod—323
3. The canons of the Synod of Constantinople—381
4. The canons of the Synod of Ephesus—431
5. The canons of the Synod of Chalcelon—451
6. The canons of the Trullan Synod 691-692
7. The canons of the Synod of Nicaea—787

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3. The canons of provincial synods, namely: that of Ancyra 314; of Neocaesarea 314-325; of Gangra 340; of Antioch 341; of Laodicea 343; of Constantinople held under Nectarius 394; of Carthage 419; of Constantinople 861 and 879.

4. The canons of the Holy Fathers, namely: (a) of Denys of Alexandria 265; of Gregory of Neocaesarea 270; of Peter of Alexandria 311; of Timothy of Alexandria 385; of Gregory the Theologian 389; of Amphiloclius of Iconium 395; of Gregory of Nyssa 395; of Theophilus of Alexandria 412; of Cyril of Alexandria 444; of Genadios of Constantinople 471; of Tarasios of Constantinople 809.

In the "Athenian Syntagma", to these canons were added, under the title of Διαφορὰ several canonical prescriptions taken from the works of Saint Basil the Great, John Chrysostom and St. Athanasius, in addition to the synodal responses of the Patriarch Nicolas of Constantinople 1086-1111, the canons of the martyr, Nicephorus 818, and the Κανονικὸν of John the Hermit.

The "Athenian Syntagma", published in Athens by Raly and Potlis 1852-59, forms a universal and official ecclesiastical collection, and is so recognized by the highest authorities of the different national churches.

It should be observed that in the Orthodox Church the legislative authority is exercised "sinodaliter". After the ecumenical synods, the legislative authority is held by the ecumenical synods, the legislative authority is held by the synods formed by the bishops of the different autocephalic churches. The most important legislative activity was that of the patriarchal synod of Constantinople, in which bishops and patriarchs belonging to areas under Turkish domination frequently participated. The decisions of the Constantinople Church are followed by the entire Orthodox Church.

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Lastly, it must not be forgotten that the Orthodox Church still accepts the principle found in chapter 28 of the first title of the Nomocanon in XIV titles, in which it is stated: "In matters for which the canons provide no solution, we must abide by the civil laws."[1]

The Orthodox Church could the more readily admit this principle inasmuch as the Greco-Roman emperors acknowledged the Church's laws to be as compulsory as those of the State by decreeing that any law contrary to the canons would no longer have any force. Where a conflict existed between the civil laws and the canons, the Orthodox Church, following Belsanon's opinion, recognized that "the canons have more authority than the laws of the State because, having been established and confirmed by the Holy

[1] Syntagma 1.68.

Fathers and by the emperors, they hold the same rank as the Holy Scriptures, while the laws of the State, being solely the work of the emperors, cannot have the same force as the Holy Scriptures and the canons.[1]

One of the most disputed of questions, in the year 1054, was the separation of the churches. Because of the seriousness of that act and the unfortunate consequences respecting the unity and splendour of the Christian Church, each individual church throws the blame on the other.

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THE TEACHING OF THE ORTHODOX CHURCH ON DIVORCE

The purpose of this work is not to make a comparative study of religious legislation, nor to exhibit the arguments for or against divorce. On this latter subject, as Mr. Glasson remarks, all shades of opinion have been collected and every solution tried.[2]

We ourselves share the opinion of Edmond Willequet who contends that the institution of divorce does not proceed from a feeling of scorn for the marriage tie, but quite the contrary; it rather bears testimony to the care taken by lawmakers to maintain the institution of marriage in the highest possible esteem. "Divorce, he says, cures the ills born of ill-assorted marriages, restores not only their inner purpose to the sexes, but prevents public opinion from attributing to marriage itself disorders the distressful spectacle of which is apparently in full view. Far from being hostile to marriage, divorce is its complement."[3]

It is our intention simply to expound the teaching of the Orthodox Church in respect of cases in which divorce is allowed, it being clearly understood that *that Church maintains, in principle, the unity and indissolubility of marriage.*

In accordance with that teaching, acceptance of divorce on certain grounds does not mean that man is putting asunder that which God has joined together, for, as the Church, in God's name, unites a couple, so also, in God's name, may she separate them, when the union contracted no longer corresponds to the Creator's intention. The Church was founded to make use of the "power of the keys"[4]; the more so in that in this question of divorce a divine dispensation is contained in the words reported in Saint Matthew.[5]

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The progression of the New Testament in respect of the Old, in the matter with which we are concerned, resides in the fact that the Lord did away with the death penalty inflicted on the adulterous woman under the laws of Moses, by making adultery, henceforth the only ground for divorce, to result in the dissolution of the marriage bond and by allowing divorced persons the right to contract a second marriage. It is clear that in interpreting the wording of the Gospel we must make a comparison, not with our modern institutions, but rather with the social environment of the Jews at the time of Christ and with the Mosaic institutions which allowed divorce and remarriage of divorced persons. According to Orthodox Church teaching the exception "except it be for adultery" is applicable both to the principle of the indissolubility of marriage and to the principle of prohibition of a second marriage.

[1] Syntagma 1.38.
[2] Glasson: Civil Marriage and Divorce, 2nd edition, p. 492.
[3] Willequet, Edmond: Divorce, p. 8.
[4] Matth. XII, 31-20.
[5] Op. cit. XIX, 9. v. 32.

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INDISSOLUBILITY OF MARRIAGE

In conformity with the words of Christ, the Orthodox Church has vigorously affirmed the principle of the unity and indissolubility of marriage.[1] Marriage, for the Orthodox Church, consists in the complete and indissoluble union of husband and wife who, in that relationship, not only have the same rights and obligations the one towards the other, but become one flesh and one blood.

The Orthodox Church sees, in marriage, both a civil contract and a sacrament; it is from this latter characteristic that indissolubility of marriage is derived.

A number of important passages in the Holy Scriptures express the principle of indissolubility. There we read: "But I say unto you, That whosoever shall put away his wife, saving for the cause of fornication, maketh her to commit adultery: and he that shall marry her that is put away, committeth adultery."[2] "What therefore God hath joined together, let no man put asunder."[3]

"For the woman which hath an husband is bound by the law to her husband so long as he liveth; but if the husband be dead, she is loosed from the law of her husband."[4] "And unto the married I command, yet not I, but the Lord, Let not the wife depart from her husband; but and if she depart, let her remain unmarried, or be reconciled to her husband: and let not the husband put away his wife."[5]

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With the teaching of the Lord and his apostles being so clear, it is fully understandable that all the doctors of the Church, without exception, taught the same truth. For example: Saint Justin the Martyr, Clement of Alexandria, Saint Basil, Saint John Chrysostom, Saint Cyril of Alexandria, as well as others.[6]

— 8 —

THE EXCEPTION, ADULTERY

The Lord has indicated only one ground for dissolving marriage, namely unfaithfulness, which is the violation of the conjugal tie by either husband or wife. "And I say unto you, that whosoever shall put away his wife, except it be for fornication, and shall marry another, committeth adultery; and he that shall marry her that is put away, committeth adultery."[7] "But I say to you, that whosoever shall put away his wife, excepting for the cause of fornication, maketh her to commit adultery: and he that shall marry her that is put away, committeth adultery."[8]

For that reason, the canons of the holy synods and the rules of the Holy Fathers give only that ground for the dissolution of marriage; however, they observe that even in this case the bond may be maintained by the reconciliation of husband and wife.[9] The passages from Saint Matthew referred to above have given rise to much controversy. The adversaries of divorce, unable to deny the authenticity of the texts in question, have issued a number of hypotheses so as to brush aside the dissolubility of marriage, even in the case of adultery.

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[1] Matth. XIX, 6; Milas Nicodem. Dreptul Biseriosc Oriental, Bucuresti 1915, p. 517.
[2] Matth. V, 32; XIX, 9—Mark X, 11, 12; Luke XVI, 12; Paul I Cor. VII, 10, 11.
[3] Matth. XIX, 6; Mark X, 9.
[4] Romans VII, 2.
[5] I Corinth. VII, 10.
[6] Justin. Apolog. I No. 6; Clem. Alex. Strom. II, 23; III, 11; Saint Basil: Exameron, Vol. VII, No. 5; Chrysost. Epist. ad. Syriac CXXV; Epiph. Expos. Fidei Cathol. No. XXI; Haer LIX, No. 46; *Cyril Alex.* to Malach. No. 28; Theodoret & I Corinth. VII, 11; Lactantius, Instit. div. VI, 23.
[7] Matth. XIX, 9.
[8] Matth. V, 32.
[9] Neocaesarean Council, c; Council of Carth. c. 115: Saint Basil, Rules: 9, 21, 39, 48. The VI Ecum. Council. c. 17.

As our purpose is not to give an exegesis, we shall simply summarize them.

Certain writers contend that the word πορνεία means fornication prior to marriage. Such an opinion cannot be accepted because:

(a) the context shows it is speaking of a marriage regularly contracted;

(b) the Lord does not use the word on any other occasion to speak of fornication prior to marriage, and lastly,

(c) means adultery in the Old and New Testaments.

Because of these difficulties, other explanations have been proposed.

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For some, the expression παρεκτὸς λόγου πορνείας could be an exclamation and might have the following meaning: Whoever puts away his wife—may the very idea of adulterous relations be removed far from me, I will not speak of such a thing—causes her to commit adultery. Such a so-called explanation contradicts the wording.

And others suggest that the relative pronoun in the second part of the text be repeated. The meaning would then be: Not only the one who puts away his wife for any cause other than adultery without marrying another commits adultery, but also the one who puts her away because of adultery and marries another. To the Orthodox Church, as we have already stated, the expression παρεκτὸς λόγου πορνείας refers to the first part of the sentence as much as it does to the second.

Catholic writers themselves recognize this.[1]

If Mark, Luke and Paul do not mention adultery as grounds for divorce, it is because they did not deem it necessary to write on a matter of which everyone was aware at that period.

In Mark, Luke and Paul, the expression, excepting for the cause of adultery, is taken for granted, it is implicitly understood.

In addition to arguments based on texts, the Orthodox Church invokes humanitarian reasons in support of its teaching. Indeed, an injustice is committed if, when one of the spouses has not respected the sanctity of the marriage bond, violating one's pledged troth by adultery, the innocent spouse is deprived of the natural right to marry, for the lifetime of the guilty spouse. Such an assertion is contrary to reason, as Origen remarked in the third century. Such violation of human nature is nowhere recommended in the Holy Scriptures.[2] While allowing divorce on the grounds of adultery, the Orthodox Church considers it to be an exception which has not the same moral value as the rule, rather as an undesirable possibility, provoked by outside and inside causes.

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The grounds for divorce are, in relation to the principle of the indivisible oneness of the relationship of spouses, not inconsistencies in ecclesiastical and civil laws, but merely temporary accommodations to human frailty.

They are exceptions which do not abolish the rule; even as such they are not to be rejected, for their purpose is to avoid a greater evil that a harshness which takes nothing into account might cause.[3]

But even more important, it is out of respect for the supreme dignity of marriage that the Orthodox Church has deemed it necessary to enact laws regarding its dissolution, where conflicting circumstances have destroyed the intimate relationship between a husband and his wife.

The notion of adultery was early expanded to include not only physical union against the law, but also the notion of spiritual adultery. It is in this latter sense that it

[1] die Unaufloslichkeit der christlichen Ehe p. 202, Paderborn.
[2] I Cart. VII, 9.
[3] Zhishman, das Eherecht der morgenlandischen Kirche, Wien 1964 p. 119.

is taken in Saint John VIII, 41, as also in Hermas, since, as stated by the latter, adultery does not only mean befouling one's body, but whoever performs the works of the heathen commits adultery.[1]

Origen (254) also favours extension of the notion of adultery. In his comments on Matth. XIX, having spoken of the laws of the Old and New Testaments, he asks himself the question whether, by the expression πορνεία other faults of the wife might not also be included, such as, for instance, the crime of poisoning, infanticide, ransacking of the house, and whether dissolution of marriage should not be allowed on grounds as serious as are those.[2] Origen made the following remark: in this matter, reason and the Holy Scriptures do not appear to be in agreement, since Jesus, on the one hand, did not admit of any other legitimate ground for dissolution than πορνεία, while reason seems to indicate that other faults just as serious are sufficient grounds for dissolution.

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The writer takes the affirmative position, for Christ did not prohibit marriage in a general kind of way, he simply said: Whosoever shall put away his wife who is not an adulteress, maketh her to commit adultery.[3]

St. Ambrose livewise favours extension of the notion of adultery: All those are adulterers, he says, who pervert the truth of the faith and of wisdom,[3] an opinion also shared by Saint Jerome (420), c.7c. XXXII, 7.

In "De Sermone Domini in Monte", ch. 12, No. 36, the blessed Augustine draws out the meaning of the word fornication, expressing himself as follows: "Since the Holy Scriptures constantly call idolatry fornication, and the apostle Paul calls greediness for riches idolatry, who can doubt that any guilty desire is rightly called fornication?[5]

In ch. 16 (No. 43) the Father of the Church again brings up the question of the scriptural notion of fornication, by which putting away of the wife is allowed: he wonders if the word fornication is to be understood of a person who is guilty of unchastity, as understood by everybody, or if it is likewise to be taken in the sense given it in the Holy Scriptures, which, generally speaking, use the word fornication to express any degradation such as idolatry, avariciousness and any offence against the law in order to satisfy desires that are unpermitted.

Using I Cor. VIII, 12 as his authority, he relies in the affirmative, saying that the word fornication is to include, in addition to carnal adultery, unbelief also, which is spiritual adultery.[6]

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He gives the same teaching a little farther on in the same chapter (No. 46): "If unbelief is fornication and idolatry is unbelief and if covetousness is idolatry, it is certain that covetousness is fornication also. Who can then exclude from the notion of fornication any guilty desires?[7] In like manner canon 4 of Gregory of Nyssa assimilates vices against nature to adultery, while Saint Basil, can. 7, and Theodore of Studium[8] assimilate murder, poisoning and idolatry thereto.

The term "adultery" is frequently applied to usurpation of the episcopal office[9] and to a marriage arbitrarily concluded before the first had been dissolved in the legal forms prescribed for particular grounds for divorce.[10]

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[1] Migne, P.G. II 919.
[2] Migne, XIII, 1245.
[3] Matth. V, 32.
[4] Migne: P.L. XV, 1768.
[5] Migne: P.L. XXXIV; 1247.
[6] Migne: 1. c. 1252.
[7] Migne: 1 c., 1253.
[8] Migne: 1 c. XCIX. 974. 1010.
[9] Evagr. Hist. eccl. II. 8 Nicet. Paphalog. vit. Ignat. Patr. Const. Collecti X. 736.
[10] Can. 48. Apost. can. 9 and 771 Saint Basil, 87 at Trullo; Clem. Alex. Strom. 2. 23. Bloptares, Synt. Atl. VI. 177.

Expansion of the idea of fornication is also admitted by the Roman Catholic Church[1], applying it, of course, in the case of separation of body, which may be pronounced on the grounds given above, on "multiple grounds", as expressed in the new Codex juris canonici.

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THE TEACHING OF THE CHURCH FATHERS AND CHURCH COUNCILS OF THE FIRST EIGHT CENTURIES OF THE CHRISTIAN ERA

The Church Fathers allow dissolution of marriage in the case of adultery: All, commencing with Theophilus, bishop of Antioch (185), quote the text from Saint Matthew which states that marriage is indissoluble except on the grounds of adultery.

The first to allude to it was Hermas, in the second century of the Christian era.

In lib. II, mand. IV, cap. Ist of his work on "The Shepherd" (written about the year 145), Hermas, among other things, asks the shepherd who appeared to him in the form of an angel, whether a man, who had caught his wife in adultery, could, without committing sin, continue to live with her. In his reply, the angel makes a distinction, based on whether or not the man was aware of his wife's fault. In the latter case, by continuing the marriage relationship, he is guilty of no sin, but if he was aware of his wife's sin and she does not do penance, but on the contrary, persists in her adultery, he is equally guilty with her and participates in the adultery. To the question as to whether, if the wife wishes to return to her husband after she has done penance, she should or should not be taken back, he obtains the following instructions from the angel: "If the husband is unwilling to take her back, he commits a sin and renders himself very guilty; for on the contrary the one who has committed the sin and has done penance is to be taken back, but only once, since, in respect of God's servants, penance is allowed but once. It is because of this possibility of penance that the husband is not to marry another woman. This disposition, he adds, is valid both for the man and the woman."[2]

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He repeats the same principle a little farther on in relation to the subject of idolatry which he assimilates to adultery. It is because of this precept (of penance), he says, that you, men and women, are to remain unmarried, for in this way penance may perhaps take place.

It follows from this text that Hermas makes second marriage of the innocent party depend upon the penance of the guilty party and not on the idea of the absolute indissolubility of marriage; it follows further that, if the adulterous party falls into sin a second time, there is no longer any hindrance to the innocent party's marrying a second time.

The passage from Hermas has nevertheless given rise to a dispute which is far from finished; it should be observed that Hermas quotes no text: he simply reflects the morals of his time.

St. Justin, philosopher and martyr, about 167, takes a stand on divorce in both of his Apologies. In the first, ch. 15, the author quotes various texts to show the sublimity of the teaching of Christ concerning chastity; among these he also quotes Matthew V. 32, "he that shall marry her that is put away, committeth adultery", without, however, going into any further explanation. And then he continues: "As those who, in conformity with human laws, contract two marriages, are sinners in the eyes of our Master, so also are those who shall look on a woman to lust after her."[3]

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[1] C. XI. C. XXXII 911, 4; c. VII. C. XXXI 911, 7 and the Vth Glory Sedomita; C.V.VI.C. XXVIII. 911. I.

[2] Migne P. G. II. 919.

[3] Migne P. G. VI 349.

This passage presents some difficulties as regards interpretation of the expression duplex matrimonium. Are we to understand simultaneous bigamy, a further marriage following the death of one of the spouses or a second marriage of the divorced persons, allowed by the law of the 12 tables?

The context indicates that St. Justin was not blaming second marriages in general, but only a second marriage contracted before the first was dissolved.

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Justin speaks more clearly in his second apology.[1] In it he speaks of a heathen woman who had long lived a dissolute life and who later was converted to Christianity. She also tried to convert her husband, but he persisted in his licentious life, with the result that his wife wanted to separate from him, thinking herself guilty for continuing to co-habit with a husband who, against the laws of nature and against every right, had no other interest than to follow, in every possible way, a licentious life; nevertheless, made steadfast by her own prayers and quieted the hope of an improvement, she did violence to her own feelings and remained. But when she learned that her husband, who had gone to Alexandria, was leading a life that was worse than ever, she sent him what you (Romans) call repudium and separated herself from him, so that she might not be an accomplice in his sins by continuing to co-habit with him and sharing bed and board with him.

Later the husband withdrew the complaint formulated against her; nevertheless he remained divorced from her.

By these words we see that divorce is allowable. The ideas of Origen (254) on marriage and divorce are found in the comments on Matth. CXIV. Having spoken of Old and New Testament laws wherein are contained many provisions providing satisfaction for the weakness of human nature, and referring to I Cor. VII. 39: "The wife is bound as long as her husband liveth."

Origen mentions a custom then existing in a number of churches of his day to the effect that some ecclesiastical officers had allowed the wife to contract another marriage while her husband was still living. To justify the custom Origen adds that they had not so acted without a reason, for, because of human weakness and to avoid a worse evil it seems preferable to allow such a union.[2]

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Farther on Origen refutes the objection that the Jews might raise to the effect that Jesus Christ was allowing the putting away of a wife under the same conditions as Moses (Paul 24.1).), that consequently the expression πορνεία in Matthew would mean the same as ἄσχημον πρᾶγμα in Deut., by the consideration that in the Old Testament grounds for divorce cannot mean adultery because, according to the law, the latter was punishable by death, but must rather mean any other fault of which a wife is guilty; Christ did not allow dissolution of marriage on any other ground than that of adultery.

In a letter addressed to Amphilochius, bishop of Iconium and Metropolitan of Lycasonia, Saint Basil (379), among other things, wrote: "The decision of the Lord by which separation is not permitted except in the case of adultery, applies, in consequence of its meaning, both to husbands and to wives"[3]. But the custom does not stop there: it is more severe with regard to women. Custom ordains that wives are not to separate from their husbands, even when their husbands are living in adultery or fornication. I do not therefore know whether a woman who is living with a husband forsaken by his wife can be called an adulteress; the wife who has left her husband is surely the guilty party, whatever the ground on which the marriage was dissolved .... However, if the separation occurred because of the husband's misconduct, the taking of such action

[1] Migne: P. G. VI. 444.
[2] Migne: P. G. XIII. 1245.
[3] Migne: P. G. XXX. 677.

finds no justification in ecclesiastical custom, for the wife is not even to separate from an unfaithful husband, but is rather under obligation to carry on right to the end, because of the uncertainty of the result, "for, how knowest thou, O wife, whether thou shalt save thy husband?"[1]

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Therefore the wife who has forsaken her husband is an adulteress if she has taken another husband; but forbearance ought to be exercised towards the forsaken husband, and the woman who lives with such a husband must not be condemmed.[2]

In the 31st oration[3], after stating that a first marriage is legitimate, a second allowed and a third contrary to the law, St. Gregory Nazianzen (390) speaks of divorce in the following terms: "The (Mosaic) law allows divorce on any grounds, but Christ does not so allow it, but only on the grounds of fornication." Since Saint Gregory Nazianzen draws a comparison betwen Mosaic divorce and Christian divorce, it is clear that he allows it, in the case of fornication, with all the characteristics belonging to divorce in the old law, so bringing with the right to divorce, the right to remarry.

In his work Πανέριν (The Bread Basket), Saint Epiphanius of Salamis in Cyprus (413), expresses himself thus: "But when anyone is not satisfied with having had only one wife, either because of her recent death, or because for some other reason, whether fornication or adultery, or indeed some dishonourable reason, dissolution of the marriage has taken place, the Holy Scriptures do not blame such a man if he has contracted a new marriage with a second wife, or a woman with a second husband, nor are they excluded from the Church, nor from eternal life, but leniency is shown them because of their weakness; or so that he might have two wives at the same time, since one of them is still living, but in order that, being divorced from the first, he might contract a new union with a second wife, if it seem good to him. The Holy Scriptures and the Holy Church of God have compassion on such a man, especially if he be a man of piety and conducts himself according to God's laws.

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When he completes the Apostle's words of I Cor. VII, 10, "let not the wife depart from her husband" by the words of the Lord: "excepting for the cause of adultery", the Doctor of the Church indicates that the Lord's words and those of the Apostle are to be understood as legitimately permitting the putting away of the adulterous wife; that to him such dissolution of marriage is absolute, that is, giving right to remarriage, supporting his exegis by verse 11. The Doctor of the Church indeed further explains this verse as follows: "But since dissolutions had taken place on grounds of abstinence and on other ostensible grounds, even as on grounds of small importance, the Apostle states that it would have been better if they had not occurred; but if the dissolution has taken place, the wife is to remain bound to her husband, and, though there is no question of physical union, she nevertheless will remain bound in this sense that she will not marry another husband."

Chrysostom therefore maintains the indissolubility of marriage only where a wife has separated from her husband on grounds of austerity, on other of ostensible grounds, or for reasons of small importance, but not in the case of a wife who separates from her husband on grounds of adultery. As he conceives it, adultery is a genuine ground for divorce, according to the law of Christ; indeed, it is clear he would also doubtless have mentioned adultery, in the contrary situation, in the reference indicated above, among the grounds that bring about only the outward dissolution of bed and board.

In support of this opinion, that the Doctor of the Church contends that a wife's

[1] I Cor. VII. 16.
[2] Comp. Can. 77; ibid 804.
[3] Migne; XXVI, 289.

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adultery dissolves the marriage bond, may also be added his exegesis of I Cor. VII, 12-15. "If anyone, whether husband or wife, has an unfaithful spouse, let her not put him away." Chrysostom asks: "What do you think? If he is unfaithful, he is to continue the conjugal life with his wife, but if he is an adulterer, he is no longer to do so? And yet adultery is a lesser sin than unbelief!". Why is the life in common allowed in this case while, in the case of a wife's adultery, the husband is not blamed for putting her away?

He solves this apparent contradiction thus: "Because in one case there remains the hope that the unfaithful party may be saved by means of the marriage, while in the other case the marriage has already been dissolved; and furthermore, in the former case (the case of spiritual adultery, that is, unbeliever) there remains the hope that the husband may be saved by the wife, his close friend and confidant; in the second case (carnal adultery) that cannot happen: for how could a wife, who for some time has left her husband and given herself to another in violation of the laws of marriage, win again the offended husband who, besides, has become almost a stranger to her? Still further, after adultery, the husband, in that case, is no longer her husband, while in the other case, even though she be an idolater, the wife does not lose her rights over her husband."[1]

As regards a wife, he offers an identical solution in the homily on I Cor. VII, 39, 40:

"The divorced adulterous wife is no longer the wife of her first husband; so as not to dishonour himself by continuing conjugal relations with the unfaithful wife and so as not to encourage adultery, the husband is obliged to put her away."

Any doubts that might still be preferred against the opinion that Chrysostom regarded adultery as grounds for divorce in the sense of dissolving the bond are dissipated by his exegesis of verse 15.

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"If the unbeliever wishes to depart, he may do so; this has come to be known as the 'privilegium paulinum', in which he understands it in the sense that the marriage is completely dissolved, and in which it is said that spiritual adultery, that is, unbelief, brings about the same consequences as carnal adultery. Indeed, in explaining verse 15 he continues thus: "If unbelief commands you to sacrifice to idols and, as his wife, to choose between participating in heathen practices or leaving the house, it is better in such case that the marriage be dissolved." In such case it is the unbeliever who provides the ground for dissolution, just as in the case of adultery it is the adulterous person who provides it.[2] By these words Chrysostom has clearly expressed the opinion that dissolution on the grounds of adultery is to be understood in the same sense as dissolution in the case of "privilegium paulinum", that is, in the sense of dissolution of the marriage bond.[3]

In his exegetical work dealing with worship in spirit and in truth, Lib. 8, Cyril of Alexandria 444, in a reference to Deut. 24:1, 4, makes the following remark: a wife divorced from her husband on legitimate grounds, and who has been dishonoured by the fact that another has taken her as his legitimate wife, is not dangerous but rather inconsiderate, as shown in Prov. XVIII, 22: "He that keepeth an adulteress, is foolish and wicked."[4]

In his comments on Matth. V, 5, 32, he adds that "it is not bills of divorce that dissolve marriage in the sight of God, but bad conduct."[5]

[1] Migne: P. G. LXI, 154ff.
[2] Migne: P. G. LXI, 155.
[3] Denner, die Ehescheidung im neuen Testamente p. 79 Paderborn 1910.
[4] Migne: P. G. LXVIII, 584.
[5] Ibid LXXII, 380.

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Therefore, according to Cyril, there are "legitimate grounds" for divorce which are based on reason. Moreover, in the case of adultery, Cyril allows that a husband may marry a second time even during the lifetime of his adulterous wife.[1]

The synods of the first centuries of Christianity largely reflect the teaching of the Farthers of the Church: marriage is indissoluble except in the case of adultery.

In the 9th canon of the Synod of Elvira (about 305 or 306) it treats of wives who "for no reason" forsake their husbands and marry others, and in the 10th canon, of those who forsake their husbands for reasons of adultery and contract new marriages.

In the former case communion is to be refused to such wives to the end of their days, in the latter it will be administered to them if the forsaken husband has died or if it appears necessary in case of mortal illness.

From the expression "without antecedent causes" the conclusion has been drawn that wives incur no penalty if they contract a new marriage after forsaking their husbands on just grounds. The remark has also been made that the canons only speak of the wives, which gives the impression that husbands might contract new marriages after putting away their adulterous wives.

Canon 10 of the Synod of Arles (314) recommends that the young husband who has caught his wife in adultery remain unmarried as long as possible, during the lifetime of his wife, even though she was an adulteress, but it is simply advice given without any sanctions.

The Synods of Neocaesarea (314-325) and *Laodicea* (314-381) are of interest because, in canons 3 and 7 of Neocaesarea and in the first of Laodicea, they deal with second marriage and other marriages that may still take place, and it is stated there that the matter does not relate to "successive bigamy", but to marriage during the lifetime of the first wife, a marriage which both synods acknowledge to be valid, to which only an ecclesiastical penalty is attached.

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In addition, canon 8 of the Synod of Neocaesarea forbids a married priest whose wife has committed adultery to continue the marriage, on pain of losing his priestly functions.

In Ireland St. Patrick held two synods with his suffragans, the first between 450-456, the date of the second, unknown.

Canon 27 of the second synod grants the right of remarriage to a husband who has put away his adulterous wife, assimilating adultery to natural death, and canon 28 considers the marriage to be dissolved in the case of adultery.

The same ideas are expressed by the Council of Vannes (465) in canon 2, which, like the Irish synods, is based on St. Matthew.

The Council of Adge (506) is still more tolerant. It only excommunicates persons who divorce their spouses and who remarry if they have not previously informed the bishops of the province of the ground for their divorce. (c.25).

The second Council of Orleans (533) forbids divorce on grounds of a disability subsequent to marriage; those who disobey will be excommunicated (can. 11).

The Council of Nantes (658) allows the husband to put away his adulterous wife, but forbids him to marry while she is living. The husband may be reconciled to his wife, but, in such case, both the husband and the wife will do penance for seven years (can. 12).

The Council of Hereford (673) expresses itself in the manner of the Fathers of the Church: none has the right to put away his legitimate wife except it be for fornication, and it adds that those who have put away their wives are to abstain from taking another if they wish to act as good Christians (Can. 10).

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[1] Denner, o. cit. p. 70.

Canon 87 of the Trullan Synod calls the wife who marries another husband an adulteress, if she has forsaken her husband without cause, but the latter has the right to contract a second marriage, and neither he nor his second wife shall be regarded as adulterers.

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The Synod of Soissons, 744, forbids divorce, but certainly allows an exception in the case of adultery on the part of the wife (can. 9). The synods of Campiègne (757) and Verberie (758 art. 68) both allow divorce on various grounds.[1]

Most of the penitential books allow divorce on a certain number of specified grounds: adultery, abandonment, captivity, impotence of husband, the servile condition of a wife ignored by her husband, conversion to Christianity of one of the spouses, and even by mutual consent.

With regard to the Orthodox Church, nothing much can be added to what has just been said. Indeed, Orthodox canon law can be considered to be definitely established by the 9th century, following the publication of the Nomocanon, long attributed to Photius. We have already emphasized how important is that canonical collection since, as we have said, it is the acceptance or rejection of a ground for divorce by it that forms the criterion in the matter with which we are dealing.

After the 9th century Orthodox theologians restricted themselves to comments on previous canonical provisions. Theophylactus 1107, archbishop of Orchrida; Eutlymius Zigabenus 1118, Zonaras, Alexis Aristenus, Theodore Balsamon.

We must add that Orthodox canonists see a confirmation of their teaching in the following facts:

(a) the attitude of the clergy, both Eastern and Western, which never protested against the legislation of the first Christian emperors, notably against that of Justinian, would tend to prove that such legislation was in accord with Christian principles, which princes of that period would never have dared disobey. Civil legislation enjoyed the

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same consideration in the East as in the West: the popes referred to it respectfully and used it, not only in ecclesiastical and civil administration, but also in the internal organizing of their courts.[2]

(b) from talks which, at Florence (1432) brought about the short-lived union of the two Churches, it may be concluded that the teaching of the Orthodox Church concerning the dissolubility of marriage was not regarded as contrary to Christian tradition, or, at the very least, it was not considered to be a dogma, but simply a matter for disciplinary action, for union would otherwise have been impossible.

The same may be said concerning partial unions which later took place: among the four conditions for the union of a part of the orthodox Roman Catholics of Transylvania 1699, to cite only one case, the question of divorce was not mentioned.[2]

At any rate, that argument is not new: it was invoked at the Council of Trent by Ostunensis: "The fact is," he states, "the practice of the Greeks did not begin at the time of the schism, nor in the period of the heresies for which they were condemned, but rather in the period in which the Greeks were united to the Apostolic See."

It is for that reason that, at the Council of Florence, Eugenius IV did not condemn them, even though they had refused to renounce their teaching.[3]

[1] Compiègne: can. 9, 11, 15, 16, 19, 21; Verberie: can. 2, 5, 9, 10, 11, 12, 17, 18.

[2] J. B. Vitra: Juris Gaecorum historia et monumenta II praefat XXXIV note 6. The four conditions are: the primary of the pope, consecration of the Host, purgatory and the Filioque of the Holy Spirit.

[3] Theiner Acta II, 320-360.

(c) Likewise the Council of Trent did not condemn the practice of the Eastern Churches. It places its anathema on those who say that the Church was mistaken when it taught and teaches, in accordance with the teaching of the Gospel and of the Apostles, that marriage is not terminated by the adultery of one of the parties and that the innocent party may not marry another. (Sessio XXIV c.7).

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The history of that canon is well known: its final editing was the consequence not only of the intervention of the representatives of the Republic of Venice (August 11, 1563), drawing the attention of the Council to the unrest that could have occurred in the Venetian possessions in the East if the original wording had been maintained, but also of that of a great many Priests who asked that the teaching of the early Church Doctors be not condemned. In addition a number of them contended that an obstructing impediment against remarriage of divorced persons might be found in Scripture texts, but not a diximant impediment, the latter having only been introduced by the Constitution of the Church.[1]

It was as a result of these discussions that the canon received the wording indicated above and that it now appears to be directed solely against Protestants.

Whether or not Canon 7, "De Sacramento matrimonii", contains a statement of dogma or is only confirmation of a point of discipline is a disputed matter[2]; however, we still believe that in our own day the question of dissolution of marriage does not form an impediment to the union of the Churches that is so desired.

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HISTORICAL SURVEY
DIVORCE BY MUTUAL CONSENT

Roman law allowed divorce. At a time when "conformatio" marriage took place, dissolution was obtained under the opposite and difficult "difformatio" method.

Divorces became more easily obtainable when marriages were performed by means of the uses of the coemptio. To obtain a divorce it was necessary to invoke grounds provided in the law: adultery, drunkenness, sorcery.

Religious decadence and the new form of marriage, marriage by consent, which replaced the old forms, still further encouraged the relaxation of morals and, as a consequence, easier divorces.

Divorce by consent now corresponded to marriage by consent: marriage could be dissolved "nudo consensu" of the spouses.

In order to obtain a divorce by mutual consent the spouses required no justification; furthermore, such divorce did not harm them materially, as their respective rights were settled by mutual agreement. In respect of unilateral divorce (the repudium), Roman law distinguished between divortium "bona gratia" and repudium "injustum": the former was obtainable on grounds recognized by the law, but for which the spouse put away was not responsible, while the latter was deliberately brought about by one of the spouses who was unable to invoke legal grounds for the divorce. Lower Empire law recognizes these various aspects of divorce, but, on this occasion the repudium is the object of a subdivision different from the former: a distinction is made between divorce that results in a penalty against the guilty party (cum damno) and divorce providing no penalty (bona gratia), which is not to be confounded with divorce by mutual consent.[3]

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[1] Esmein op. cit. II, p. 299.
[2] Perome: De Matrimonio christiano, Leodii, 1861, III, p. 4.
[3] Nov. 117, Cap. 8-13.

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In the previous chapter we showed the teaching of the Orthodox Church on the dissolution of marriage for a specified cause; it now remains to show its struggle in the fight against divorce in general, and expecially against divorce by mutual consent, which managed to keep alive until the tenth century.

In the struggle against "divortium ex consensu" the difficulty arose from humanitarian notions from which its legal strength had been derived and which could not willingly be repudiated. Because of the profound penetration of the institution into all circumstances of life, it would frequently be a painful business to bring the special reasons for divorce into court or before public opinion, for example, in the case of adultery, to accuse powerful and wealthy accomplices, to render public ignominious treatment sus ained, to destroy whole families by the exposure of things most delicate in nature and altogether private in character, and to provoke bitter enmities. And as little could implacable hatred and invincible antipathy, which are based on temperaments and often on inexplicable causes, be reduced to special grounds for divorce.[1]

In spite of these difficulties, the Roman emperors clearly perceived that, in order to prevent the decline of morality, and, as a consequence, of the State, resulting from the facility of divorce "ex consensu", it was their duty to take restrictive measures.

In the year 18 Augustus tried to reduce the number of divorces by the "Julia de coercendis adulteris" law.

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As in the past, divorce was to be effected without the intervention of the public authorities: however, observation of certain formalities were now required: the consent had to be confirmed by the statement of seven adult Roman citizens (S. XXIV, 2.9.).

A limitation of the right to divorce was also brought by the laws of "Julia" and "Papia Poppaea" about the year 9 of our era, under which marriage contracted between a freedwoman and her employer could no longer be dissolved. The Church, on its part, stood strongly against divorce. The canons have their basis in the New Testament, but in them the essential matter is not the prohibition of divorce, but the precept of the Lord and the prescriptions of Saint Paul according to which a divorced spouse has no right to remarry (can. 46 Apost. 102 Carth. 48 and 77 Saint Basil, 87 in Trullo), while the Fathers speak strongly against voluntary divorce, as, among others, did Saint Gregory of Nazianzen who asked Olympias to use every means to prevent the divorce of the daughter of Veranius by mutual consent (Ep. 176).

The Church's influence began to make itself felt in the political legislation. In the year 331 Constantine limited the "repudium injustum" by making it impossible for the husband to separate from his wife unless the latter had been guilty of adultery, pandering or poisoning. But the grounds on which a wife could put away her husband were reduced to murder, poisoning and despoiling of a grave (C. Theod. III, 16. 1).

The "divortium bona gratia" was also subjected to changes: for example, where a husband had gone to war, a wife could only remarry four years after his disappearance. Illegal separation resulted in pecuniary penalties being imposed on the spouses, and, in addition, a wife was deprived of the right to remarry. Divorce, "ex mutuo consensu", was not altered by Constantine (Cod. V. 17.7). His legislation, abolished by Julian in the year 363, was re-established and partly changed by Theodosius II and Valentinicus III in the year 449. In principle they were devoted to Constantine's law by which divorce was not to be permitted for every trifling reason; nevertheless, they considerably extended the right to obtain a divorce by the addition of a whole series of new grounds for divorce to those already in existence.

[1] Zhishman, op. art. p. 99.

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In order to get a divorce both spouses could invoke the following grounds: adultery of the other spouse, poisoning, theft, forgery, receiving and concealing stolen goods, piracy, debauchery, attempts on one's life. In addition, the wife could unilaterally divorce her husband for high treason, theft of animals and cruelty on the part of her husband. The husband could put away his wife when the latter became dissolute without authorization, or when, still without her husband's authorization, she attended the theatres and banquets. If the divorce took place where none of the grounds mentioned existed, severe penalties were laid upon those found guilty. A wife lost her dowry and the donation, "ante inuptias"; moreover, under pain of infamy she chould not remarry before five years had elapsed. In the case of a divorce without justification, the husband was only subjected to pecuniary penalties (loss of dowry and the donation ante nuptias). Where there were grounds for divorce, the husband could after a one-year period, remarry the wife who had been put away; the dowry and the donation "ante nuptias" were awarded to the innocent party.

In the year 497 the emperor Anastasius declared that, where a marriage is dissolved by mutual consent when none of the reasons indicated by the emperors Theodosius II and Valentinicus III, in the year 449, exists, a wife may, after a year, marry again (Cod. V. 17.9).

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The right created by Theodosius lasted about a century, and it was only the important reign of Justinian I that brought new reforms to divorce legislation. In respect of this question, Justinian laid down as his primary principle that anything contracted between human beings may be dissolved. The stipulations "ne liceat divestere" were absolutely null and void. (Nov. XXII. C3.).

However, in the year 542, the same emperor, in the Novella 117, ch. 10, abolished divorce "ex consensu" except on grounds of piety. According to the Novella 117 there are two kinds of unilateral divorce (Repudium): divorce "cum damno" and divorce "bona gratia". The former is justified by the crime of high treason, attempts on one's life, adultery legally proved, and circumstances usually accompanying adultery or following thereupon.

These are considered to be: (a) on the husband's side: a wife's keeping company with other men, participation in banquets and the baths, the unauthorized absence of a wife from the conjugal home, frequenting of theatres and circuses without her husband's authorization; (b) on the wife's side: attempts made by a husband upon his wife's moral rectitude, falsely accusing her of adultery, keeping a concubine, continued adulterous relations in spite of repeated exhortations.

Divorce "bona gratia" was also made the subject of legislation by Justinian. Divorce on the grounds of disappearance, allowed by Constantine, was restricted by the Novella 22, ch. 14, the waiting period being fixed at ten years instead of four.

The Novella 117 no longer recognized those grounds for divorce. But divorce could be granted on the grounds of impotence after a test period of two years (L.10.C.5.17), and, according to the Novella 22, ch. 6, after three years. In addition the following grounds for divorce were recognized: captivity or slavery (Nov. 22, ch. 7; Novella 117, ch. 12), monastic vows, elevation to the episcopacy (Nov. 22, ch. 5, Nov. 117, ch. 12).

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Where illegal divorce occurred, a wife lost her dowry and was exiled for life to a convent, while a husband guilty in the same fashion lost the donation "propter nuptias" and, in addition, was subject to a penalty equal to one-third of the donation (Nov. 117, ch. 13).

The Novella 117 was later confirmed by the Novella 134, ch. 11. But, as noted in the Breviary of Theodore Hermopolitanus (Nov. 134 and 26), separation where no grounds existed remained valid: it is bad, said he, but it is valid.

Divorce by mutual consent, abolished by Justinian, was re-established in the year 566 by Justin II, his successor (The Novella 140). Justin II begins by declaring that there is nothing so worthy of esteem as is marriage which, ensuring an uninterrupted succession of families, forms the very basis of the State.

It is for that reason that he is anxious that marriage bring happiness to husband and wife, and that they, avoiding the suggestions of the Evil Spirit, do not separate without just cause.

But as such a state of perfection cannot be reached by all men, because of the difference in temperaments, which very often engenders a dangerous enmity between the spouses, he decided to remedy this situation, even more so because, in his opinion, when his father abolished divorce by consent, he had not obeyed the injunctions of his just and sure thinking, and had not done what was necessary in respect of the weakness of the human will.

There are many who, painfully enduring a marriage that had been entered into, have asked him, he says, to allow their marriage to be dissolved by mutual consent. He put off its solution for awhile, endeavouring to reconcile those who were dominated by disorderly sentiments and hatred. Sometimes some of them even reciprocally set traps for each other, using poison and other means which end in death, to such an extent that the very children of their marriage have been unable to reconcile them.

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For these reasons, Justin II decreed a return to the ancient right by which, with no damage, a marriage could be dissolved, "for if the marriage is established by the reciprocal will of the spouses, it is ordinary justice that it be dissolved "ex consensu" in the opposite situation, for which bills of divorce are the evident manifestation.

Lastly, Justin again confirms the previous decisions relating to marriage, the children by such marriage and the grounds for dissolution. Very important with regard to the development of the teaching concerning divorce, not only in the Orthodox Church, but also in civil legislation, is canon 87 of the Trullan Synod (692). That canon excludes divorce where no grounds exist, as well as divorce by mutual consent. The result was that the Ecloga, published (740) by the emperor Leon II and his son, Constantine, abolished divorce by mutual consent. Both emperors issued the following decree: "the wisdom of God, the Creator, has made us to understand the indissoluble union of those who, being legitimately married, live in Our Lord; for, having created man out of nothing, he did not create woman in the same manner, even though he could have done so, but he formed her out of the man, so as to establish the law that, since those two persons are one flesh, marriage is not dissoluble. For that reason when the woman, at the instigation of the serpent, approached her husband, offering him the bitter fruit, he did not separate her from her husband; in the same manner, when both disobeyed the commandment that had been given, God did not separate the man from his wife; he punished the fault that had been committed without dissolving the marriage. This important law was also confirmed by the words of the Creator: when the Pharisees asked him whether a man could separate himself from his wife for every cause, he replied that what God had joined together, man is not to put asunder, unless

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it be for fornication. That is the law we wish to follow also, and we do not intend to take other measures in relation thereto. But, since bad habits have enveloped most men, and a great many married couples are dissolving their marriages on trifling grounds, we have deemed it necessary to indicate one by one in this law the grounds on which marriages may be dissolved. (Ecloga tit. XIII).

After that introduction the following reasons for divorce are given:

1. Fornication of the wife.
2. Impotency of the husband.
3. Undertakings endangering the life of the other spouse.
4. Leprosy. All other causes for divorce, notably mental illness, are suppressed.

Forty years later, about the year 790, emperors Leon IV and Constantine found they had to take severe measures against those who brought about, together, a spiritual relationship to a degree that was prohibited (can. 53 in Trullo), so that they might thereupon obtain a divorce.[1]

The same Novella condemned divorce by mutual consent, recalling that it is only permitted, in accordance with the Justinian law, for a pious purpose, which does not seem to be altogether in agreement with apostolic canon 8.

In spite of those prohibitions, there are good reasons for believing that divorce by mutual consent continued even after the Novella quoted above.

It is thus an explanation is given of the reasons why canons 115 and 123 of the Patriarch Nicephorus (806-815) do not declare divorce by consent to be null and void, and only impose a canonical penalty; on the other hand, it is seen from the Eclopa privata aucta, ch. 7, title II, that divorce by mutual consent was still being practised at the time that that collection was published, about 867.

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The collection bearing the name of Photius (Tit. XIII, ch. 4) does not go beyond a reminder that divorce by mutual consent was abolished by Justinian (Nov. 117), and then re-established by Justin II. From that single reference it would appear that divorce by mutual consent was still in effect about 883, because that collection makes only one final reference to the Novella 140 of Justin II. But, in his comments, Balsamon is more explicit: he shows that the Basilicas do not reproduce the Const. 9, tit. 17, lib. II of the Code that allows dissolution of marriage by consent. The fact that neither do the Basilicas reproduce chapter 10 of the Novella 117, abolishing divorce by consent, is of no importance, he says, since they have reproduced (lib. XXVIII, tit. 7, ch. 4) chapter 13 of the Novella 134 which confirms the Novella 117. Moreover, he observes that the Novella 140 of Justin II was not accepted in the Basilicas (Migne P.T. CIX 1192).

Victory against divorce by mutual consent was only fully won at the end of the 9th century. The Byzantine collections of that period all contain the prohibition of divorce by mutual consent.

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SECOND PART

CHAPTER I

CAUSES FOR THE DISSOLUTION OF MARRIAGE—CLASSIFICATION—DISSOLUTION OF BETROTHAL

A. The causes for divorce have fallen under various classifications. John Hadsdits, one of the first authors to deal with divorce in the Orthodox Church, divided them into two main groups, each having two subdivisions:

(a) *Death*, (1) natural death, certain or presumed, (2) civil death.
(b) *Fornication* or adultery, (1) certain, (2) presumed.[4]

[1] Zadoria. J. G. R. III. 49.
[2] Zhishman, op. cit. p. 1. 106.
[3] The Prodiron XI, 4, Epanagoga, tit. XXI, Basilicas XXVIII, 7, 6. Peira XXV, 37, 62 LXVIII. 6.
[4] John Hadsdits: Rissertatio de causis matrimonium dissociantibus Budae 1826.

In the first half of the 19th century, Theodore Mandies considered the following as causes for divorce: death, fornication and apostasy which, according to him, are the only canonical reasons for the dissolution of marriage.[1]

The most widespread division and that which is generally adopted by canon lawyers and authors who have dealt with this matter, is that referred to in Novel 117 of Justinian, chapter 8, which divides the reasons for divorce as follows: (a) causes which entail penalties against the guilty and (b) causes which dissolve the marriage "bona gratia", i.e. without penalties against the spouses.

In spite of its antiquity and its practical importance, our preference goes to the division of causes for divorce into three groups according to their origin and their (occupation) acceptance or rejection by the canonical collections.

This division seems to us more legal and more in accordance with the development of ecclesiastical doctrine regarding divorce, because the Orthodox Church has not indiscriminately accepted all the causes for the dissolution of marriage established by the civil laws, but only those which are recognized as such be the Nomocanon which for a long time was attributed to Photius. The Nomocanon was made compulsory for

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the entire Orthodox Church by the synod held in Constantinople in the year 920. The cause for divorce established by the State, but which is not accepted in this collection, has no legal force from the viewpoint of ecclesiastical law and no divorce may be pronounced for such a cause. But, for acceptance in the above-mentioned collection, the cause for divorce acquires a canonical character and may serve as a cause for a canonically valid divorce. In our outline, we shall thus divide the causes for divorce as follows: (a) causes established by the Church in accordance with canonical sources, (b) causes established by civil legislation and accepted by the Church, (c) causes established by civil legislation and not accepted by the Church.[2]

B. *The betrothal* is the promise of marriage. In the Mosaic law, it had the value of marriage, and whoever had sexual relations with someone else's betrothed was punished as an adulterer. (Comp. Seut. XXII. 24).

After the exchange of symbols of bethrothal, the bethrothed woman received ther name of spouse. It is in this sense that the Holy Virgin is called Joseph's spouse (Matth. I. 20).

In Roman law betrothal was considered as a contract which was accompanied in most cases by a "stipulatio poenae" which was valid in that case. It was also accompanied by certain formalities: an exchange of gifts, giving of earnest money or the kiss which the betrothed exchanged before witnesses. Whoever had sexual relations with a young woman who was betrothed in this manner, committed adultery, but betrothal which was entered into solely by means of verbal engagements, did not produce this effect (Cod. V.1.3. De sponsalibus). In the case of dissolution of betrothal, the betrothed woman had the right to act as husband, both against the fornicating betrothed and against the person which had committed adultery with her. (Basilian rule IX. 7.c. 17. and 2; LX, 58, c.8 heading 7, chap. 12 and 3 of the same book).

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Novel 109 by Leo the Philosopher and a Novel by Alexis Comnenus in the year 1083, imposed the religious blessing upon betrothal and made it one with marriage; since that time, it can only be dissolved in the same manner as perfect marriages. In

[1] Th. Mandies: Dissertatio de causis connubium discindactibus, Leipzig, 1849.
[2] Nicodem Milash: Oreptul Biscericese Orientul, p. 521, Bucuresti 1915.

principle, religious betrothal is indissoluble like marriage itself; it can only be dissolved for the following reasons:

(1) If the betrothal could not be made valid because the children were under the age of puberty.

(2) When the betrothed woman has been made pregnant by a person other than her betrothed. Leo the Philosopher who added this new cause for dissolution to the former ones set by the Cod. V.1, justifies it by the consideration that such relations, before marriage, prove the absence of loyalty and sinceriity on the part of the betrothed woman towards her future husband and furthermore, they would not be a cause for perpetual disputes in the future family.[1]

(3) Because of diversity of religion and dogmas.

(4) Because of moral depravity or

(5) Because of a change of social conditions.

(6) When marriage has been deferred since more than four years for a plausible reason, because of chronic illness, because of the death of parents, because of crimes entailing capital punishment or because of a lengthy trip undertaken out of necessity.

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(7) When the betrothal took place as a result of violence exercised by the Governor of the Province, against the will of the parents.

(8) When one of the parties takes up monastic life. In such cases, wedding gifts are returned, but no damages are due (Photius, Nomoc. tit. 11.c.1.).

(9) When the betrothed man became a decurion.

(10) When his fortune was confiscated or he was obliged to perform some service towards the State.[2]

The betrothal was also dissolved when the marriage could no longer take place because of some hindrance. The bethrothal without religious blessing was not nullified: it had the force of a civil contract, and even constituted an impediment to marriage, in accordance with the ancient civil law, but the betrothed man, from the civil viewpoint, only was not considered bigamous in a case where he married after the death of his first bethrothed. Byzantine civil laws and canon lawyers deal at great length with the dissolution of betrothal, but from the practical point of view, those prescriptions are without interest, because the Orthodox church, in order to avoid the latest consequences resulting from the complete union of betrothal and marriage—consequences which were sometimes unfortunate, namely for future clerics—has made provision to celebrate the religious betrothal and the wedding on the same day, at the same time, without discontinuity, so that in fact the question of the dissolution of religious betrothal no longer arises.

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I. THE CANONICAL CAUSES OF DIVORCE

ADULTERY[3]

A. *The notion of adultery:* As we have already shown in the doctrine of the Orthodox Church, adultery completely dissolves the conjugal bond. Greco-Roman civil legislation agrees on this point with the teaching of the Orthodox Church: Novel 117, c.8 and 2 cite adultery as a cause for divorce, immediately after the crime of high treason.

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[1] Novel 93.

[2] Blastores, Migne, 1.9. CXLIV 1190.

[3] The causes for divorce are enumerated in the Nomocanon XII, 4 (Synt. Ath. I 294-301) and in Blastores I, 13 (Synt. Ath. VI. 175 and 179), and also in Latin in Beveregii Synodicon II, p. 73-75; Migne, Bibologia graeco-latina (IV (Nomocanon et CXLIV (Matth. Blastares).

By adultery we mean the violation of conjugal fidelity. However, the notion of adultery has not always been understood in the same manner: it has covered more or less ground according to the different definitions dealing with it.

According to the first definition, adultery is any sexual relation contrary to the laws, whether it be with a free person or with a married person. According to this conception, which has often been applied in the Church, the notion of adultery coincides with that of fornication.[1]

The argument of those who confuse adultery and fornication is that there can only exist one single legitimate union of the husband and the wife and of the wife with the husband, and consequently, that which is not legitimate is unjust and contrary to law and whoever is not properly bound is in possession of a foreign bond, even though the latter does not have a master.[2]

The definition given by the Fathers of the Church is of a more restrained nature and holds as a principle that "copula cornalis" of a married person with a person other than the spouse constitutes adultery.[3]

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Although this definition was in keeping with the aspirations of the Church which was aiming at establishing legal equality between spouses, it was not accepted by the canonical law of the Orthodox Church, which in the end followed the opinion of St. Basil, which in fact amounts to the ancient Roman law modified by Byzantine law. In L. 6 and I Dig. XLVIII. 5. we read that every fornication committed with a virgin or a free woman is considered as adultery. But immediately thereafter, in the same law, we encounter the restriction, according to which adultery proper consists in relations with a married woman, and the term fornication (stuprum), is reserved to relations with a virgin, a free woman or with children.[4]

Byzantine legal experts have adopted this distinction between adultery and fornication: according to Harmenopoulos (Manuale Legam. lib. VI. tit. I) the definition of the Julia de adulteris law is abusive, because true adultery is that which is committed by the married woman.

The demarcation between fornication and adultery is also clearly drawn by the Fathers of the Church and by the canonical lawyers. The basis for the distinction is the consideration that, in the first case, it is the sexual instinct and its amorous passions which are gratified without infringing on the rights of another person, whereas adultery implies the violation of another person's rights which often goes hand in hand with attempts against the latter's life. In the case of fornication, the man has sexual relations with a free woman, whereas in the latter case, he has illicit relations with someone else's wife.[5]

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Fornication does not differ much from adultery[6]; but since the Fathers recommend indulgence, St. Gregory of Nyssa also accepts the above-mentioned distinction. Since adultery is thus a more serious sin than fornication, because of the prejudice it imposes on a third party, the penalties for adultery are equally more severe: the Fathers of the Church agree that the penalties for adultery should be doubled as compared to the penitence imposed on fornicators.

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[1] Sig. XLVIII, 5, 6; Basil LX 37.8.

[2] St. Gregory of Nyssa, c. 4.

[3] Tertoll de Monog. C. 9. Lactance div. Inst. VI. C-23; Chrysost. Homil. V in Thesal c. 4; De lib. rep. in I. Cor. VII 39; Augustin, de bono conjug. c. 4.

[4] Cf. L. 34 and I D. XLVIII 5.

[5] St. Gregory of Nyssa, c. 4.

[6] I. Thesal. IV. 4.; Eecles. IX. 12.

St. Basil (Can. 21) makes the same distinction between adultery and fornication. A husband who has a legal wife and who has relations with a free woman is a fornicator and not an adulterer, for want of a canon condemning him as such. But he should be punished more severely than the unmarried man, who is guilty of fornication.

In fact, the latter has an excuse which the former, who only acted because of his intemperance and immoderate feelings, cannot invoke.

A wife must take back a husband guilty of fornication who has given up his misconduct, but a husband is obliged to turn an adulterous wife out of his house. St. Basil adds that justification for this measure is not easy to find, but custom will have it that way; he cites: Proverb XVIII. 22 and Jerem. III. I. The commentators state that the latter passage, "The woman shall no longer return to her husband" should be understood in terms of the husband who does not want to take her back; but if the husband forgives her, she must be taken back within a period of two years, in accordance with the Novels of Justinian and of Leo the Philosopher. And finally, it should be noted that the woman, who has made a vow of chastity and has then given way to the desires of the flesh, is adulterous, along with the man with whom she has sinned (Can. 60 St. Basil).

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The same applies to he who marries the betrothed of another man, during the latter's life (Can. 98 St. Basil and 98 of synod in Trullo). The Fathers of the Church very often quote the words of the Lord reported in St. Matth. XIX 9. and V. 32. Canonical lawyers interpret them in the sense that it is only he who turns out his non-divorced wife in terms of the law, who is guilty of adultery. By means of an a contrario argument, it is inferred that whoever turns out his wife for a just cause and marries another, whether free or divorced according to the legal conditions of Novel 117 of Justinian, is not guilty of adultery.[1]

With regard to a divorced woman, the Fathers and canonical lawyers agree that she should remain unmarried (Can. St. Basil 48) because of the general terms in which the Lord expressed himself, without distinguishing whether she has been turned out for a just cause or not. She only becomes adulterous though, if she contracts a new union, in view of the fact that simply abandoning her husband does not make her adulterous.[2]

Although a wife was not the cause for the divorce, but the husband, she will be condemned as adulterous, if, failing to become reconciled with him, she contracts a new union.

The following question has been asked: what penalty was imposed upon the husband of the wife who was unjustly turned out, the husband who was the cause and the author of the adultery if the woman contracted a new marriage? Some have considered him adulterous, but this is not the opinion of Balsamon, since the wife is free not to remarry according to her will and thus not to become adulterous.[3]

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He should thus not be considered adulterous, but he will be dealt with according to civil laws, which forbids divorce without just cause and here Balsamon refers us to Novel 134 cap. 11, reproduced by the Basilian rule: book XXVIII tit. VII. c.6. Christianity has upheld the principle of the equality of rights of the spouses. This principle is affirmed for instance by St. Basil in his canon 9 and we also find it in the Roman legislation of the Lower Empire, which applied without distinction the penalties for reckless divorce to husband and wife.

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[1] Migne: P, G. CXXXVIII, 134.
[2] Migne: CXXXVIII. 621.
[3] Ibid. 729

However, in that same canon 9, St. Basil affirms that the custom is more severe towards women, who according to it should make it an absolute duty never to abandon their husband, because even though they left him because of ill-treatment, it would have been better to suffer the blows than to separate; the squandering of the dowery does not constitute a just cause, and neither does the husband's fornication.

This practice would be all the more justified, since the Apostle himself does not order the wife to separate herself from her unfaithful husband, but on the contrary, he enjoins her to remain with him because of the uncertain result, because the wife may perhaps save her husband.[1]

For these reasons, St. Basil affirms that the wife who abandons her husband, no matter for what reason, and who marries another man, is adulterous, but the abandoned man is not guilty, since the responsibility falls entirely upon the woman who has abandoned him. In this case, the second woman who cohabits with the abandoned husband, is not adulterous.

The canonical lawyers add, that the husband only becomes adulterous when he separates himself, without just cause, from his wife and marries another woman because he imposes adultery upon his former wife, and likewise, the woman who lives with a husband who has turned his legal wife out without reason, is adulterous, because she takes the husband of another woman.

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It goes without saying that adultery must have been committed intentionally. The purpose must be sought for in any crime, and St. Basil does this at great length when examining the circumstances in which adultery has not been committed intentionally. (Can. 8 St. Basil). Consequently, there is no adultery when relations took place by error or when the woman was raped. St. Basil states it formally in the case of fornication (Can. 49) and St. Gregory the Thaumaturge does so for the captive women who are raped by barbarians, unless they had already entered upon guilty relations prior to their captivity (Can. II. This is only the confirmation of the ancient principle: "Vim passa mulier lege non tenetur".[2]

B. THE PENALTIES FOR ADULTERY

I. The ecclesiastical penalties: Adultery is such a serious sin, that St. Basil likens the adulterous person to homicides, sodomites, makers of poison, idolaters, to whom he inflict a penance of 15 years (c. 7 and 58). St. Gregory of Nyssa punishes adultery with 18 years of penance, which is double the penalty for fornication. (can.4).

The synods of Ancyra (can.20) and the 6th oecumenical gathering in Trullo, show more indulgence towards people guilty of adultery, to whom they inflict a penalty of seven years. (can.87). This penance consisted of five degrees: the first year, the penitent had to remain at the gates of the Church and, falling at the feet of those who entered it, ask them with tears in his eyes to pray for him; during the second period, he was allowed to remain in the entrance of the Church to hear the reading of the Holy Scriptures; during the third stage, the penitent took part in the prayers of the catechumens, and then in those said by the faithful, and it was only after seven years of penance—the three last periods lasted two years each—that he was considered worthy to receive communion.

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The foregoing degrees did not apply to the adulterous woman. She was simply excluded from communion during 15 or 17 years for the reason that if she were put amongst those who wailed at the doors of the Church or else placed amongst the

[1] I. Cor. VII. 16.
[2] L. 39. O. XLVIII. 5.

catechumens, everyone and especially the husband would think that she was guilty of adultery and perhaps even of other crimes, and because of this, her life would be in danger.[1]

Adultery is such a serious crime that laymen, whose wife has committed adultery, are not allowed to become members of the clergy and this applies all the more so if they have committed it themselves. If the wife has committed adultery after the ordination of her husband, the latter must turn her out; in the opposite case, he will be unfrocked.[2]

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II CIRCUMSTANCES ACCOMPANYING ADULTERY

The circumstances which, in general, accompany adultery or suggest it, are considered by Novel 117 as distinct causes for divorce. This is why we shall expose them in a special paragraph, although they seem to be rather an extension or at the very least a means of proof of adultery.

Likewise, all attempts by one of the spouses against the life of the other, constitute, according to the same Novel, a distinct cause for divorce. However, we have joined them under the heading of circumstances which accompany adultery, since, ordinarily, it is the relations of one of the spouses with a stranger which leads to attempts against the other's life.

These circumstances are as follows:

A. Faults which are ascribable to the wife.[3]

(a) If the wife has been guilty of attempts against her husband's life or if she has had knowledge of plots prepared by other persons and has not denounced them to him. The nature or motive of these undertakings is not important, whether they were successful or not; all they have to do is put the life of the other spouse in danger.[4]

(b) If the wife takes part in feasts with strange men or goes bathing with them against the husband's wishes.

(c) If she lives outside of the conjugal home against the husband's wishes, except in cases where she was staying with her parents or when she had been turned out without the husband being able to ascribe one of the causes provided by the law. In this

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case, the marriage will not be dissolved, because this is an act of God for the wife, which was provoked by the husband.[5]

If the wife was present at equestrian games, at plays or took part in hunting unknown to her husband or against his wishes.

In all cases, the husband obtains the right to make use of the guilty wife's dowery, while its ownership is reserved for the children resulting from the marriage; if there are no children, the husband will have full ownership over it.

(e) The fact of a wife reaching an understanding with a third person, while her husband is still alive, in order to conclude a new marriage, was considered by Novel 22, c.6., as a cause for divorce. Through Constitution 30, Leo the Philosopher refers to the first decision of Justinian by decreeing that arrangements of the wife with a third person, in view of concluding a new marriage, constitutes a cause for divorce and the justification for it is that by her action the wife has offended the Creator who had united them, and by coveting another husband, the wife was the first to separate herself from her husband, towards whom she has shown hostile feelings.

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[1] St. Basil, can. 34.
[2] Can. 61 apost. and 8 of the synod of New-Caesarea.
[3] Nov. 117, cap. 8.
[4] Comp. can. 8 St. Basil.
[5] St. Basil, can. 35.

B. Faults ascribable to the husband.[1]

(a) If the husband has made attempts against the life of his wife, or if having knowledge of plots by others he did not denounce them to her, and did not try to defend her according to the laws.

(b) If the husband acts to the detriment of his wife's pureness, by giving her to other men.

In both these cases, the wife obtains, besides her dowery, the proper nuptias donation, the ownership of which is reserved to the children, if any.

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(c) If the husband has accused his wife of adultery without being able to prove it. In this case, the husband not only loses the donation, "propter nuptias", but also one third of this donation, which is deducted from other personal property.

These penalties are applicable when there are no children; if there are any, all the husband's property is awarded to them, and the rights concerning the ante-nuptial donation and resulting from other laws, remain valid.[2]

Furthermore, the husband will have to undergo the penalties which the wife would have received had she been condemned.

(b) If the husband, scorning his wife, cohabits with another woman in the common house or in another house in the same locality, and if, in spite of repeated exhortations by his wife, by the parents of the latter, or by other reliable persons, he does not give up his conduct.

As in the foregoing case, the wife receives over and above her dowery and the ante-nuptial, one third of the latter deducted from the husband's other property. If there are any children, the wife will only have the usufruct of the ante-nuptial donation and of the one third received by her as a penalty inflicted upon the husband, while its ownership is reserved to the common children; if there are no children, the wife will have its entire ownership.[3]

C. According to the Basilian rule XXVIII, tit. 8 reproducing L. 39.D.XXIV 3, if the spouses have both given causes for divorce, with reciprocal wrongs, dissolution will take place without any damage for them, because as the offences are equal, dissolution takes place by means of reciprocal compensation.

But in this case, canonical lawyers admit a compensation for wrongs which makes the dissolution of marriage impossible.

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The husband, who has known and tolerated his wife's misconduct, will no longer be able to divorce her for adultery; the same applies to a husband who has become reconciled with his wife after having found her guilty of adultery.

If the wife accused of adultery proves that her husband was guilty of the same crime, the judge will not separate them.

In order to avoid the dissolution of the marriage, the wife accused of adultery may accuse the husband not only of adultery, but also of the vices against nature of which the latter is guilty and any heresy into which he has fallen, because both of them, it is said, must do penance and the faults of one of the spouses are neutralized by those of the other.[4]

D. A wife who is whipped or beaten with sticks by her husband for a reason which does not give any right of divorce may not be separated from him. In this case,

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[1] Novel 117, cap. 9.
[2] L Harmen XV (XII) 14; Prochiron XI. 17.
[3] 4 Harmen XV (XII) 15; Prochiron XI. 18.
[4] The rule of Matth. Bassarab ch. 179. 180 and Bujoreanu.

the marriage remains indissoluble, but the husband who has been convicted for assault and battery against his wife, in a circumstance other than those constituting causes for divorce, will have a pecuniary penalty imposed upon him. As damages for cruelty towards her, the wife will receive, even during her marriage, besides her dowery, one third of the "propter nuptias" donation which is deducted from the husband's property.[1]

E. The civil-ecclesiastical legislation of the Rumanian principalities, which were decreed in the middle of the 17th century and remained in force until the introduction of the Civil Code in 1865, permitted the wife to ask a divorce when the husband beat her excessively, causing her injury and tears, or else if he terrified her by his menaces; it gave the husband the same right, when the

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wife beat him or when she had an abortion. A husband was obliged to provide for the upkeep of his wife who had left the conjugal domicile because of ill-treatment inflicted by him.[2]

The maltreatment had to be proven by reliable witnesses, with the exclusion of the wife's parents. The latter's lamentations and cries which could be heard outside, were not sufficient to prove the ill-treatment dealt by the husband. Finally, the legislator recommends to put more faith in witnesses who affirm than in those who deny.

The same laws, which are merely a translation of dispositions taken in Constantinople under Emperor Alexis Comnenus, in the 12th century, give a husband the right to chastise his wife.

A husband has a right to beat his wife for a just cause and with reason; furthermore, the chastisement should be applied with measure, with compassion and without hate. At the same time, the legislator took care to decide when chastisement is applied with measure and when not.

Blows are considered as applied beyond measure, with spite and as unappropriate, when the wife is beaten with a stick and especially when the piece of wood with which the husband was beating her is broken in the process, or when he draws blood and finally, when he give her blows in the face or on the head.

If someone has beaten his wife only once or if he beats her by means of punches or slaps, this is not considered as resulting from spite, no matter how hard and how

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often he beats her. At the request of a wife who fears ill-treatment by her husband who has a violent nature and easily blows his top, the judge may order the latter to provide a security to his wife to guarantee her from all excesses and maltreatments.

In spite of the security, the husband keeps his right to chastise his wife when she is guilty of a serious fault, but he should always exercise it with measure and without spite.

We hasten to add that this legislation, which is foreign to Rumania, has never been literally applied, because the customs of the country have always been more lenient than the above-mentioned dispositions would lead one to believe.

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III—ABORTION

Tertullian (Apol. c.9) took an energetic stand against this crime, along with Lactance (I. VI. C.20) and Minutius Felix in Octavo.

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[1] Basil. XXVIII. 77. comp. c. 9 St. Basil.
[2] The rule of Matth. Bassarab. p. 121-122.

The synod of Ancyra (can. 21) subjects women, who give and who accept medicines which are conducive to abortion, to a 10-year penance.

According to St. Basil (can. 2), women who deliberately did away with foetuses, are liable to charges of murder, without distinguishing—and in this he differed from the Mosaic Law[1] whether the foetuses were formed or not.

The 6th Ecumenical Council in Trullo also considers as murderers persons who both give and accept medicines conducive to abortion (c. 91).

Finally, women who abandon their children, who do not nourish them or who expose them to public pity, which they themselves have not received,[2] are considered as belonging to the same category as women who do away with foetuses. According to Novel 22 c. 16, which reproduces the provisions of the Code (I. 11 and 2.C.V. 17), abortion was considered as a cause for divorce, because by her ignominy, the wife has caused great pain to her husband, whom she has deprived of all hope of offspring. But in Novel 117, cap. 8, Justinian no longer counts abortion amongst causes for dissolution of marriage.

Emperor Leo the Philosopher, who favoured divorce, put the first law of Justinian in force again because it seemed more useful to him. According to Leo the Philosopher, a woman who has an abortion should be considered as an enemy of her husband; such a woman is even more guilty than the one who, against the will of her husband, has lived outside of the conjugal house or who, still without the consent of the husband, has taken part in feasts with strange men. And yet, the latter actions which are less guilty than abortion, constitute causes for divorce; Leo the Philosopher concludes that the husband has all the more reason for repudiating his wife who is guilty of abortion, which is a crime against the husband, by depriving him of offspring, and also against nature (Novel 31). This provision was accepted in the fundamental collection of canons of the Orthodox Church.[3]

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4. *Difference in Religion*

The Church very early pronounced against marriage of the Orthodox with heretics and pagans except where the heretic party showed its intention to convert to the christian faith: cf. in this connection the Councils of Cartage, C. 21, Laodicea, C. 10 and 31, Chalcedon, c. 14.

The sixth ecumenical synod, c. 72, reviving the same interdiction, added that such a marriage, if need be, should be dissolved and the guilty, excommunicated for it said, do not combine that which cannot be combined, do not unite the lamb with the wolf nor the sinner with the elect of Christ.

Finally the canon arrives at the situation considered by Saint Paul (I Cor. VII 12, 17.) Two partners have contracted a legitimate marriage, both being unbelievers. In the following, one of them converts to the Christian faith, the other continues in his erroneous ways. In this case, the Apostle—"Speak I, not the Lord"—commands the christian party not to dissolve the marriage if the unbelieving spouse consents to live with him, for the unbelieving husband is sanctified by the wife and the unbelieving wife is sanctified by the husband: else were your children unclean, but now are they holy (verse 14).

But if the unbelieving depart, let him depart. A brother or a sister is not under bondage in such cases.

Different from this case is the one where the unbaptized spouse agrees to live with the converted spouse but in this cohabitation wants to compel him to commit actions

[1] Exod. XXI, 22, 23.
[2] St. Basil can. 52.
[3] Nomoc SIII. 10.

contrary to the Christian religion or to the essential marital duties. This discipline is attested from the very beginnings, cf. the commentary of Ambrosiaster I Cor. VII and the 19th Homily of Saint John Chrysostom.

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Divorce takes place also where one of a Christian couple married in church apostatizes or falls into heresy if the latter refuses cohabitation or endeavors to betray the other one into his errors. The spouse that has been released from the bonds of matrimony may contract a second marriage without being subject to a pecuniary penalty.

To justify the dissolution of a marriage contracted by a Christian with a heretic or a pagan, the canonists also refer to the definition of marriage given by the Roman Law: (Nuptiae Sunt conjunctio maris et feminae, consortium omnis vitae, divini et humani juris communicatio.)[1]

This definition shows that those who would contract marriage must belong to the same religion, for a difference of opinion in this important matter which concerns the salvation of the souls would be a source of continual dissension in the future family. Often the dissolution of the marriage of a trumpeter of the Emperor of Byzance is quoted as an example. This dissolution was due to a decision of the patriarch Theodote on the grounds that the wife refused to follow her husband who had embraced the Christian faith.[2]

However, civil law recognizes the possibility of mixed marriages between the Orthodox and heretics and requires in such a case that the children be brought up in the Orthodox religion[3], a principle accepted and applied by the Orthodox Church. Roman Law (Cod. lib. V, 1 Const. 5) also provided for the breaking-off of an engagement on grounds of difference of religion: if the betrothed was aware of the difference in religion between herself and her fiancé before the engagement, her parents were considered responsible; if she was not aware of this circumstance or if she learned about it only after the payment of the earnest, the parents were only obliged to return the earnest.

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So far we have assumed that only one spouse had embraced the Christian faith and that the other one continued in his erroneous ways. But what solution should we apply to the case where the other spouse converted to the Christian faith as well and wished to take back his former spouse now in the bonds of a second marriage? The canonists differentiate according to whether the first marriage was dissolved by the Church or not[4]. In the first case nothing more can be done since the second marriage contracted with a Christian spouse remains valid and thus indissoluble. However, if the Christian spouse has contracted a second marriage without having had the first one dissolved, it is this marriage that remains valid and the second one will be dissolved by the judge who will advise the former spouse to resume the connubial life.

The same criterion applies where the first converted spouse has taken up the monastic life. If he has taken it up after having had the first marriage dissolved by the Church, connubial life will not be resumed. But if he entered orders without having the first union dissolved, the judge may allow the spouse who became a monk to leave the order and to take up connubial life with his former partner. The judge's decision is

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[1] (Sig. 1. lib. XXIII tit. 3.

[2] Migne P. G. CXIX, 767.

[3] 1 Cod. tit. 5 Const. 12 and Const. 18 of the saame title.

[4] The rule of Matthew Basarab, ch. 182 p. 120.

optional. The spouse that entered the order cannot be obliged to leave it. His consent is necessary for the resumption of the connubial life. However, if the spouse that entered the order has been ordained a deacon or priest, he cannot leave it, even if he wanted to do so. Only monks that have not progressed beyond the first degree of monastic life, i.e. the ones that have only received the benediction of the religious habits, may leave the order to take up married life with the former partner.

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V—THE SPOUSE THAT HAS LIFTED HIS OWN CHILD OUT OF THE FONT

Canon 53 of the Trullan Council considers the spiritual relationship resulting from baptism as superior to natural relationship.

On the basis of this provision, the canonists of the Orthodox Church decided that relationship resulting from baptism is an obstacle to marriage up to the seventh degree. The same as natural relationship. The same conclusion was arrived at by the synod held under Nicolas, patriarch of Constantinople.[1]

This principle has also been admitted in Civil Law: Basilica XXVIII, tit. 5. c. 10 Decree 6.

Noting that a great number of those that received children from fonts later married their co-sponsors, the Sixth Ecumenical Synod condemned such action and decided that marriages contracted in defiance of the provisions made would be dissolved and the guilty, subjected to the penalties provided for fornication.

The Sixth Council, held in the Trullus, having learned that many bishops, in Africa and elsewhere, lived together with their wives, even after consecration, absolutely forbade this practice in the future (Can. 12). The council declared that it would not revoke earlier decisions in the matter but that it saw itself compelled to take this measure in the interests of the Church in order that the clergy might not incur the reproaches of the faithful, and based itself upon I Cor. X. 31, 33 and I Cor. IV, 16. Lastly, it decided that bishops that did not abide by these decisions would be removed. This decision is quite in keeping with the laws of Justinian which prohibit a bishop

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from having a wife or to live with her on pain of removal from the episcopacy because he had shown himself unworthy of his ministry[2].

Canonists explain that there is no contradiction between c. 5 Apostolic which prohibits bishops, priests and deacons from repudiating their wives on religious grounds and c. 12 of the Trullan Council which orders bishops to separate from their wives. Apostolic Canon 5 is explained, they say, by the need of the young church to deal tactfully with the customs of the pagans she wanted to convert and upon whom she could not, from the very beginning, impose all the decrees of Christian perfection, for the priests of the Jews were married and the Greek sacrifiers as well. Eventually, however, when the Christian faith had spread farther about the world, the bishops could be subjected to the more rigorous rules of continence without danger.

Canon 12 of the Trullan Council thus appears as an advance in the moral order and a measure taken in the higher interests of the Church, who always considered celibacy superior to marriage.

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[1] Migne P. G. CXXVIII 993; Balsamon Rep. to Marc Alex. interrog. 43.
[2] Nov. 123. cop. 29; Basil. lib. III, tit. I c. 45.

Canon 48 of the Trullan Council stipulates the conditions of this divorce.

(a) It is a divorce by mutual consent for the sake of piety, the only kind of divorce by consent permitted by the Justinian's civil legislation.

(b) It is a divorce "bona gratia" that does not involve the former spouse in any pecuniary penalty.

(c) The divorce can only take place with the consent of the wife: her consent is essential.

(d) It is the sacrament of the bishop that dissolves the marriage.

(e) Following consecration, the wife is given the tonsure and will live in a convent removed from the residence of her former spouse.

(f) The latter may maintain her if she has no personal means of livelihood.

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The consent of the wife is required in the case of elevation to the episcopate because after the consecration of her spouse she is obliged to take up the monastic life.

This is not the case where the spouse takes up monastic life. The partner remaining in the secular world is entitled to contract a second marriage.

Finally the following question was asked: A married priest, deacon or reader enters a monastic order and is given the tonsure but his wife remains in the secular world which she may do as has been shown. Can the tonsured one eventually be elevated to the episcopate although his wife refuses to take up the monastic life?

This question was answered by John, Bishop of Citros, who said that the divorce for the purpose of entering a monastic order is a legitimate action undeserving of censure. The tonsured one may therefore be promoted to the highest ecclesiastic dignity if his merits recommend him for it.

John of Citros bases his reply on Can. 8 of the Council of Neo-Caesarea which prescribes that the priest whose wife has been convicted of adultery shall retain the priesthood provided he expels her. If such a priest retains the priesthood after having expelled the guilty wife, there is all the more reason, he says, for a husband divorced from his wife for a good cause to be worthy of obtaining the sacerdotal and pontifical functions.[1]

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VI—ENTERING THE MONASTIC ORDERS

The basic writings in this matter are Novel 22. cop. 5, Novel 117, cop. 10 and Novel 123 De episcopis, clericis et monachis.

From these writings and the commentaries concerning them, the following principles are derived:

1. Divorce is permissible for the sake of piety when one member of a married couple chooses the better way of chastity by taking the vows.

2. Although Novel 117, cop. 10 calls this kind of dissolution of the marriage a divorce "ex consensu", the great majority of the canonists teach that a tonsure may be given even without the consent of the other member.[2]

However, the divorce is called "bona gratia" i.e. without pecuniary penalty for the married couple in view of the sublime purpose they have in mind.

3. The spouse remaining in the secular world may contract a second marriage and it is precisely for this reason that the canonists emit the opinion that divorce may take place even without the consent of the spouse.

4. The marriage is dissolved without repudiation, i.e. without judicial sentence. However, the dissolution is effective only at the end of a three year period

[1] Migne, P . G. CXIX. 963.
[2] Blastares, in Migne, P. G. CXLIV 1182.

(the period of probation provided for in Novel 123, cop. 35 and Canon 5 of the Second Council of Constantinople) at the end of which the spouse actually dons the monastic habit.

5. If the husband alone has choosen the monastic life he must return to the wife not only the dower and all he has received besides, but also whatever he promised her in the case of death.

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If the wife enters the convent the husband shall keep the marriage portion and receive as well whatever the wife promised him in the case of predecease. All other property will be returned to the wife.

If both members of a married couple enter the monastic life at the same time, the dotal instruments are voided and each member receives the property that was his before the marriage unless they wish to make mutual donations and concessions to each other.

6. The two spouses may reconsider their decision and resume connubial life without being subject to any penalty provided that they do so before they enter the cloister.

7. The marriage of the partner who abandons the monastic life must be dissolved, he being considered an adulterer. Those that gave their consent or had knowledge of the fact shall be punished.[1]

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CAUSES FOR DIVORCE ESTABLISHED BY CIVIL LEGISLATION AND ACCEPTED BY THE CHURCH

I. HIGH TREASON

Lex majestatis similis est legi de sacrilegio". Thus the Roman Law.[2]

The commentators find that the comparison is justified because, they say, either violates the divine order and piety and because things public may be compared to things divine.

The seriousness was such that the crime could not be expiated even by the death of the accused.[3] Action could be taken even after death. Whoever was guilty of the crime of high treason could no longer validly sell, transfer or receive.

II. EXTENDED ABSENCE

According to Can. 31 of St. Basil, the wife whose husband has gone on a journey and who marries somebody else without awaiting the return of the former and without having obtained reliable information as to the death of her husband commits adultery. The justification of this provision lies in the consideration that such a wife lacks adequate reason for contracting a second marriage.

In Canon 36, the same Father decided that the wives of soldiers on a military expedition, who remarried without awaiting the return of their husbands, are guilty of the same crime as the wives whose husbands have gone on a

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journey and who remarry without awaiting their return. However, in the case of the husbands on a military expedition, the wives deserve greater indulgence since the

[1] Peira, 25, 38.
[2] L. I. D. XLVIII. 4.
[3] L. II. XLVIII. 4.

probability of their husbands being dead is greater owing to the variety of dangers they are exposed to.

Finally, Canon 46 of St. Basil considers the case of a woman who has married a husband whose wife has temporarily left him. However, the latter returns and the husband separates from the former. According to St. Basil, the wife who separated in this manner has committed adultery albeit through imprudence owing to her ignorance. Such a woman cannot lose the right to contract a second marriage although it would be better that she remain unmarried, for it is not proper that she live with another husband when she was known a short while ago as the wife of another. In marriage, Blastares adds, following therein the civil laws, we should consider not only that which is allowed but also that which is honest.[1]

Novel 117 cop. 11, reproduced by all Byzantine collections, provides that the wife of a soldier must wait indefinitely even though she receive no news whatever from her husband. And although she may be told that her husband is dead, she may not marry a second time without having first questioned personally or through other trustworthy people the chiefs and archivists of the unit in which he served. The military chiefs will issue her with a certificate of death for her husband, the truth of which must be confirmed by an oath on the gospel. Having obtained this certificate, the wife must wait another year and only at the end of this period may she legally contract a second

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marriage. Finally, the Novel provides penalties for those who have borne false witness and stipulates that the soldier may on his return, if he so desires, take back his former spouse, a provision the Orthodox church has extended to the husband who is not a soldier.

III. Impotence

Novel 22 cap 6 and, following it, all the Byzantine civil law collections consider impotence as a necessary and reasonable cause for divorce.

The law gave the wife and her parents the right to repudiate her husband if he had shown himself incapable of fulfilling the conjugal duty during two years after the conclusion of the marriage.[2]

Novel 22 cop. 6 reproduces the provision of the Codex with a minor change concerning the time the husband is on trial which is now three years. This measure is justified by the fact, established since, that husbands who were impotent for a longer period than two years, eventually showed that they were capable of fulfilling the conjugal duty and procreating.

Novel 117 cop. 12 merely quotes impotence among the causes that dissolve marriage "bona gratia", without penalty, and refers otherwise to the earlier provisions. These provisions are resumed in the following points:

1. A continuous period of three years must have elapsed since the conclusion of marriage.

2. Impotence must be due to a natural weakness preceding marriage. This excludes accidental impotence or impotence acquired after marriage.

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3. Impotence must be proven. This must be done before the Court, and dissolution will be by sentence of the Court.

4. Action rests with the wife and her parents who may bring it even against the will of the husband.

[1] Migne P. G. CXLIV. 1198.
[2] L. 10. c. V. 17.

5. As regards property, the wife takes back her dower but the donation "ante nuptias" or "propter nuptias" remains the property of the husband who does not lose any of his. The foregoing provisions have been accepted by the Church and are reproduced in all canonical and civil collections of the Orthodox East.

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3. CAUSES FOR DIVORCE ESTABLISHED BY CIVIL LEGISLATION BUT NOT ACCEPTED BY THE CHURCH

I. INSANITY

According to the old legal experts, insanity was an impediment to betrothal but if it occured later it did not dissolve it. [1]

It was the same with marriage: insanity made its conclusion impossible since consent was necessary to render a marriage valid but insanity did not dissolve a validly contracted marriage.[2]

Finally Digest XIII. 3.I.22 and 7 and 8 distinguishes between sufferable insanity and insufferable insanity.

If insanity is sufferable, the husband or wife that sends the bill of divorce must know that he or she will be considered guilty of the dissolution of the marriage. However, if the insane partner is incurable or raving, so as to frighten the other partner, the latter may repudiate the insane spouse. In this case, the dissolution is "bona gratia", without pecuniary loss to the married couple.

The above legislation finally considers the case of a husband why does not wish to divorce his insane wife who he neglects in her misfortune, keeping her dower. In this case the committee of the wife and her parents are entitled to apply to a judge who will take the necessary coercitive measures against the husband. If the latter continues to misure the dower of his wife without providing the care she requires, the property of the wife will be committed to the custodian who will administrate it.

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Neither of Justinian's Novels 22 and 117 list insanity among the causes for the dissolution of marriage.

Leo the Philosopher considers this provision too severe. To oblige the husband to live with an insane wife is contrary to reason. For the husband, this is contrary to reason. For the husband, this is tantamount to being condemned to live all his life with a wild animal. Such a marriage, says he, is not within the intentions of the Maker. Only the marriage that does not afford the couple all the satisfaction and all the joys to which they are entitled according to the laws of nature, is indissoluble.

Photius (Nomoc. XIII. 30) maintains that Leo the Philosopher's novels 111 and 112 have never been applied and that Justinian's novels 22, cop. 15, and 117, cop. 8.9. were always followed which do not list insanity among the causes for divorce. It should be noted that Timotheus of Alexandria (Can. 16) considers that the husband who sends away his insane wife and marries another one commits adultery. (Nomoc. XIII. 30) but adds that he has nothing else to say. Similarly, the Ecloga of the Emperors Leo and Constantine decided that the insanity of one of the partners, if occurring after marriage was contracted, does not dissolve the latter.[3]

To insanity may be compared the decision taken by the Church of Constantinople in the case of epilepsy of one of the partners.[4] This decision establishes the principle

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[1] L. 8. D. XXIII 1.
[2] L. 8 pr. D. I. 6; L. 16; 2. XXIII 2. L. 4 D.XXIII 2.
[3] Leunclavius: Jus graeco-romanum t. II p. 107.
[4] The rule of Matthew Basarab. p. 145.

that the marriage is dissolved if epilepsy is prior to celebration of the marriage but that it remains indissoluble if the sickness occurs after its celebration.

We consider this decision to be a local prescription.

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II—SENTENCE OF HARD LABOUR

This cause for divorce was established by modern civil legislation which entitles the innocent spouse to seek the dissolution of the marriage (Section 213 of the Roman Civil Code).

III—INSUPERABLE REPULSION

This is not accepted as a cause for divorce. It is cited as such in Section 214 of the Rumanian Civil Code, 1864. However, this cause for divorce is not accepted either by the Canon Law of the Orthodox Church nor by the other codes containing divorce causes for the members of this Church. It is true that a decision of the Council of Constantinople dated December 1315 (Act. Patr. Const. I.28.29) considers insuperable repulsion a cause for the dissolution of marriage. However, in the opinion of the canonists, this decision is not founded in law.

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CHAPTER III

DIVORCE PROCEDURE AND THE SECOND MARRIAGE

The majority of procedural rules as well as rules concerning the material aspect of the dissolution of marriage have been taken, as many causes for divorce, from Roman Law in accordance with the principle that in questions not resolved by the canons Civil Law must be followed.

The rules to be exposed in connection with the action, the "procedure at court" and the consequences for the partners and the children apply only in the case of adultery which is the main cause for divorce. The details of the other causes for divorce are set out in the preceding chapter where each one of them has been treated.

1. First of all there must be good cause for divorce. The earlier laws and old custom let people divorce without penalty. The husband could say to his wife "Uxor, tuas ipsa res tibi agito" and the latter could say "Tuas, marite, res tibi agito."[1]

All this has been rescinded by Christian law. The Orthodox Church adopted the restrictive list of divorce cases established by Justinian's legislation and, in accordance with Novel 117 cap. 12[2], decided that marriage might not be dissolved except for these causes.

2. There must be a judicial sentence. The canonists insist on the principle that the partners may not separate at will without process or sentence. On no account, says Balsamon, whether it be for a rational cause or not, may the wife separate from the

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husband without the permission of the judge, as laid down in Canon 9 of St. Basil and the various novels of Justinian reproduced in Basilica, lib. XXVIII tit. 7. Any abandonment of the husband by the wife without a judge's permission is unjust and illegal.[3]

However, in the legal regulations of Basil the Wolf[4] as well as in the rule of Matthew Basarab, which is but the translation of Aristaene's commentary, we find cases

[1] L. 2. I. D. XXIV. 2.
[2] Basilica XXVIII 7.5.
[3] Migne, P. G. CXXXVIII. 809.
[4] Basil the Wolf, Legal Regulations, Iassy 1664.

where one of the partners may separate from the other "at will and without the knowledge of a judge"[1]

By virtue of his own authority and without the permission of the judge, the husband may chase from his home the wife caught in the act of adultery. The wife may separate alone on her own initiative and without the instrumentality of a judge where the husband has beaten her to the point where she had to run away lest she be killed or where he has beaten her so severely that she was unable to voice her complaints against her husband before the judge.

The wife may also separate without a judicial sentence if the husband illtreats her too often and without reason.

Finally, she may separate of her own volition if the husband lapses into heresy or attempts his wife's life.

None of these cases concern divorces without judicial sentence. The context leaves no room for doubt. The cases only concern spouses who may send away their partner without the instrumentality of a judge. Normally a judge gives a decision on the de facto separation of the partners, assigning to each of them a different residence, but the

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cases mentioned were considered so serious, that the spouse was given permission to send the other one away without asking for judicial action. Dissolution of marriage can only become an accomplished fact after the judgment has been pronounced by an ecclesiastical court.

Marriage is a divine institution says Matthew Basarab in Chapter 213 of his rule, which, in addition, orders that dissolution cannot take place without cause nor be obtained by bribing the judges. He who, without good cause, would dissolve the marriage is called an antichrist and a violator of the laws.

"Neither may the wife separate from her husband without judgment, nor the husband from his wife" says the same legislator a little farther on. This is why a person who marries a woman who is married but not legally divorced, is called an adulterer, although the wife gave cause for divorce or the husband had good cause for sending her away, for a married couple cannot separate without judgment and without a divorce decree.

3. The fact must be proven. Having mentioned the causes for divorce by name, Novel 117, c.8. 1 and 2 continues as follows: If the husband believes he can convict his wife of the crime of adultery, he must first draw up the accusation and if the crime of adultery has not been clearly proven, the penalties provided for in the laws will be applied to the offenders after the bill of divorce has been sent. The same principle is taken up in Novel 134, cap. 12.

Balsamon, referring to the laws that require the statement of five witnesses to condemn a woman, adds that according to the teachings of the Fathers the woman would only be condemned if she were convicted of adultery but would not be if she were only suspected of meeting, or becoming intimate with, a third person.[2]

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4. *Action for divorce* on the grounds of adultery becomes void after five years. Not everybody is entitled to bring such an action in order that not just anybody may hurt the marriage. The action is the exclusive privilege of the closest parents, grandfather, brother, paternal uncle, maternal uncle and above all the husband. The law also recommends that they act only in the case of great necessity.[3] However, parents can

[1] The Rule of Matthew Basarab. Targoviste 1652, ch. 193-187 pp. 121-124.
[2] Migne: P. G. CXXXVIII. 1215.
[3] Basilica, LX 37.68. Harmenop. VII I, 34.

only dissolve the marriage of their unemancipated daughter and not that of their emancipated daughter.[1]

5. *Legal procedure.* Jurisdiction in marriage matters belongs to the bishop who exercises his jurisdictional powers with the help of the church council (dioceson synod).

Proceedings are instituted by the innocent spouse (the guilty partner is not entitled to bring an action) either directly before the church council or through the parish priest. The respondent must reply to the accusations brought against him by the plaintiff. He must also reply to any new objections the latter may make. The hearing continues until the Court considers that the defence has been given a full hearing. The counts, the pleadings and the plea of the defendant are carefully examined by the Court who for this purpose subpoenas witnesses and people acquainted with the circumstances of the case. After being sworn in, the witnesses are questioned by the competent ecclesiastical tribunal.

The injured partner is given a certain time by the Court, during which an appeal with the higher court (Consistory of Appeal) may be lodged. Once the time has expired the right of appeal is lost and the decree becomes definite.

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2—THE SECOND MARRIAGE

The doctrine resulting from the canons and their interpretation by the great canonists, whose opinion is tantamount to law in the Orthodox Church, concerning the persons who commit adultery may be reduced to the following points:

1) The husband who sends his wife away and marries another is an adulterer: such a husband may not contract a second marriage.[2] The canonists interpret these writings to the effect that they apply only to a husband who sends his wife away without good cause. Such a husband may not contract a second marriage and will be excommunicated if he does, whereas he who sends away his wife for good cause and marries another is not an adulterer.

2) The same applies to the husband who does not marry a free woman but a wife that has been sent away. He is an adulterer and any marriage contracted is not a legal one.

Here, however, the canonists, by "sending away", mean the wife that has not been legally separated from her husband. A man may therefore validly marry a legally divorced women. i.e. under the conditions set out in Justinian's Novel 117.[3]

3) The husband who has been abandonned with or without good cause (can. 9 and 35 St. Basil) deserves indulgence. He may contract a valid second marriage and his second wife will not be considered an adulteress.

4) Balsamon finally asks whether an adulterer may marry an adulteress, his correspondent. The answer is yes. He develops this idea in the commentary to Canon 39 of St. Basil after having maintained in the commentary to Canon 37 of St. Basil

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that, contrary to Roman Law, the adulterer may contract a valid second marriage after having paid the penalties for adultery in Canon 58 of St. Basil.

B. Concerning the second marriage of an innocent spouse the Orthodox Church has not experienced any difficulties since none of the Fathers of the first four centuries of the Christian Era has condemned it. However, this second marriage, as any second marriage in general, involves some loss. He who marries for the second time, says St. Nicephorus, patriarch of Constantinople, shall not be crowned. In addition he is

[1] L.S.C. V. 17.
[2] Can. 48 Apost. 9, 77 St. Basil, 87 in the Trullus.
[3] Migne, P. C. CXXXVIII, 134.

punished by being excluded from communion with the holy sacraments during two years, and he who marries for the third time, during five years. In addition, the priest may not take part in the marriage festivities and those who have contracted a second marriage may not be ordained priests.[1]

The question of the second marriage does not offer any difficulties concerning the renewal of the marriage between former spouses. The Orthodox Church recommends, at the very height of the procedure, the reconciliation of the married couple in each case, even that of adultery. He differs herein from the former harshness of the Roman laws. Even after dissolution of the marriage on the grounds of adultery, she favoured the reconciliation of the married couple.

C. Some canonists, in particular Aristaene, admit in certain cases a temporary separation lasting until the guilty spouse has improved.[2]

This separation may take place where one of the partners is guilty of sodomy, where the husband oppresses his fellow-man by usury and above all in cases of insuperable repulsion involving the danger of death for the partners. Similarly, Section

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11 of the Green Synodal Statute provides for a temporary dissolution of the external community of the married couple which was also permissible in the Patriarchate of Constantinople under Sections 512 and 517 of the Judicial Instructions of 1899.

The objection that this was a western custom unknown to the Orthodox Church is answered by Theotoca as follows: "The informal divorce practiced by us is a temporary measure, a preventive rule quite different from the divorce as it exists in the Eastern Church. This rule involves the following: where the ecclesiastic court has vainly tried, by all possible means, to reconcile the partners it sets in the meanwhile at time limit of 15 days for a new attempt at reconciliation. If this time limit is also passed without any result, the court orders a temporary divorce for three, six or nine months, as the case may be, assigns a residence to the couple and obliges the husband to pay annually a certain amount for the maintenance of the wife and the children.[3]

The Orthodox Church, in certain cases, does admit the complete dissolution of the marriage ties. From the present study it appears that this doctrine is based on the two writings of St. Matthew V. 32, XIX-9 prohibiting divorce "except in the case of adultery", which writings have led to the serious controversy mentioned above. In addition, the Orthodox Church relies upon the opinions of a great many Fathers and councils of the first eight centuries of the Christian Era.

On the other hand, it was found that under the principle that in questions not resolved by the canon ecclesiastic law must follow civil law the Orthodox Church has accepted a certain number of causes for divorce established by the Emperors of the first Christian centuries. Justinian's Novel 117 thus still is the basic text in the matter of divorce.

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It has finally been shown that the criterion for the allowableness of causes for divorce established by civil legislation is based on their allowance or rejection by the collection of canons written at the end of the 9th century and long attributed to Photius.

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[1] Synt. Ath. 10. 427; V. 441.
[2] Nomocan. XIII. 2.
[3] Milas, op. cit. p. 525.

The various governments of the Orthodox East accepted the principles of ecclesiastical legislation. Elsewhere, as in Romania, this jurisdiction is left to the civil authorities. In the present Orthodox countries beyond the Iron Curtain great differences of opinion have arisen.

Marriage and divorce are thus considered a purely civil agreement. The church has no jurisdiction in the matter of divorce. The wreckage of broken homes is everywhere. The word "home" has lost his true meaning. The sacred ties of marriage are made in heaven, but to judge by present developments they merely are, as in Noah's time, a simple formality, a temporary trial union, an agreement to be broken as the whim takes the contracting parties and for any reason whatever.

The vows of fidelity then would appear to be no more than scraps of paper.

APPENDIX "76"

ONTARIO WELFARE COUNCIL
22 Davisville Avenue, Toronto 7
487-3291

March 6, 1967

Mr. J. P. Savoie,
Secretary,
Special Joint Committee on Divorce,
The Senate,
Ottawa, Ontario.

Dear Mr. Savoie:

Would you be kind enough to bring to the attention of the Special Joint Committee of the Senate and House of Commons on Divorce, the enclosed document.

It is a brief presented by the Ontario Welfare Council to the Ontario Law Reform Commission. At the request of that commission, a committee of our Council, in conjunction with the Association of Directors of Family Agencies in Ontario, undertook to comment on a number of matters related to family life.

Since changes in the divorce laws relating to Ontario and in the methods of handling divorce actions in Ontario courts are included in the recommendations, the Board of Directors of the Ontario Welfare Council has asked that a copy of the Brief be forwarded to the Joint Committee.

If further copies are desired please let us know.

Yours truly,
Trevor Pierce,
Executive Director

BRIEF
to the
ONTARIO LAW REFORM COMMISSION
FAMILY LAW PROJECT

Submitted by the Ontario Welfare Council
March 1967

RECOMMENDATIONS FOR LEGISLATIVE CHANGES

1. Amendment to The Juvenile and Family Courts Act and The Divorce Act (Ontario) (Canada) to give legislative sanction for a marriage counselling service attached to the courts, and to provide for government funds for this service in courts and in qualified family service agencies.

2. Amendment to The Deserted Wives and Children's Maintenance Act to allow for granting public assistance during a waiting period before the required laying of a charge for non-support; and to place reponsibility for action in cases where there is delinquency in maintenance payments, with the court or the municipal welfare department.

3. Amendment to The Matrimonial Causes Act to provide for maintenance and education of children up to the age of 18 and beyond, while a child is still at school (Section 6 (2)). This would be consistent with The Child Welfare Act in which Crown guardianship is continued up to the age of 18 and may be extended up to 21 years of

age (Section 34), and with The Youth Allowances Act. Also, maintenance orders should be granted on the basis of need and should not depend on judgment of guilt or fault.

The following recommendations which are outside the scope of the department instituting this enquiry are included because we feel they are an integral part of the total situation in Ontario.

1. Amendment to The Divorce Act (Ontario) (Canada): Under the present legislation, divorces are costly. This often leads to desertion, common-law unions and illegitimacy. When all reasonable hope for reconciliation has come to an end, divorce should be equally available to all segments of the community regardless of ability to pay. New legislation should introduce the concept of "marriage breakdown" to replace the concept of "matrimonial offence" as the basis for granting of divorce. Domicile of either husband or wife in Ontario should entitle that party to institute proceedings in Ontario.

2. Amendment to Section 150 of The Criminal Code: Instruction in family planning is an integral part of marriage preparation and counselling and should be readily and legally available to married couples and couples about to be married. The Act should be amended to permit the legal dissemination of information and the legal sale of contraceptive devices.

ONTARIO WELFARE COUNCIL

BRIEF TO THE ONTARIO LAW REFORM COMMISSION FAMILY LAW PROJECT

The Ontario Welfare Council was asked to submit this brief on Marriage Guidance and Conciliation Procedures for the consideration of the Family Law Project, which has been authorized by the Ontario Law Reform Commission. Specifically, the Ontario Welfare Council was asked to present a review of the present situation and the extent to which it can be improved by governmental action.

PROCEDURES

The Committee (list attached) assigned this responsibility was aware that marriage guidance is offered under a variety of auspices by people of different professional training. As a first step, it was decided to obtain information about the kinds of programs and services offered, major problems and how improvements might be effected. Accordingly, a questionnaire (intended for purposes of *sampling only*, copy attached) was designed to obtain information about preventive programs, pre-marital counselling and family life education as well as counselling on marital problems. Family planning, an important aspect of marriage preparation and marriage counselling, was included. Questionnaires were sent to the 24 family agencies in Ontario, five juvenile and family courts and to a number of different organizations and individuals who offer marriage counselling and/or become involved in helping people with marital problems. In all, 65 questionnaires were sent out and 46 were returned. The high proportion of returns, we believe, indicates the degree of concern about family life, and the Family Law Project.

In addition, letters (copy attached) were sent to the major national church organizations, ten in all, requesting information on whether formal programs in pre-marital counselling, marriage counselling and family life education have been developed; whether the churches offer clergy and training for counselling, either informal educational programs or formal post-graduate training. Nine replies were received and questionnaires and the considered opinion of the Committee members.

All responses have been carefully considered and taken into account by the Committee. This brief is thus a consolidation of the information and views given in the questionnaires were completed on seven programs.

The Ontario Welfare Council wishes to acknowledge the help received from those who provided information. Particular mention should be made of the Ontario Association of Family Agency Directors who collaborated with us in the preparation of this brief.

The Ontario Welfare Council also wishes to express its appreciation to the Ontario Law Reform Commission for undertaking this important work, and particularly to Professor Julien Payne for providing this opportunity to the Ontario Welfare Council to submit this statement.

A REVIEW OF THE PRESENT SITUATION

1. *Counselling on Marital Problems*

People seek help with marital problems from doctors, lawyers, clergymen, juvenile and family courts, family service agencies and other voluntary community agencies and from professional people in private practice—psychologists, psychiatrists and social workers. Many of these also offer pre-marital counselling.

Doctors and lawyers become involved tangentially in the course of professional practice.

A study[1] of the *doctor's* role in marriage counselling points out that the majority of the 30 doctors interviewed recognized a responsibility to help their patients with marital problems. However, "because of time limitations or because their training did not equip them to help in this area, they could offer only a very limited time and help. These doctors allowed and encouraged the patients to talk over their problems, but were frustrated with the limited help they were able to give. For the most part, the treatment given by the doctors was advice-giving or offering the patients a sympathetic audience which provided a cathartic release of tension. . . Most of the doctors did not follow up on the problem that were discussed with them, so that they had no way of knowing the extent to which they had or had not been helpful, or the extent to which the problem had eased or become aggravated." Most of the doctors knew about the services of family agencies but were under the impression agencies serve 'welfare' cases only.

A study[2] of 30 *lawyers* led to similar conclusions. Most lawyers accepted responsibility for the social aspects of legal problems, but in varying degrees. Two-thirds of the lawyers involved with domestic relations work "expressed dissatisfaction on the grounds that they could try their best but really would not be able to help anyway, or that they felt incompetent in the social area." Although it was not possible to make any judgment about how adequately lawyers recognize, accept and discharge these responsibilities, there is generally an absence of special attention in any of the major law schools to the teaching of human relations.

Clergymen generally regard marriage counselling as an inevitable aspect of their work, and feel that it is within their competency. Although some denominations provide institutes for pastoral counselling, few clergymen have formal training in this field.

Generally speaking, doctors, lawyers and clergymen refer more serious problems requiring long-term marriage guidance to family agencies where available, or to private practitioners—psychologists, psychiatrists, or social workers.

Most *juvenile and family courts*[3] provide some counselling on marital problems. By the time cases get to the court, however, situations are acute and frequently the

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[1] Marriage Counselling—by Lillian Messinger, B.A., B.S.W. Research report submitted in partial fulfilment of the requirements for the Degree of Master of Social Work, University of Toronto—School of Social Work, University of Toronto, April 1959.

[2] Lawyers' Help with Social Aspects of Socio-Legal Problems—by Marian B. Guild. Submitted in partial fulfilment of the requirements for the Degree of Master of Social Work, University of Toronto, 1961.

[3] Foor the material in this section, the Committee relied heavily on the Report of the Department of Justice—Juvenile Delinquency in Canada, 1963.

husband or wife has already deserted. In the opinion of one judge, the service offered by the court "usually draws the bitterness out of the situation" but in only about 20 to 30 per cent of cases are reconciliations effected.

Some courts employ marriage counsellors but generally counselling on marital problems is provided by probation staff. The training and experience of personnel engaged varies considerably. Frequently, too, the work of the probation staff is too diversified, involving the handling of adult probation, parole, domestic counselling, and juvenile problems. Although there was a difference of opinion among our respondents as to whether counselling should be compulsory, there was general agreement that a good professional counselling service should be available in juvenile and family as well as supreme courts.

Although statutory responsibility of these courts is limited to wives and families who have been deserted, in practice some courts accept referrals where there is a possibility of desertion developing, or where help with a marital problem is requested by one partner. Several respondents felt that counselling by the juvenile and family courts should have legislative sanction. Other respondents said that courts should have better qualified judges and magistrates. As an example, one said that, "Much suffering has been caused in families because of the lack of qualified personnel in positions of magistrates and judges."

Judges of juvenile and family courts are selected by provincial authorities. No professional qualifications are, by law, required of persons appointed. We believe that legal knowledge is necessary to enable a judge to perform his functions properly, but that a background of social and behavioral sciences and knowledge of resources available to the court is equally important. Recognizing that it would be difficult, if not impossible, to combine these in one individual, the report of the Department of Justice on Juvenile Delinquency in Canada has recommended that a specialized program of training be made available to judges.

The method of financing these courts also has a bearing on their efficacy. Although The Juvenile and Family Courts Amendment Act 1966 has added a section whereby Ontario may administer a juvenile and family court and pay operating costs and salaries, financial responsibility usually is left with the municipality. This makes the successful operation of the court dependent upon the cooperation of local authorities, who sometimes are more concerned about the tax rate than they are about ensuring the proper solution of the community's social problems.

The result is that the level of performance of the juvenile and family court varies considerably from municipality to municipality. Salaries, generally, are low and unlikely to attract the calibre of persons required. The Juvenile and Family Court Act (Section 21) provides for the Lieutenant Governor in Council to make regulations prescribing the duties of the officers and members of the staffs of juvenile and family courts, but regulations have not been written.

The Juvenile Delinquents Act[1] requires that a juvenile court committee be established in connection with a juvenile court. In Ontario, a committee of a children's aid society is required to act in this capacity, but we question to what extent any such committees are functioning in the Province and, in view of the heavy responsibilities carried by the societies, whether they should be expected to do so. In any case, although the duties of the juvenile court committee set out in the federal act relate specifically to juvenile delinquents, in view of the extent to which juvenile and family courts are involved with marital problems and desertions, the function of the juvenile court committee should be reassessed.

The Report of the Department of Justice[2] states that one of this committee's major functions would be "that of continuous public education in the community to interpret the purposes and philosophy of the juvenile (and family) court and to

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[1] Section 27, subsection (7).
[2] On Juvenile Delinquency.

stimulate the support necessary to enable the court to carry out its objectives. Another should be that of general 'watchdog' supervision of the court and the services upon which the court relies .... Judges should continue to be appointed by the appropriate provincial authorities but should be selected only from names recommended by an advisory group, consisting of representatives of such fields as education, law, medicine, psychology, religion and social work."

Family service agencies are the major organized voluntary resource for people needing help with marital problems. In fact, because of the high prevalence and serious consequences of marital problems, marriage counselling is now a core service of these agencies. Doctors, lawyers, clergymen, juvenile and family courts, all refer people to family agencies for help.

People who are referred to, or apply directly to a family agency, generally recognize and want help with their relationship problems. They usually come at an earlier stage than to the family court, but nevertheless their problems are frequently deep-seated. Skilled, intensive and long-term counselling is needed to help these people resolve their difficulties.

Juvenile and family courts, particularly, tend to refer those who seem to require long-term counselling to family agencies and often expect these agencies to function with the authority of probation staff. But family agencies do not have this status, and partly because of this, but also because there is poor liaison between courts and family agencies, the latter seem to lose many of these people. Several respondents suggested that new legislation in Family Law should provide for purchase of service from qualified family agencies and that procedures for referrals, consultation and assessment between courts and family agencies should be formalized.

Most agencies charge a fee based on the ability of the client to pay, but otherwise these agencies are almost totally dependent for financial support on voluntary funds allocated by united community funds. With few exceptions, personnel are professional social workers, educated and trained to provide skilled counselling to people with complex marital problems.

There are 24 family service agencies in Ontario located in 16 cities, some of them under the auspices of children's aid societies. Almost all are in the southern part of the Province, thus there are large areas where these services are not available. Under The Child Welfare Act 1965, it is possible for children's aid societies[1] to offer a preventive family counselling service and several societies have moved into this area of work. But no significant expansion under children's aid societies' auspices can be anticipated since traditionally the societies were organized for the purpose of protecting neglected and dependent children and generally they see this as their primary purpose.

Even where there are established family agencies, services are extremely limited. Long waiting lists, insufficient qualified personnel and financial stringency were repeatedly reported. The lack in most communities of sufficient psychological and psychiatric resources to support the work of family agencies was also of concern.

Of the many proposals made by respondents, the one submitted most consistently by all types of organizations was that family agencies urgently need to expand, not only marriage counselling services, but also their preventive work, pre-marriage counselling and family life education. Many felt that government funds should be made available to family agencies for all these programs.

2. Pre-Marriage Counselling and Family Life Education

Pre-marriage counselling is provided to individuals and in group programs by family agencies and also under church auspices. As in the case of counselling on marital problems, pre-marriage counselling by family agencies, individually or in groups, is sought by people who need help with emotional problems.

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[1] Since the Ontario Association of Children's Aid Societies is submitting a brief to the Family Law Project, it is not necessary to elaborate on their programs.

Group programs, organized under church auspices are offered in some areas to people recently married or about to be married. These usually deal with practical matters relating to marriage, such as budgeting, health, sex relationships and family planning and are given in the form of a series of lectures by doctors, lawyers, clergy, social workers and psychologists on a voluntary basis or for a small honorarium. With few exceptions, no fee is required and the programs are supported by congregations. There was some feeling that these group programs probably reach those who need counselling least, "those who would probably succeed in marriage anyhow."

Sometimes couples about to be married will consult with their minister, priest or rabbi, but there seems to be considerable variation among clergy in the emphasis given to this aspect of their work.

Family life education programs have been developed by family agencies, churches, Home and School Associations, and by some Boards of Education as part of the school curriculum. Some of the adult programs are similar in content and format to the pe-marriage courses. Others, developed under the auspices of family agencies, are small group discussions, focussing on family relationships. Although method, technique and content vary widely, the common objective of all is to promote healthy family life and to forestall some of the problems which lead to marriage breakdown.

There was almost unanimous agreement that pre-marriage courses and family life education are valuable, depending on the competence of personnel, and that more programs should be developed by family agencies and under church auspices. Insufficient funds and the lack of qualified leaders were consistently reported. The lack of coordination, the need to reach a younger age group in family life education and for research into the effectiveness of the different types of program were also cited.

Family planning is regarded as an integral part of marriage counselling and family life education. Most respondents were emphatic about the need to make information and instruction readily available and felt that Section 150 of The Criminal Code should be amended.

3. Conciliation Procedures

Respondents to the questionnaires supported, almost unanimously, conciliation procedures in family and divorce courts, with opinion equally divided as to whether these should be voluntary or compulsory. Some qualified their positions stating that conciliation procedures should be compulsory, "before the case is filed in the divorce court", or "during the six-month waiting period prior to the final decree", or "providing the grounds for divorce are widened and the service is given by professional people", or "where there are children, or where partners are under 25 years of age", or "where it is demanded by one party".

4. Legislative Changes Proposed by Respondents

A number of changes, both in federal and provincial legislation, were proposed by respondents. Amendments to Section 150 of The Criminal Code, The Divorce Act, and legislation to provide for a marriage counselling service attached to the courts were considered most urgent.

Marriage Counselling: Amendment to The Juvenile and Family Courts Act and The Divorce Act (Ontario) (Canada) to provide for a marriage counselling service attached to the courts and government funded was proposed by almost all respondents. There was strong support also for government funds being made available to family agencies for marriage counselling, through purchase of service by juvenile and family courts and by children's aid societies under The Child Welfare Act, and/or new legislation in family law which would provide family agencies with the necessary legal and financial backing.

Section 150 of The Criminal Code: Almost all respondents emphasized the importance of instruction in family planning as an integral part of marriage preparation and counselling and urged that information should be made readily and legally available to all segments of society.

The Divorce Act (Ontario) (Canada): Broadening the grounds for divorce was proposed by some churches, juvenile and family courts, family and other community agencies. The hardships for parents and children resulting from the present outmoded law were noted repeatedly.

The Deserted Wives and Children's Maintenance Act: The difficulty in collecting maintenance even where there are court orders was pointed out in a number of replies, but there was concern about the practice in some Departments of Public Welfare of requiring a wife to lay a charge of non-support before she is eligible for public assistance.

Other proposals in regard to legislation made by some respondents included: legal aid available in family and divorce courts, amendment to The Marriage Act to raise the minimum age of marriage, amendment to The Matrimonial Causes Act, and provision for judicial separation.

CONCLUSIONS AND RECOMMENDATIONS

It is apparent from the approach taken in this brief and from the views expressed in our sample survey, that a comprehensive marriage guidance program should include family life education, marriage preparation courses for couples planning marriage, marriage counselling, and family planning instruction. Some or all of these services are now available in parts of the Province, but they are unevenly distributed and often seriously deficient in both quantity and quality. Several approaches will be needed to effect any substantial improvement in the situation.

FAMILY LIFE EDUCATION

The purpose of family life education, as the name implies, is to educate for and promote healthy family life. It should be a continuing process which starts from childhood, directed at influencing attitudes, relationships and goals in life. The objectives of family life education can only be fully achieved by a thoughtful community approach which involves home, church, school and other community organizations.

Much valuable work is being done in family life education by churches, family agencies and schools, but by and large, efforts have been meagre because of insufficient financing and the limited supply of qualified group leaders. There is no clear definition of the term and subject matter and approaches differ widely. While there is value in diversity of method and technique, the effectiveness of the work has been weakened because the whole field is uncoordinated and there is no central organization to give direction or leadership.

At the national level, the Vanier Institute on the Family has been established to promote the well-being of Canadian families. It is believed that the Institute is presently planning a national study, probably linked with a national conference on Family Life Education. Such a conference involving theologians, educators, social workers, psychologists, and psychiatrists, could lead to the establishment of a coordinating group in Ontario. The Government should lend its support to such a move and make funds available for the development of resources for training leaders and expansion of family life education programs.

MARRIAGE PREPARATION

Aside from the specialized work of psychologists, psychiatrists and social workers, marriage education is regarded by most denominations as a basic function of the church. The quantity and quality of such education, however, says Dr. S. C. Best in a

summary report prepared for the Canadian Conference on Children[1] varies greatly. This is in line with the views expressed by clergymen in our very limited survey. The churches recognize the value of pastoral counselling and marriage preparation courses and the importance of training leaders, but as Dr. C. R. Feilding stated in his address to the Symposium on Counselling in Family Planning[2] "good facilities now exist in Canada for the development of basic supervised pastoral education (of which family planning might be a normal part), but the interest of the theological schools is not fully engaged in it and budgetary needs have not yet been faced .... at present the colleges alone cannot afford to expand the programs."

It is clear that there is value in these marriage preparation courses and that they should be expanded. But as in the case of family life education, this will only be possible if public funds are available for training leaders and subsidizing courses.

COUNSELLING ON MARITAL PROBLEMS

Family service agencies are the main community resource for prevention of family breakdown where marital disharmony exists. Since prospects of achieving success are most favourable in the early stages of marriage conflict, the work of family agencies is crucial.

It has already been pointed out that there are large areas of the Province where there are no family counselling services and even where there are established agencies, their work is severely restricted because of limited financing and staff shortages. Clergymen, juvenile and family courts as will as family agencies emphasized the urgent need to expand family counselling services. Different approaches will be needed in different areas of the Province.

Since family agencies are almost totally dependent on voluntary funds, it is doubtful that the present method of financing will permit any significant expansion of their services. Therefore we believe that governement funds should be made available to qualified agencies providing a marriage guidance service. Children's aid societies will also need to strengthen their programs and develop a professional counselling service to families.

County Welfare units of administration, long advocated by the Ontario Welfare Council[3] could provide an integrated service to families and result in viable units, able to attract qualified staff. The Amendment to The Department of Public Welfare Act, May 1965, which provides that the provincial government will share 50 per cent of the cost for personnel directly involved in welfare operations of a county welfare unit or a district welfare administration board should encourage consolidation of services and enable county welfare units to hire trained, qualified staff.

The shortage of professionally qualified personnel is a problem, but resources for training people at the professional, undergraduate, and technical levels are increasing and we can anticipate a gradual improvement in this situation. Experimentation with panels of trained counsellors such as are used by the National Marriage Guidance Council in England, might be initiated as a supplement to professional service. Such lay counsellors would not, of course, be expected to function as professional social workers. But experience in England indicates that trained people, under the guidance and supervision of a professional, have an important part in the total scheme.

Juvenile and family courts: By the time problems reach the stage of court action, compulsory conciliation, in our opinion, could have an adverse rather than a positive effect. Nevertheless, many people who institute legal proceedings could be helped through skilled marriage counselling to reconcile their differences. Therefore we believe

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[1] S. C. Best—Pre-marital Education for Parenthood, Canadian Conference on Children, 1960 (mimeographed).

[2] Bulletin, The Council for Social Service—June 1966, The Anglican Church of Canada.

[3] Study of the Welfare Services of York County; Memorandum to the Minister of Public Welfare on the Report of the Advisory Committee on Child Welfare.

that a high quality professional counselling service should be available in family and divorce courts. The service should not be compulsory but should be offered routinely before a charge is laid in family court or action for divorce is filed.

Some juvenile and family courts in the Province now provide marital counselling but on the whole the service is most inadequate. Counselling is usually provided by probation staff who have a variety of other responsibilities, and their qualifications and training are not always suited for this highly skilled work.

The family court is a community resource which has a crucial role in matrimonial matters. Factors which adversely affect the level of performance in family courts have been noted above. Briefly: salaries paid to judges and magistrates are generally inadequate to attract the calibre of person required; counselling is not a statutory requirement and the overall standard of court services is dependent on the willingness and ability of municipalities to finance a service of high quality. As a result, the status of juvenile courts is generally very low.

In our view, major changes should be made in the way matrimonial matters are handled. We have already said that a marriage counselling service should be an integral part of family and divorce courts. Provision for the service should be written into the legislation; it should be financed by the government and offered routinely. We have given careful consideration to the question of who should provide ongoing service where conciliation seems possible. For several reasons, we have concluded that the courts should look to family service agencies, where available, to provide long-term counselling, providing provincial funds are made available to them. Firstly, most family agencies have the specialized knowledge, experience and skill to offer a good professional service. Secondly, it would be difficult, because of manpower shortage, for courts to recruit qualified staff in sufficient numbers. Nevertheless a skeleton staff of qualified counsellors in the courts is essential to do the initial interviewing, to determine whether conciliation is possible, and to explore the appropriateness of referral for family service. Cases should not be referred routinely to family agencies.

We are aware that it would be difficult to implement such a plan in less populated areas. We believe, however, that the proposal would be practical if family courts were set up on a regional basis, to coincide with other plans for regional administration by government.

A comparable service should be available in courts handling divorce cases. This might not be practicable in light of available resources. Ideally, we believe that all matrimonial matters should be handled in one court; there seems to be little rationale in the division of courts dealing with divorce, custody and maintenance of children and separation and desertion. An integrated court which would handle all these matters would have a number of advantages. It would be easier to broaden the functions of such a court under one administration. It would conserve manpower. In-service training programs for judges and counsellors could be developed more readily. Records could be kept in one place. Perhaps most important, we fell that it would result in raising the status of the family court. We realize that, although this plan appears to us to be logical, it might be difficult to implement, since divorce is a federal matter and family courts operate under provincial statute. But since juvenile and family courts, established under provincial statute for the purpose of dealing with juvenile delinquents are governed by The Juvenile Delinquents Act (Canada), we wonder whether a similar procedure could be adopted in regard to all matrimonial matters.

FAMILY PLANNING

It is not necessary to set out in detail the reasons why Section 150 of The Criminal Code should be amended. We believe that this is not necessary. Simply stated, instruction in family planning is now available to sgements of our society. Frequently the people who can least afford large families are those to whom information about family planning is not readily available. In other words, the law favours the rich and penalizes the poor.

The need for adequate legislation to permit the legal dissemination of information and the sale of birth control devices is urgent. But this alone will not be sufficient. Family planning services should be developed in the Province as an integral part of public health and welfare programs.

In concluding, we should point out that we realize that our proposals will require a substantial financial investment by the Government. But money invested in education and preparation for marriage and marriage counselling at all levels has dividends, financial as well as in terms of human lives. Broken homes frequently lead to a need for some form of public assistance, or placement of children, which in the long run is costly. The financial outlay to repair damage to children in families where there is marital discord is considerable. Not infrequently resulting problems are so deep-seated, that the ability of these children to function later as parents is permanently affected. Even where divorce or separation is not forestalled, counselling can make the experience less hazardous for adults and children.

First Session—Twenty-seventh Parliament

1966-67

PROCEEDINGS OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON

DIVORCE

No. 23

TUESDAY, MARCH 21, 1967

Joint Chairmen:

The Honourable A. W. Roebuck, Q.C.

and

A. J. P. Cameron, Q.C., M.P.

WITNESSES:

Ron Basford, M.P., Sponsor of Bill C-44.
Andrew Brewin, M.P., Sponsor of Bill C-264.
Robert Prittie, M.P., Sponsor of Bill C-41.
Robert Stanbury, M.P., Sponsor of Bill C-55.
Arnold Peters, M.P., Sponsor of Bill C-19.

APPENDICES:

No. 77—Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.
No. 78—Bill C-264, An Act respecting Divorce.
No. 79—Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).
No. 80—Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.
No. 81—Bill C-19, An Act to provide in Canada for the Dissolution and the Annulment of Marriage.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1967

26055—1

MEMBERS OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

FOR THE SENATE

Hon. A. W. Roebuck, Q.C., Joint Chairman

The Honourable Senators

Aseltine	Connolly (*Halifax North*)	Flynn
Baird	Croll	Gershaw
Belisle	Denis	Haig
Burchill	Fergusson	Roebuck—(12).

FOR THE HOUSE OF COMMONS

A. J. P. Cameron, Q.C. (*High Park*), Joint Chairman

Members of the House of Commons

Aiken	Forest	McQuaid
Baldwin	Goyer	Otto
Brewin	Honey	Peters
Cameron (*High Park*)	Laflamme	Ryan
Cantin	Langlois (*Mégantic*)	Stanbury
Choquette	MacEwan	Trudeau
Chrétien	Mandziuk	Wahn
Fairweather	McCleave	Woolliams—(24).

(Quorum 7)

ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the House of Commons:

March 15, 1966:

"On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—that a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee."

"By unanimous consent, on motion of Mr. McIlraith, second by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19, an Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bills be referred to the Joint Committee of the Senate and the House of Commons on Divorce".

March 16, 1966:

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon which courts now have jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce".

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce."

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March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—That a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Goyer, Honey, Laflamme, Langlois (*Mégantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams."

February 24, 1967:

By unanimous consent, it was ordered—That the subject-matter of Bill C-264, Divorce Act 1967, be referred to the Special Joint Committee on Divorce.

LÉON-J. RAYMOND,
Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate and the House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative."

March 29, 1966:

"With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, namely, the Honourable Senators Aseltine, Baird, Belisle, Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig, and Roebuck; and

That a message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—
Resolved in the affirmative."

May 10, 1966:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19 intituled: "An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief".

The question being put on the motion—
In amendment, the Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative."

J. F. MacNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

TUESDAY, March 21, 1967

Pursuant to adjournment and notice, the Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3:45 p.m.

Present: For the Senate: The Honourable Senators Roebuck (*Joint Chairman*), Baird, Belisle, Burchill, Croll, Gershaw and Haig—7.

For the House of Commons: Messrs. Cameron (*High Park*) (*Joint Chairman*), Aiken, Baldwin, Brewin, Fairweather, Forest, McCleave, Peters, Stanbury and Wahn—10.

In Attendance: E. Russell Hopkins, Law Clerk and Parliamentary Counsel, and Peter J. King, Ph.D., Special Assistant.

The following witnesses were heard:

Ron Basford, M.P., Sponsor of Bill C-44.
Andrew Brewin, M.P., Sponsor of Bill C-264.
Robert Prittie, M.P., Sponsor of Bill C-41.
Robert Stanbury, M.P., Sponsor of Bill C-55.
Arnold Peters, M.P., Sponsor of Bill C-19.

The following are printed as Appendices:

No. 77—Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

No. 78—Bill C-264, An Act respecting Divorce.

No. 79—Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

No. 80—Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

No. 81—Bill C-19, An Act to provide in Canada for the Dissolution and the Annulment of Marriage.

At 6:00 p.m. the Committee adjourned to the call of the Joint Chairmen.

Attest.

Patrick J. Savoie,
Clerk of the Committee.

MINUTES OF PROCEEDINGS

THE SENATE

SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

EVIDENCE

TUESDAY, March 21, 1967.

The Special Committee of the Senate and the House of Commons on Divorce met this day at 3.30 p.m.

Senator Arthur W. Roebuck and Mr. A. J. P. Cameron, M.P., Co-Chairmen.

Co-Chairman Senator ROEBUCK: Ladies and gentlemen, the time has arrived but Mr. Cameron is at a press conference upstairs and he is the presiding co-chairman today. I am advised he will be down in a few minutes and I would like him to be here, so if you do not object I think we had better wait for a few minutes for him. Is that satisfactory?

Hon. MEMBERS: Agreed.

Co-Chairman Senator ROEBUCK: Honourable members, we have now waited fifteen minutes, which I think is all that is reasonable on our part. I have sent Mr. Savoie to tell Mr. Cameron that we were waiting, but as it is now fifteen minutes past the time I think under the circumstances we had better go ahead.

Mr. MCCLEAVE: Could I raise a point of order, since the session might wind up? I do not know whether it is planned to wind it up or adjourn it. I spoke about this problem to Dr. John Stewart, the Member for Antigonish-Guysborough, who is Parliamentary Secretary to Mr. McIlraith, about our right to carry on in the new session, and I have a note from him which he has given me permission to place on the record of the committee, which I think perhaps should be done. He had spoken to Mr. Pennell, the Acting House Leader, but Mr. McIlraith gave the same undertaking verbally and has no objection to this going on the record. The Acting House Leader advised Dr. John Stewart that if the committee agrees that the evidence taken will be acceptable in the new committee, he will undertake—that is the Acting House Leader—to have the committee reconstituted very early in the new session if it does not report finally now, and that is initialled "J.B.S"

Co-Chairman Senator ROEBUCK: I am sure that a similar undertaking could be obtained from the House Leader in the Senate, but I doubt if it is necessary. We will of course reconstitute immediately on our reassembly. I suppose there is no objection from anybody to taking the evidence which we have received in this session and using it in the next session.

We have some work to do today. According to the schedule, Mr. Prittie was first on the list but I do not seem him here. Then Mr. Brewin, Mr. Basford, Mr. Stanbury and Mr. Peters are all scheduled to address the committee Mr. Cameron has sent me a message to start the proceedings and that he will be coming later on.

Mr. Brewin, would you like to start?

Mr. BREWIN: Mr. Basford tells me that his presentation will be extremely brief, and in that strong hope I would be quite happy if he went ahead.

Co-Chairman Senator ROEBUCK: Then perhaps Mr. Basford would come forward. There is one thing about you, Mr. Basford. I do not have to introduce you to this assembly.

Mr. Ron Basford, Member of Parliament for Vancouver-Burrard: We have been studying marketing in another committee. Marketing is the essence of putting something in a distinctive package, which I have done.

Honourable senators and members, I intend to be very brief because my bill, Bill C-44, is a fairly standard one, adopting in essence the provisions of the English divorce law. My purpose in introducing it in the house was I think similar to that of other members, simply by putting in private members' bills to encourage the Government and Parliament to take some action to amend the laws relative to dissolution of marriage. I think that action is forthcoming in the very work of your committee. I only regret that because of other activities I have been unable to participate in the work of your committee.

I would be happy to entertain specific questions about my bill, but because it is a standard one I do not propose at this time to present you with a detailed discussion of it. I think my hope is the hope of a great many Canadians, that there be parliamentary action and a recommendation from the committee for reform of our divorce laws.

I think that honourable senators and members who over the last few months have been involved in an examination of this question will have come to realize that there has been, as I think, a vast change in public opinion on this matter. I would report to you from my own province of British Columbia that in the last year our legislative assembly, for example, unanimously passed a resolution favouring divorce reform. I have discussed this with members of the legislative assembly to determine whether they received any adverse criticism of this resolution and none of them did. In fact they received, in so far as they could judge public sentiment and public feelings, overwhelming endorsement of the position of the legislative assembly in favour of divorce reform.

I have introduced my bill to help in the cause of obtaining some parliamentary action, because I think that there are hundreds and thousands of Canadians—both those directly affected by our present divorce laws and those who are concerned about them, such as members of the legal profession, members of the judiciary, welfare workers, et cetera—who are somewhat discouraged and disgruntled at us parliamentarians for the long time we appear to have taken in dealing with the question of divorce reform.

I would hope that with the bills in front of you and the work you have been doing over the last few months you would report in favour of divorce reform. If I might, I would ask that you append to your report a draft bill rather than simply making recommendations. If your report contained a draft bill, should it be possible to draw up and agree on one, I think this would speed action being taken by full Parliament itself.

As I say, I wanted to be brief because the purpose of my bill was simply to generate the action which has resulted, namely the hearings of this committee and what I hope will be a report in favour of divorce reform, but I am of course open to any questions on my bill itself.

Mr. MCCLEAVE: Clause 2 gives jurisdiction only to the courts and would in effect eliminate the proceedings here in connection with Newfoundland and Quebec divorces. Had you taken this into account in drafting the clause?

Mr. BASFORD: Yes, I had, because clause 2 gives jurisdiction to the courts in those provinces now exercising jurisdiction, and clause 3 establishes what is in effect a Canadian domicile for divorce or dissolution of marriage. There people in any part of Canada would be free to apply to those provincial courts now granting divorce to obtain divorce, and because of that I did not see the need to continue parliamentary action in this regard.

Mr. MCCLEAVE: Suppose we faced great protests from the judiciary or the administrators of justice in Ontario and New Brunswick—which I presume would be the places where the courts would have an extra burden if Quebec cases came before

them—would you not agree to the alternative that the committee take the step of giving the extra ground of jurisdiction to a commissioner and to the Senate itself? You are not opposed to that, are you?

Mr. BASFORD: No, I am not opposed to it. I think it is possibly an easier way to do it, because then throughout Canada divorce jurisdiction is at least being exercised at the same level and by the same bodies. I think it would tend to make the growth of jurisprudence more consistent. If the committee does not like that system and wants to maintain parliamentary jurisdiction, I certainly have no objection. Quite frankly, I would be surprised if Ontario and New Brunswick protested, but your information might be better than mine.

Mr. MCCLEAVE: If we put it in the hands of the county courts, the county court judges in Ottawa and in Restigouche Country, New Brunswick, might be raising merry Cain with Parliament if they had to divide about 500 or 600 cases a year between them.

Mr. BASFORD: Yes, and the Parliament of Canada, it would seem to me, could thereby appoint judges.

Mr. MCCLEAVE: I should like to ask two questions on grounds. The first is on (f), imprisonment. Did you consider granting relief to, say, a woman who was married to a man who was continually in prison, perhaps for short periods of time, but was likely to be almost a habitual offender? It seems to me your clause makes people who are guilty of one serious crime liable to have their marriages dissolved when the one serious crime might be the one bad thing they ever did in their lives.

Mr. BASFORD: If someone did become an habitual criminal and was so charged and convicted, coming from a city where they were crazy with habitual convictions on criminal charges, it seems to me that upon conviction that person would undoubtedly remain in gaol for three years and become subject to paragraph (f).

Mr. MCCLEAVE: In drafting have you considered that the points under (g) might quite likely fall under (c), the cruelty paragraph?

Mr. BASFORD: Yes.

Co-Chairman Senator ROEBUCK: Have you considered the rather new thought that has come to us in the course of our hearings, of marriage breakdown by reason of imprisonment, putting that on a new basis? The suggestion is that when a man has gone to gaol divorce should be given on the ground of marriage breakdown.

Mr. BASFORD: I have thought about it but I cannot honestly say I have considered it, if I can draw a distinction between the two points. Probably your committee has heard a great deal more evidence and considered the question of marriage breakdown more carefully than I, and I hope that you will deal with and very carefully consider that question, which is as you say a fairly new concept in our thinking on divorce reform. The one thought I have is that the concept of marriage breakdown appears to me to be one put forward in substitution for the various specific grounds for divorce, because surely—it seems to me anyway in our development of our thinking and our jurisprudence on the subject—the reason why people want to enumerate more grounds for divorce is that they figure these specific grounds constitute breakdown of marriage. Therefore I think they are alternatives, and breakdown of marriage should not be treated as just another ground for divorce. If you are going to accept the concept of marriage breakdown—this is just my own thinking—that is the beginning and the end of the answer and the begining and end of the grounds, and it is up to the judge to determine whether in fact there is marriage breakdown rather than just adding it on, for example in my bill as paragraph (i).

Senator HAIG: In Clause 5 (h) you deal with mental illness. Would that mean the respondent would have to be committed by a superior court to an institution? The medical prevention and cure of mental illness is increasing, so you would have to have a committal.

Mr. BASFORD: Under paragraph (h) I do not think a court committal order is a prerequisite.

Senator HAIG: The respondent might be under care and treatment for a couple of months over a year.

Mr. BASFORD: For a period of at least five years. I say that remembering that in my own province people can voluntarily commit themselves to an institution and then remain there.

Co-Chairman Senator ROEBUCK: And in other provinces as well. You do not have to have a committal.

Senator HAIG: But they would have to be under the care of an institution, either going there voluntarily or put there by a court order.

Mr. BASFORD: Yes.

Senator HAIG: So they would have to be in an institution.

Mr. BASFORD: I am sorry, I misunderstood your question. I thought you were saying a prerequisite would be a committal order. Paragraph (h) requires care in an institution by my reading of it.

Co-Chairman Senator ROEBUCK: Perhaps, Mr. Basford, you are in the same position as I was. I introduced a bill over a year ago now; I have learned a great deal in the following year and I said to the committee the less said about it the better. I was looking forward rather than back and I did not wish to defend the details of bill I introduced at that time. Perhaps you are in the same position if you have been reading the record of the many briefs we have received during this past year.

Mr. BASFORD: That sums it up precisely. That is why in my opening statement I did not deal with a detailed presentation of the bill, because it was introduced, as yours was, to get some action taken. I would think that at this point the members of the committee are far more knowledgeable on the subject than I am.

Co-Chairman Senator ROEBUCK: I felt that my bill was tuned up to be so conservative that it would get by. I think things have changed considerably in the last year, both in the country and in Parliament. Is that all you wish to say to us, Mr. Basford?

Mr. BASFORD: Yes, Mr. Chairman, unless there are further questions.

Co-Chairman Senator ROEBUCK: Thank you. Even if it is not necessary to go into the last details of the bill, dotting the i's and crossing the t's, you have made your contribution

Mr. BASFORD: Thank you, Mr. Chairman.

Co-Chairman Mr. CAMERON: The members of the committee are, of course, acquainted with Mr. Brewin, who is the Member for Greenwood in the Commons; he is a distinguished lawyer and a parliamentarian of eminence. He is sponsor of Bill C-264, an act respecting divorce, and he will now discuss his bill with the members of the committee.

Mr. Andrew Brewin, Member of Parliament for Greenwood: Mr. Chairman, honourable senators and members, I think I will be a little longer in the introduction of this bill than with the other bills because my bill attempts to strike new ground, or at least to embody ideas that have not been familiar for very long. In my judgment, the bill poses one of the most important issues facing this committee. I believe, with Mr. Basford and many others, that there is a very wide measure of agreement, both publicly and in this committee, that the law of divorce does require change and reform.

I suggest that there is one real alternative though which faces the committee in considering reform, and that is whether it will expand the grounds of divorce, or the matrimonial misconducts which are the present grounds of divorce, or accept and recommend to Parliament the acceptance of a new basis for dissolution of marriage, namely the principle of breakdown as the sole ground for granting divorce. I have

based this, as will appear later in my draft bill, on a book called *Putting Asunder*, which in fact is a report prepared by a group appointed by the Archbishop of Canterbury in England in January, 1964. Frankly, it was the reading of this book, in addition to other representations made to the committee, that persuaded me to draft this bill. I urge any of you who have not had the opportunity to do so, if you are concerned about this aspect of the subject before the committee, to get the book and read it because it is full of detailed explanation of why that committee felt as it did.

Co-Chairman Senator ROEBUCK: We sent a copy to every member of the committee.

Mr. BREWIN: I know that most of you suffer from the same problem that I do in that we get a lot of books, recommendations and literature, but I sincerely suggest to you that this is worth very careful study, because it deals in detail with the matters I shall be discussing, and I will not attempt to go through it in detail.

Co-Chairman Senator ROEBUCK: We also sent the book published by the Law Commission.

Mr. BREWIN: I have that too and I want to refer to it.

Co-Chairman Senator ROEBUCK: We sent that to every member of the committee.

Mr. BREWIN: There is one thing I think I should try to make clear at the outset, and here I wish to quote Lord Hodgson, speaking in the House of Lords in England, to which there is a reference at page 16 of the book:

> There are only two theories alive on this problem—

that is the problem of divorce—

> namely, are we going to act on the matrimonial offence or are we going to act on the breakdown of marriage theory?

I want to emphasize that, because both in this book and in other places, and in my representations to you, I want to make it clear that the breakdown theory is a substitution. In fact, the authors of this book—who incidentally include a good many distinguished lawyers as well as theologians, sociologists and so on—said they felt it was a substitute and not an addition to existing grounds.

The reason I drafted this bill was partly as a result of reading this book and partly because of the presentation to this committee of a brief by the United Church of Canada in which it urged the substitution of breakdown instead of matrimonial offences as the basis for dissolution of marriage. I therefore thought it suitable to put that in the form of a legislative draft in order that when we were discussing the matter in this committee we should not just have a general representation but could see it in black and white, so that if you accept the theory you would have something, no doubt subject to amendement and improvement, before you in legislative form.

May I now review what I have put in the bill itself. The main provision is in Clause 2, which proves what is really the core or basic proposition of the bill:

> A petition for divorce may be presented to the court either by the husband or the wife, on the ground that a marriage has irretrievably broken down and that there is no reasonable possibility of reconciliation, and the court may grant dissolution of the marriage in such case.

There is no definition of "breakdown" here, and this is deliberate. There is no definition of "breakdown" because immediately you start defining it you narrow it in a sense. The only definition—which again I base upon *Putting Asunder*—is equating it with the situation that there is no reasonable possibility of reconciliation. This is not divorce by consent; the court would have to determine as a fact that the marriage had irretrievably broken down and that there was no reasonable possibility of reconciliation. That would be the issue before the court, and I may say that the report thinks that it is a triable issue.

Co-Chairman Senator ROEBUCK: Do you add separation at that point?

Mr. BREWIN: Not at this point. I deal with separation in clause 3, and I am coming on to that clause. Before I read clause 3 to you, may I say that the Law Commission in Great Britain, in this volume which Senator Roebuck says you have all received, which is a review on reform called *The Law Commission's Report on Grounds of Divorce,* set out the field of choice. It contains much that is very interesting and pertinent, but the only point I want to refer to is that they approved the principle of breakdown of marriage as set out in the archbishop's report *Putting Asunder*, but said that from a practical point of view it would create very serious problems in the courts in England. They said that at the present time divorces were granted for adultery and grounds like that, which were proved in a very cursory and summary fashion, whereas the principle of breakdown involved some sort of inquisition into the state of the marriage and a full inquiry, a full inquiry would put an intolerable strain on the existing courts and it would therefore be impracticable.

Mr. Ryan, who is on the staff of Queen's University, whom many of you heard when he gave evidence here with the Anglican delegation, pointed out that the same objections perhaps did not fully operate in Canada because there was already, at least in some parts of Canada, in the Province of Ontario with which I am familiar, a species of investigations by social workers. The procedure is that where the future of children is involved in dissolution of marriage the official guardian is asked to make a report, and he refers it to the children's aid or other suitable social agencies who make a report about the home. Mr. Ryan's suggestion was that through the use of social agencies and so on, who would conduct the inquisition and make a report to the court, the burden on the courts would not be so great.

Nevertheless, it was my view that there was a great deal of force in the argument of the Law Commission in England that there would be extreme practical difficulty, and I therefore propose to try to solve that by clause 3 of the bill I have drafted, which provides:

> Where the parties are in fact living separately and apart and have lived separately and apart for a period of at least one year immediately preceding the date of the commencement of proceedings, then there shall be a prima facie presumption that the marriage has irretrievably broken down and that there is no reasonable probability of reconciliation.

I may say that in discussing this with a number of people, some have told me that a year was too long and others have said it was too short, so I am not particularly wedded to the period of a year, but I think a full period of separation is at least *prima facie* evidence—and I stress that it is only intended as *prima facie* evidence—that the marriage has broken down.

In clause 5, I deal with two problems. I give the court the right to refuse a decree of dissolution where it is not satisfied

> that adequate and just provision has been made having regard to the financial circumstances and conduct of the spouses,
>
> (i) for the maintenance of the other spouse—

and you notice that I have not distinguished between the husband and the wife; in these days of equality of the sexes if the wife is able to support the husband and it is just she should do so I do not think she should be in a different position from the husband—

> (ii) for the custody and maintenance of any child or children of the marriage.

I have not attempted to spell out how the court will be satisfied. It could be by proof of agreement, it could be by proof of decree or judgment in some court of jurisdiction within the province, it could be by the province conferring jurisdiction on the court to deal with that matter on the application for dissolution. I believe that there would be no constitutional problem in saying that the court should not grant a decree unless it was satisfied that provision had been made. Indeed, in my view it would be irresponsible to contemplate the dissolution of a marriage until these matters had been dealt with.

Paragraph (b) is a different thing altogether:

> where it appears to the court that for some other reason a decree may prove unduly harsh or oppressive to the respondent.

This is not to say the mere fact that a person could be described as a guilty party necessarily means he or she is unable to petition—I intend the contrary—but this provision exists in Australian law, and I was impressed with the argument of *Putting Asunder* that it should be included.

I omitted by oversight to refer to clause 4. This is designed to prevent what I think was described by one of the witnesses from the United Church as "quicky" divorces. It is based on the English law as I believe it is at the present time, that no petition for divorce shall be presented until after three years from the date of the marriage, except in cases where there is some particular hardship in the view of the court and an application has been made to the court to that effect.

Clause 6 provides the court with the right to adjourn the proceedings.

> with a view to enabling the parties to seek to effect a reconciliation and for the purpose, if the parties request it, of consulting a qualified person or persons with experience or training in the field of marriage counselling.

I have not endeavoured to make that a compulsory provision, because I think that any attempt at compulsion usually makes it by its nature unsuccessful. This is something that reminds the court—and it is inherent in the idea of breakdown—that there are facilities which might assist the parties towards a reconciliation.

In clause 7 I have dealt with the question of jurisdiction. I made a mistake here owing to my ignorance. I had thought that county courts and district courts were superior courts, but I understand I was wrong in that. I would certainly like to see an amendment to give jurisdiction to county courts. The former Chief Justice McRuer came before the committee on that point, and I thoroughly agree with the argument he presented. That is just an oversight in the clause. I think county courts should have jurisdiction, and it may be that should be reviewed in the light of the situation in other provinces.

In subsection (2) I put in something that I think rights a wrong which has been called to our attention in a good many briefs:

> the domicile of a married woman, wherever she was married, shall be determined as if she were unmarried.

I think that the contrary doctrine, the doctrine pronounced by the Privy Council on the basis of antiquated theories in the ecclesiastical courts about the unity of the spouses and the natural assumption in that era that if there was a unity the husband was the one who ruled the roost entirely and therefore the wife's domicile must be the same as her husband's, is not necessary, and for the purposes of the bill I think this is useful.

In clause 8, I have preserved the jurisdiction of the Senate, as exercised at the present time, but I have suggested that the grounds they act on should be those set out in the bill so that there would be uniformity.

In clause 9, I have explicitly excluded any effect of this bill on nullity. I think that is a separate subject, and anybody who wants to look into the question of nullity should deal with it separately.

By clause 10, I have repealed a number of acts.

Clause 11 is the height of naive optimism. I have suggested that it should come into force on July 1, 1967. It is a pious hope, but I do not think it will do any harm if it is not accepted with the rest of the bill.

There are a number of reasons for submitting this bill but I will not attempt to go over them in detail. I have already said that they are fully expressed in *Putting Asunder*, which is a detailed examination of the whole subject. One recalls that in

England, where *Putting Asunder* was written, they have since 1937 or thereabouts, since the time of Lord Herbert's bill, had additional grounds beyond those existing in Canada. According to that report the situation is apparently not found to be satisfactory and that committee came down firmly, following a suggestion made in an earlier report, which was a minority report at that time, in favour of breakdown.

That committee made two things very clear. First, they thought of breakdown as not an additional ground but a substitution. Secondly, in their view breakdown was a triable issue. It has sometimes been argued that it is a difficult thing to determine. In their view it was a triable issue quite apart from the question of consent, and it should be tried.

In their report they deal with the unhappy results of what they call the "accusatorial proceedings". These, they say, put the parties at odds more than they need be and bring the law into disrepute; one party is found to be guilty and the other innocent, although this is unreal.

They reject divorce by mutual consent and give a quotation, which I would like to read, from Lord Walker in an earlier report, in which he was a dissenter:

> The true significance of marriage, as I see it, is lifelong cohabitation in the home for the family, and when the prospect of continuing cohabitation has ceased the true view is that the significance of marriage seems to require that the legal tie should be dissolved. Each empty tie as empty ties accumulate does increasing harm to the community and injury to the ideal of marriage.

This proposal is therefore put forward and accepted by this committee of churchmen on the ground that in their view it is more consistent with a lifelong union, which they think marriage should be. The United Church in its brief put before the committee the situation of tens of thousands of people living in Canada in what were in effect stable unions which could not be made legitimate.

It will be observed by the committee that the adoption of the principle of breakdown as opposed to the principle of matrimonal offences will in some ways widen the opportunities for obtaining a divorce. There may be circumstances which do not constitute grounds which would nevertheless be evidence that there was an irretrievable breakdown without hope of reconciliation. On the other hand, I think I should point out that in some cases it would narrow the basis for divorce. For example, a single act of adultery would not necessarily be regarded as a ground for dissolution where it could be shown that there remained a real opportunity for reconciliation. So the proposal broadens the ground in some respects and narrows it in others.

The principle of breakdown has been supported more or less clearly in a number of briefs filed before the committee, although I have not gone through all of them for that purpose. The committee will recall that, the idea of breakdown being relatively new in this country, a number of those who advocated a liberalization of the law by broadening the grounds for divorce had not at the time of presenting briefs to our committee given attention to the principle of breakdown. Nevertheless, the following briefs support the breakdown principle. I do not think I should take time to read the briefs to you, but they include the Canadian Jewish Congress, the National Council of Women, the United Church of Canada, the Canadian Committee on the Status of Women, the Anglican Church of Canada and, although I do not seem to have it in my list, the Canadian Mental Health Association.

The same view is strongly advocated by a lawyer in Toronto named Mr. MacDonald who, with a Mr. Ferrier, has written an article to which I would like to refer you in the *Canadian Bar Journal* of February 1967, Volume 10, No. 1, where the breakdown of marriage as a ground for divorce is fully examined by Mr. MacDonald and Mr. Ferrier. It is on page 6 of that brief.

Since this bill was given first reading in the house and some attention was called to it in the press I have had a number of requests for copies. I would like to point out—again I do not think, unless you want me to, I will take time to read them—I

have had letters expressing approval of the bill in principle if not in detail from the Canadian Committee on the Status of Women, the Seventh Day Adventist Church in Canada, the Pastoral Institute of Calgary, which is operated by the United Church who presented a brief to you, the Canadian Mental Health Association, and the Rev. Frank Fiddler, who was on the committee of the United Church. I have all these letters here if anybody is interested in them. The Anglican Church of Canada in their presentation specifically referred to bill C-264 and expressed their approval, with some slight limitation I think on clause 3 as drafted; otherwise they expressed their approval.

In paragraph 15 of the Law Commission report the following statement is made as to the objectives of divorce law:

> A good divorce law should seek to achieve the following objectives: to buttress rather than to undermine the stability of marriage, and when regrettably a marriage has irretrievably broken down to enable the empty legal shell to be destroyed with the maximum fairness and the minimum bitterness, distress and humiliation.

It is my hope that Bill C-264 although I am sure it could be much improved in form, in substance achieves this objective.

The main argument I have heard in discussing this matter against the principle of the bill is that the proposal is a new one. Some people have said it may fail to be acceptable to the people of Canada and some people have said it is a step in advance of what has been done in other parts of the Commonwealth and the United States. I would only comment that I cannot believe this is a good enough answer. Why do we in Canada have to tread a path that other countries have trod before and found unsatisfactory, I think notably the United Kingdom? The proposal in the bill can scarcely be said to be wildly radical when it has the support of such groups as the United Church of Canada and the Anglican Church of Canada. It certainly cannot be thought to be disrespectful of the sanctity and permanence of marriage as an idea.

It would, I have suggested here in my notes, be following Canadian tradition if we were to advance slowly and accept the reforms made some thirty years ago in the United Kingdom, albeit with some minor modification. But I suggest it would be setting a new and worthwhile tradition for Canada to move in advance of other countries to a more humane and satisfactory basis for the dissolution of marriage. I feel quite sure the public would be prepared to commend us if we took our courage in our hands and accepted a more adventurous approach, and one which I believe would bring a greater measure of justice to those involved.

I should have said in opening that my colleague Mr. Gordon Fairweather joined me in presenting this bill to the house. I hope that before this committee completes its review of policy it will give the most earnest consideration to this approach, which, as I said in opening, is really something different. I think we are faced with a choice. For myself, I must say that I had never given any great thought to this question of breakdown of marriage until I read *Putting Asunder,* and I was completely converted by reading it. It was obviously written by someone with legal experience, and to my mind it deals with the objectives and problems entirely satisfactorily.

For these reasons, Mr. Chairman, I am very happy to be able to present Bill C-264 and I hope it will receive due consideration.

Mr. BALDWIN: I am basically in agreement with the principle this bill envisages, but there are one or two collateral aspects of it that I want to question Mr. Brewin about. I have gradually come round over a period of time to accept the principle which is inherent in this bill. As I understand what Mr. Brewin said—and this would confirm my own views from reading the literature he has mentioned—the idea of breakdown of marriage is not to be brought forward as an additional ground but in substitution for the existing grounds, or such additional grounds which could be added as grounds on the accusatorial system. That is correct, is it?

Mr. BREWIN: That is correct, yes.

Mr. BALDWIN: With that in mind I have been wondering for some time what our position would be, if we did legislate in the way suggested by your bill, as to the grounds which presently exist. I note you have proposed in the schedule that certain acts be repealed. By repealing those would we be getting rid of, for example, the ground of adultery which presently exists, bearing in mind that in some jurisdictions under the British North America Act, and a few other reasons, adultery has been incorporated into the law of Canada as a ground for divorce not always pursuant to a statute creating it as such? In other words, what I am asking is: would it be necessary to go a step further and say the exclusive grounds for dissolution of marriage shall be those you have mentioned in clause 2?

Mr. BREWIN: That is a very good point. Frankly, I had not given thought to it, perhaps because I am familiar with the situation in Ontario where there is statutory jurisdiction, where a statute is explicitly repealed. I would be very happy to have that carefully looked into, and if it is necessary to clarify the situation to do so, because certainly the purpose I had in mind was to wipe the slate clean and start with this different ground.

Mr. BALDWIN: That is what I thought. This only occurred to me fairly recently and I am glad to have this opportunity of bringing it up. We might be able to get some advice on this.

Mr. BREWIN: I am sure there are experts in this field who could clear that up for us if they did think it was necessary. I had assumed it was a series of statutes that made the law of England at various historic dates applicable in various parts and that these were covered by the repeal. If this is not so, I think it very necessary to make clear that this is intended to apply across Canada and to replace any other grounds as established by English law, pre-Confederation statutes or what-have-you.

Mr. MCCLEAVE: Mr. Brewin, in clause 6, would you agree that one of the parties could seek reconciliation perhaps hedged about, even one short effort, so that people could use it as an indefinite stalling device?

Mr. BREWIN: I would think the court would have to try to look after that. It would be a danger. I certainly did not think of this as being a stalling device. I thought the court would more likely act on its own judgment and try to make sure that it was not just a stall by one of the parties.

Mr. MCCLEAVE: One party might not feel the marriage had irretrievably broken down. That was in my mind.

Mr. BREWIN: That might be so.

Mr. MCCLEAVE: Would you consider an amendment to clause 9 so that the right of judicial separation in a province where it is exercized could still be continued as law?

Mr. BREWIN: Yes. I must say I have not given much thought to that, again partly I suppose because we do not have judicial separation as such in the Province of Ontario. We have alimony actions which have a very similar effect. I would be quite happy to see that amendment.

Mr. MCCLEAVE: Have you solicited the views of lawyers? I believe you quoted the MacDonald and Ferrier article, and the same gentlemen appeared before us. I still have a great deal of trouble in my own mind about irretrievable breakdown as a triable issue in this sense. Would the parties really know what they were faced with before a court? Would the judge himself know what he was faced with in having to make the decision without allegations of particular things such as adultery or cruelty or other elements which would be the basis of breakdown?

Mr. BREWIN: In *Putting Asunder* they suggest that the procedure leading to the granting of dissolution on the ground of breakdown would include a pretty detailed history of the marriage and the apparent causes of breakdown, which might well be the same as matrimonial offences. They came to the conclusion—and I was really adopting it—that it was a triable issue and that, while new attitudes and new procedures were called for, it was not beyond the power of the courts to make fairly clear the basis

upon which they were acting; no doubt jurisprudence about it would grow up, and there would be rights of appeal if individual judges took an idiosyncratic view of the law.

Senator HAIG: The petitioner would have to allege certain acts or offences which caused the breakdown.

Mr. BREWIN: No, sir. He would have to set out the history of the marriage, and this no doubt might include offences now known as matrimonial offences—continued commission of acts of adultery, continued cruelty—but it would not be an allegation of offences as such, it would be a statement of the situation of the marriage and that it had irretrievably broken down. It is for that reason, as I understand it, that the authors of this report reject definitions, which would again narrow it down to bringing yourself within the slots of particular offences. I think the courts would want to know the history and some sort of reasonable explanation of why the marriage had in fact broken down, but this would not necessarily be a recital of offences as such.

Mr. MCCLEAVE: It seems to me that the only area where you reach broader ground than, for example, Mr. Basford, who has listed quite a number of grounds in his bill, is twofold: (a) undoubtedly the archbishop and his group were sick to death of the contrived adultery cases, and (b) there were areas of incompatibility which would not normally be covered in the law as it existed, for example, in England since the Herbert bill of 1937. I think those are the only two areas, and they would really boil down to incompatibility, because your faked adultery case is simply a way of finding a key to get out of a very bad marriage. It seems to me that really is the only area perhaps where the experience in English divorce reform of 1937 has not worked out particularly well.

Mr. BREWIN: In *Putting Asunder* there is a whole section devoted to arguments why the principle of breakdown must not be introduced into a law based on matrimonial offence.

Mr. MCCLEAVE: I have not read that paragraph.

Mr. BREWIN: They list a number of reasons and say that the principles are mutually inconsistent. They are contemplating not only a new wording or basis but a new approach in which the mutual recriminations as to the fault of the parties—when often it is perhaps contributed to by faults of both parties—is removed. They also suggest that by listing offences you create a superficiality when, in order to get round the breakdown generally, you try to fit yourself into slots of offences, and it is easier to prove it that way. They want to change the whole approach, and I think this is not done by Mr. Basford's bill. I think the difference is quite a fundamental one.

Mr. MCCLEAVE: I was only using this bill as an illustration because it contains grounds that are generally acceptable by divorce reformers. May I present this as an argument for your opinion? The fact that one party to a marriage may believe it has broken down and presents a petition under clause 2 of your bill could very well lead to the recriminations that you say we would be rid of if we removed the matrimonial offence approach.

Mr. BREWIN: It could. I do not suppose any bill could eliminate that possibility. I had a case the other day in my own constituency of a chap who had been living apart from his wife for 25 years and had had a family by his second and illegal union. His wife either would not or could not give him a divorce. He had only lived with her for a few months, and if I remember correctly she had had three or four illegitimate children before he married her which she had not disclosed before the marriage. There was no way in which he could dissolve the shell of a marriage. Technically he was the guilty party in every sense of the word, but there was nothing he could do about it. This was just one illustration that came to my personal attention.

Senator HAIG: That would be a marriage breakdown.

Mr. BREWIN: It would be a very clear marriage breakdown.

Mr. BALDWIN: That would be an irrebuttable presumption of breakdown.

Mr. BREWIN: I would think so.

Senator GERSHAW: We are indebted to Mr. Brewin, who has given us so much food for thought. It occurred to me that clause 4 ought to be left out altogether. If a marriage has irretrievably broken down it seems to me that there should be separation at any stage. The reason I mention that is because over the years there have been a lot of people coming to the senate for divorce in cases where a baby has been born prematurely, they have married with the intention of getting divorced, they hated each other, there was no affection, no chance of it ever being a proper marriage. I do not think there should be this three-year waiting period in such a case.

Mr. BREWIN: I put that in largely because of the representations in the brief of the United Church. They suggested it, as I understand it, in order to prevent people marrying in a hurry and thinking it is an easy thing to get out of. Clause 4 is not an absolute bar. If the court thinks some hardship is involved they can act more quickly. I am not wedded to clause 4 if the committee does not think it is an essential part of the bill. However, it seemed to me to be a reasonable provision. I think it is in the English law. I think something might be done to indicate to people getting married that unless there is a very clear-cut circumstance they cannot just except to get married today and be divorced the day after tomorrow.

Senator GERSHAW: On clause 3, I think one year is too short a period. Certainly a may may go to live somewhere else and transfer his affections, but in the case of sickness he may be away for the same time. I would think the period should be longer than one year.

Mr. BREWIN: Personally I did not feel wedded to the one-year period. I think the Law Commission report suggested six months, because they contended that if you made it too long a period you might be back to the faking of different grounds. However, I think that is a matter for discussion.

Mr. FOREST: In Quebec and Newfoundland, would clause 8 mean that the breakdown of marriage would be an additional ground to the existing adultery ground?

Mr. BREWIN: No, it is not intended as an additional ground. It says:

> The Senate of Canada may dissolve a marriage for the grounds and upon the conditions set out herein,

so that—I may not have expressed it properly—this would be in lieu of adultery as a ground and obtain all over Canada. The court or tribunal that administered it would be different but the law would be the same. That was my intention. If it has to be changed or clarified the draftsman will have to improve on it.

Mr. FOREST: Under clause 5, in Quebec that would render necessary a judgment concerning the maintenance of the other spouse and custody of the children, but under paragraph (b) an agreement between the spouses would not be legal or binding.

Mr. BREWIN: Perhaps I need more advice on that clause. It is a tricky one. I had thought that as far as our jurisdiction, the federal jurisdiction, was concerned all you needed to do was to enunciate the principle that the court should not grant a divorce unless proper provision had been made, leaving it to the provinces, as they have done in very many cases, to provide legislation for maintenance and custody to be dealt with. I am dubious about the extent to which the federal jurisdiction ought to go, whatever the constitutional power may be, and how far it ought to go in trying to regulate this field.

I assume that an agreement, certainly in the jurisdiction of Ontario which I am familiar with, would quite often be treated as being what the parties thought was adequate and just provision, but if the court felt it had been forced on one party or was not fair or adequate it certainly would not be bound by any agreement of the parties. As to other jurisdictions having made other provisions, I suppose normally this would be accepted by the court. This would impose an obligation on the court granting the divorce to ensure that in one form or another these matters had been dealt with.

Senator BURCHILL: Are there any jurisdictions that you know of where this approach is the law?

Mr. BREWIN: No, I do not think so, not very close to this. We have already had briefs before this committee about the law in Scandinavian countries, and I think in one or two of them very similar provisions exist. In Australia and New Zealand they have included breakdown, or equivalent provisions, as an additional ground, but, as I have already explained, in my view it is not satisfactory as an additional ground. That is spelled out in detail in *Putting Asunder*, why they think the New Zealand and Australian laws are not the last word. Some of the members of the committee who are more assiduous in their reading may be able to inform you better than I can on precisely what the provisions are. I think in both Sweden and Denmark, as I recall it, there are provisions which are really breakdown provisions.

Mr. WAHN: Clause 3 makes separation for a year prima facie evidence that the marriage has irretrievably broken down. What depth of investigation would you expect the court to make in practice once that one-year separation was established? What do you visualize?

Mr. BREWIN: I visualize—I am sure this is not an exclusive view at all; it is just a possible view—that if and when this bill were passed, as part of the rules of the court there would be provision for a reference to some official such as the official guardian, or to some agency with responsibility—say a family court where a family court was available—to make and file a case report on the circumstances, to verify both the fact of separation and that one spouse had not been put upon by the other in some way, to look into whether there was need to worry about the children, for example, and maintenance.

Mr. WAHN: Putting aside the question of maintenance of the wife and children, what type of investigation would be made into the question whether the marriage had broken down because of this one-year separation period?

Mr. BREWIN: I think they would make a report on the circumstances.

Mr. WAHN: How would this be established? Supposing this difficult task were removed from a judge to somebody else, how would this somebody else perform this difficult task?

Mr. BREWIN: I think they would make a report, and no doubt some sort of form would be evolved. The report would contain a history of the marriage, when they separated, what reasons were advanced by the two parties. This would not replace a pleading by the petitioner but would be a report on the position.

Mr. WAHN: Would you visualize a private investigation outside the court by social service agencies which would then make a report?

Mr. BREWIN: Yes, it would be filed as a report, the court would look it over and if it thought on the report that it was a relatively straightforward matter, that there had been separation, there were no children and no complicating factors, then I suppose dissolution would go through very quickly as a matter of course.

Co-Chairman Mr. CAMERON: Are not you really talking about clause 6 now, reconciliation, where you get this type of report?

Mr. BREWIN: No, sir.

Co-Chairman Mr. CAMERON: It strikes me, if I interpret clause 2 correctly, the determination of that is a question of fact and you would prove it in the same way that you would provide a question of fact in any court of law. Under that clause the judge would say, "Well, I have a report from an organization. You prove your case."

Mr. BREWIN: Under clause 2 the judge would have the responsibility of making a finding of fact as he has to do today in dealing with the question of custody, but that is no reason in the world—and I think this was Mr. Ryan's suggestion—why ancillary to that decision there should not have been some form of investigation by a qualified social worker.

Mr. WAHN: Do you think it is desirable that the parties should be subjected to an inquest by a social worker with regard to their marital relations?

Mr. BREWIN: Yes, I do.

Mr. WAHN: If one party deserts another for a year so that in fact they have lived separately and apart, would that party be able to apply for a divorce? For example, if the husband deserts the wife and lives separately and apart for a period of more than a year, I presume under section 3 there would be a prima facie presumption that the marriage had irretrievably broken down?

Mr. BREWIN: Yes, but I suppose if the wife objected very strongly and said she had not been properly looked after, and there were other reasons, the court might refuse a divorce on the basis of clause 5 (b).

Mr. WAHN: Assuming proper financial provision were made, would the deserting husband have the right to divorce?

Mr. BREWIN: Yes.

Mr. WAHN: So where the period is so short as a year it really amounts to a licence to obtain a divorce by desertion, and if both parties are willing it amounts to divorce by consent, does it not, where the period of time is so short?

Mr. BREWIN: I think it does whether the period of time is short or long. As I said before, I am not wedded to the period of a year. If that is thought to be too short we might extend it a bit, but the principle is the same. It is perfectly true—

Mr. WAHN: If you—

Mr. BREWIN: Let me answer your question, Mr. Wahn. You have asked me a question and I suppose you would like an answer. Let me suggest to you that there is already a large element of consent in divorces, and there would continue to be an element of consent, but instead of consent taking the form of trumped up charges of adultery with someone it would take the form of proving that in fact the parties had been apart and there were no special reasons for believing or hoping they could ever be reconciled again. To that extent it would be, as you say, a possible licence to end the marriage. I would think myself that if the parties had in fact been separated for an appropriate period, be it a year or two years, or whatever period is decided, that is pretty good prima facie evidence that there is not much left of the marriage.

Mr. WAHN: I would suggest to the witness that to use this very convenient term "appropriate period" is really covering up the basic problem. Let me put it to the witness this way. If the so-called appropriate period is very short, then in fact it amounts to a licence to one spouse to get a divorce by deserting, provided he is prepared to pay, or it amounts to divorce by consent if both parties wish to terminate the relationship. If the period of time is longer, say three or four years, that is more substantial evidence that the marriage has in fact irretrievably broken down; but in that case does it not indicate that you do need other grounds for divorce? For example, a party should not be expected to wait four years in the case of extreme cruelty or in the case of continuous adultery.

Mr. BREWIN: You understand that this is only a presumption here. There are other grounds, as you say. A breakdown is not necessarily based upon separation or any such thing, as you say. It might be the marriage is shown to have clearly broken down six weeks after it had been consummated, after the marriage had taken place, by reason of extreme cruelty or something of that sort. This is not the sole basis for this. Quite frankly, I do not follow your point, that there is any difference in kind between a separation of a year and a separation of three or four years. It may be the view of the committee that a year is too short to determine even in a prima facie way that a marriage has broken down, but the exact time is only a matter of judgment and does not affect the principle. I certainly do not accept your argument on the other problem that this shows you must have individual grounds. I personally do not like clause 3 very much. It was only put in, as I said—I am not sure whether you were here then—to meet the difficulty raised by the Law Commission report, which was that if you had to have a detailed inquisition in every case it would impose an undue burden on the courts.

Mr. WAHN: Let me put it to you this way, Mr. Brewin. Perhaps I have not made my point clear. If the appropriate period for clause 3 were considered to be, say, three years, would you consider that unduly long?

Mr. BREWIN: I would be inclined to think so, but I would be subject to persuasion on it. If people with experience on this committee were to say they knew of separations of over a year which did not really indicate that the marriage had broken down and they felt on the basis of their experience that three years would be a better period, I would be prepared to accept their judgment. At the present time my inclination is to think that a year would be appropriate, particularly when in my view if you do not make it a reasonably short period you perhaps open the door to the very sort of chicanery and deception of the court that exists under the present situation.

Mr. WAHN: If you did accept the period of three years in clause 3, would you not agree that in a case of obvious cruelty a divorce should be permitted before the expiration of the three-year period?

Mr. BREWIN: Mr. Wahn, it is my assumption that facts justifying a proper finding of cruelty would be equivalent to finding that the marriage had broken down. It would be based on a different approach. The same facts that prove one would presumably prove the other.

Mr. WAHN: That is exactly what I thought you would say, and then my question is: why do you object to having cruelty as a ground for divorce?

Mr. BREWIN: I am afraid I would be repeating the whole argument I have made to this committee and the whole argument of *Putting Asunder,* which I think you have read. All I can do is to refer you back to that and say it is a totally different approach. It is a different thing to say cruelty is one thing and breakdown of marriage is something different. One is an offence in which one person is wrong and the other is right, one is guilty of misconduct, the guilty party, and the other is not. Breakdown may come from a series of causes contributed to by both parties; breakdown may be based upon many other causes, of which cruelty is perhaps a symptom and not a cause. Unless you accept the theory we are not together on it.

Mr. WAHN: For my part I am doing my best to get together. Would you not admit that a marital offence can cause the breakdown of marriage?

Mr. BREWIN: I have just said so.

Mr. WAHN: I merely point out that it is some indication that there is nothing inconsistent in my view with having specific grounds together with marital breakdown as a ground of general principle.

Mr. BREWIN: Rather than continuing this dialectical argument between ourselves I would refer you to these sections in *Putting Asunder*, which do not agree with the point you are making.

Senator CROLL: Mr. Brewin, I have been practising as one of the men who grant divorces in the senate. I have sub-consciously been giving divorces on the ground of marriage breakdown for almost ten years, so I am in your corner to begin with. What bothers me is this. I have read all the literature, and perhaps twenty years ago I had a bill on divorce in the house which was defeated. Are you satisfied that the people understand what we are talking about? Does it not occur to you that on this basis we need at least four or five years of debate in the House of Commons on this principle to get it across to the people?

Mr. BREWIN: No, sir, I do not believe we do. I think the people are ready for this. On all the occasions I have heard of, in church assemblies and other groups, when this proposal has been put forward it has met with quick and ready acceptance, because I believe it makes sense. I do not believe we should wait four years for this to permeate further, and I do not think anybody suggests that we should continue with the present law. I do not think we should just add a series of grounds now and hope to progress further in a few more years. It seems to take a hundred years in this country to reform

our laws. If we are going to reform them I would like to reform them on the basis upon which we are in fact operating.

Senator CROLL: But Mr. Brewin, here is Ian Wahn—I think one of the really intelligent members of the House of Commons—who is all in favour of this and has been for years, who is having great difficulty in reconciling this. If he has difficulty, think of the poor fellow in the street.

Mr. BREWIN: Mr. Wahn, as you say, is a highly intelligent member of the House of Commons. I have found that some of my colleagues, even of high intelligence, do not always jump to the conclusions that I would. I think Mr. Wahn may be convinced even yet, but you have got to allow some area for perhaps disagreement. I think Mr. Wahn may be difficult to persuade partly because he himself has long been a foremost advocate of other forms of divorce reform. I know that when I advocate something I am tenacious about it. Maybe that is one reason why he has difficulty. As I say, the principles I have expounded are not my own principles; they are principles expounded by people who have spent years studying this matter.

Senator CROLL: They have not made quite the impression in Great Britain that you suggest they have made, because I have read considerable literature and opinion that does not agree with what you are suggesting here and that the archbishop's group suggests.

Mr. BREWIN: I would not suggest that it can be universally accepted. Certainly not. What I am suggesting is that the people who propounded this proposition—which commends itself to me at least, and to a good many other people I know who have taken the trouble to read the report—are themselves highly experienced in this field. That is all I am saying.

Senator CROLL: What I am afraid of is that the idea of breakdown of marriage will raise hopes in the minds of people that they could not possibly achieve with respect to these marriages that will not work, despite the fact that you have certain precautionary measures which you have in mind.

Mr. BREWIN: I know there is a lot of heartbreak today because of the present state of the law, and I do not know why the principle of breakdown should be the cause of more misunderstanding and unhappiness than exists today, or would exist if all we decide to do is expand some of the grounds.

Senator CROLL: I think the breakdown of marriage has about it in the minds of the public an aura of collusion. Two people walk in and say "Our marriage has broken down" period. Where do you go from there?

Senator HAIG: Get a divorce.

Senator CROLL: Exactly. That is what I am getting at.

Mr. BREWIN: They will soon find out that is not what is involved here. People can read, you know.

Senator CROLL: My suggestion is that is the impression we are getting out to them, and I do not think they know enough about it.

Mr. BREWIN: I have more confidence in the intelligence of people than apparently you have. That is all I can say.

Senator CROLL: It is not a matter of having confidence in the intelligence of people. I think I know what people think as well as you do. The idea of getting across to them something that is new takes a little time. That is what I am saying. You cannot just say, "This is it." It takes a little time, and one of the ways I think we might be educating them is through debates in the House of Commons, which have an educating effect.

Mr. BREWIN: I think the quickest and best education would be for us to enunciate the principle that we think is best. I am not saying this is the best. It would be up to the committee to decide what is the best principle. If they think this is the best principle, then I would not spend my time worrying too much about public opinion being able to accept it and understand it. Perhaps I should put it the other way round—understand it

and accept it. When this committee reports there will be debates in both houses, interest will be aroused, and if it is the best principle I do not think we need worry about four or five years' public education frankly.

Co-Chairman Mr. CAMERON: Are there any more questions?

Mr. BALDWIN: Could I ask something supplementary to a question asked by Mr. McCleave with regard to the possibility of the courts being able to establish a satisfactory jurisprudence on the issue of irretrievably broken down marriages? May I ask you a leading question, Mr. Brewin? Would you not feel that courts which have reasonably successfully grappled with the M'Naughten rules for a number of years could deal with the irretrievable breakdown of marriage?

Mr. BREWIN: That is a difficult subject for me because I am not sure they have wrestled so successfully with the M'Naughten rules, but I think they would manage to handle this problem all right.

Mr. MCCLEAVE: I wonder if Mr. Brewin could answer one parting shot in the same spirit as Mr. Baldwin's? What is the difference between irretrievably and retrievably broken down?

Mr. BREWIN: Well, that is a matter of semantics. I think one is the opposite of the other, is it not? "Retrievable" means you can get it back again; "irretrievable" means, as I understand it, that you cannot.

Mr. MCCLEAVE: How could you say it could never be gotten back again?

Mr. BREWIN: As a reasonable conclusion of fact. No one can be so wise as to be 100 per cent certain, but I think that in human affairs we act on probability and moral conviction. I am quite sure the word "irretrievably" would not be beyond the judgment of courts in arriving at a decision—and conceivably be wrong on occasions.

Co-Chairman Mr. CAMERON: Senator Roebuck, would you thank Mr. Brewin?

Co-Chairman Senator ROEBUCK: I do not know that that is necessary. We have given you a grand hearing, Mr. Brewin, and I think we have all learned something from what you have said to us. I did not take part in the cross-examination, but I can assure you of this, that the subject of marriage breakdown will be thoroughly considered by this committee. I do not think I should go further than that.

Co-Chairman Mr. CAMERON: We have three other members of the House of Commons who have sponsored private members' bills on this subject-matter, Mr. Prttie, Mr. Stanbury and Mr. Peters. Mr. Prittie tells me he will not take very long, Mr. Stanbury tells me he will not take too long, Mr. Peters feels he will take more time. I am going to call on Mr. Prittie, then Mr. Stanbury, and if we have any time we will call on Mr. Peters.

Mr. Robert Prittie, Member of Parliament for Burnaby-Richmond: Mr. Chairman, gentlemen, I think you realize why my submission will not take very long. A couple of months ago in one of the Vancouver daily newspapers there was an editorial entitled "Divorce Reform. Where's the Action?" Early in 1965 I introduced the same type of bill as I have in Bill C-41. I think it was a desperation sort of measure. I had given up hope that the federal Parliament was going to take any action to expand the grounds for divorce, so I drafted this bill which would have given the provinces, by an amendment to the B.N.A. Act, concurrent jurisdiction with the federal authority.

To my knowledge two provinces have passed resolutions stating they would be willing to act in this field, or requesting the federal Government to change the grounds; the Legislature of British Columbia passed a unanimous resolution in 1965, and in the same year the Legislature of Manitoba passed a resolution, not unanimously but by one vote. As the explanatory note in my bill explained, if we could not get action in Ottawa then perhaps the power could be given to the provinces. This is not really what I want. I would much prefer to see the laws relating to divorce on a national basis rather than have what they have in the United States, where each state can legislate on its own.

This was the only point of my bill at the time, to try to illustrate that some provinces were more ready than others.

Mr. Chairman, I am not a barrister, I am not learned in the law, and I really have not much to add to explain the reasons for the bill. If there is to be a recommendation from this committee that the law be changed, certainly I would prefer it to apply to the whole country rather than to individual provinces.

Co-Chairman Mr. CAMERON: Are there any comments on Mr. Prittie's presentation?

Senator GERSHAW: I must say it is original. It is the first time I have ever seen divorce coupled with agriculture and immigration!

Co-Chairman Mr. CAMERON: Have you any questions, Senator Roebuck?

Co-Chairman Senator ROEBUCK: No. Mr. Prittie is in exactly the same position as I was. I introduced a bill a whole year ago and I do not want it thrown up at me now, because in the meantime we have learned a very great deal about this subject and we are looking forward, not back. We are all hoping for a very fine report from this committee, and I think we will achieve it. We have not got to that yet, but in the meantime we have stored up a very great deal of knowledge as a result of our studies and the time will come when we put it into effect I think.

Mr. PRITTIE: Thank you, Mr. Chairman.

Mr. Robert Stanbury, Member of Parliament for York-Scarborough: Mr. Chairman, I have the same advantage or disadvantage as the Co-Chairman Senator Roebuck. Being a member of this committee I have learned a great deal since our hearings began. My bill is one of those introduced at the very beginning of this Parliament. It was drafted before I was sworn in as a member, and with the very limited knowledge of the field which I had acquired as a practising solicitor and barrister I have learned a great deal, as has Senator Roebuck, although it is hard for me to believe that he could have learned from these hearings.

I must say, my feelings may be quite different when the committee comes to prepare its report. I do want to express some concern that we not completely abdicate our responsibility to define what the grounds for dissolution are going to be. If we accept some theory other than on which dissolution of marriage has taken place in the past, I hope that we will not simply leave it to judges to enact specific grounds which we have not enacted. For instance, it may be that judges will come to some agreement on what period of desertion will constitute a breakdown of marriage. They may come to some agreement at their judges' meetings on the appropriate degree for a person to be subject to the influence of drugs or alcohol to constitute a breakdown of marriage. I would not want us simply to abdicate to the courts the definition of the circumstances under which dissolution of marriage should take place.

Another concern I have is that we not make dissolution of marriage even more difficult and more expensive than it is now by requiring some very long, cumbersome and complicated process for couples to go through before they could reach this solution of their problems.

Co-Chairman Senator ROEBUCK: It has been suggested that we have two steps in the procedure. First you have judicial separation, and after a decree of judicial separation and a wait of a year the parties come back and ask for a divorce. You would not favour something of that kind, would you?

Mr. STANBURY: I would not want to see one rigid system supplemented by another, and I think that some of the propositions put before us have elements of rigidity which are perhaps almost as bad as what we have been living with. I would like to get away from the idea that one party to a marriage is guilty and the other party is innocent.

Co-Chairman Senator ROEBUCK: But if there are such would you close your eyes to it?

Mr. STANBURY: There are cases when courts will have to decide which party is sufficiently at fault so as to be deprived of custody of a child, for instance, or sufficiently at fault so that he or she will be required to pay costs etcetera. I think that the courts will have to determine fault in some degree, whether or not it is called that in the legislation. My doubts about some completely new approach would at present resolve around the necessity not to abdicate to the courts completely the definition of the circumstances under which people should be entitled to dissolution of their marriages, and to keep the process for obtaining dissolution of marriage as simple as possible.

Co-Chairman Mr. CAMERON: Are there any questions of Mr. Stanbury?

Senator CROLL: I am impressed with what Robert has just said. What I have understood from his statement is that it is our responsibility to write the law and it is not for the courts to say that this is what we meant. With that in mind I do not know how to write the law for the breakdown of marriage. That has been going through my mind all the time. I like the term, I like the concept, but I do not know how you do it in a realistic fashion. Can someone help me out?

Mr. STANBURY: It seems to me that even under the present process of dissolution of marriage the court does determine just what you have to determine in the senate, that a marriage has come to an end. One party suggests to the court that the marriage has been brought to an end by the action of the other and then the court determines whether or not that has actually taken place. I think the marriage breakdown theory is a very appealing one and it may help us in the development of the law with respect to the dissolution of marriage. However, it seems to me that it will be incumbent on us to give the guidelines for the symptoms of what will constitute the breakdown of marriage or the courts will have to do it themselves. There may be less certainty for the parties; there may be less consistency across the country because judges in different areas may come to agreement on different standards, different criteria. I still have the concern that it may be less satisfactory if we avoid defining, in some way at least, the symptoms of breakdown, which is really what the grounds set out in most of the draft bills constitute, I suggest.

Mr. MCCLEAVE: Would not you agree also, in answering Senator Croll's plea for somebody to help in coming to grips with this, that when dealing with custody of children somebody is bound to wag the finger of moral blame at one party or the other, so the court assigns the children to the care of the person who will provide the best moral atmosphere for them?

Mr. STANBURY: I would think it is inherent in the whole judgment that has to be made.

Mr. MCCLEAVE: So that breaks down the marriage breakdown theory right there?

Mr. STANBURY: I think the marriage breakdown theory threatens to break down the system which it attempts to set up, because if I understand the theory correctly it would seem that there would be a massive requirement for social scientists to support it.

Senator CROLL: What do you mean by saying if you understand it correctly? Mr. Brewin just told us that everybody understands it correctly, and I should have thought you were one of those intelligent members.

Mr. BALDWIN: There are degrees of understanding.

Mr. STANBURY: I am not sure I can aspire to Mr. Brewin's attainments, as I understand them. However, I do think there is a danger that we may set up a system which will fall under its own weight. We simply do not now have the social scientists to staff our prisons, our mental hospitals and so on. Maybe we are daring to think we can process the social problem that we have in our divorce courts with what would seem to be a cumbersome system.

Mr. BALDWIN: In clause 6 (b) one of the grounds for dissolution of marriage is that

> the other party to the marriage has been guilty of cruelty.

I am a little puzzled. Would not that be putting almost the same degree of responsibility and burden on the courts in its attempt to come to grips with what is the measure of cruelty essential to dissolve the marriage as they would have in connection with Mr. Brewin's proposal of irretrievable breakdown? It not there a similarity there?

Mr. STANBURY: Courts have made attempts to define cruelty sufficient to constitute a ground for dissolution of marriage.

Mr. BALDWIN: In other jurisdictions.

Mr. STANBURY: In other jurisdictions. Also our courts have defined cruelty sufficient for other matrimonial offences, and they have at least a basis for developing a definition of cruelty.

Mr. BALDWIN: Just one more question and then I have finished. In their early days the courts in struggling with this question of cruelty went through the same difficult process that they would go through in trying to come to an acceptable definition of "irretrievable breakdown". Defining cruelty judicially caused many agonizing moments in the lives of a number of courts.

Mr. STANBURY: I think though that perhaps there is no need for us to start over again. At least, I would like to see us avoid a period of years when there is uncertainty of that kind in trying to define a new ground for divorce, because during that period it will be most difficult for legal advisers to give people adequate advice on their legal position.

Mr. BALDWIN: New legal aid would mean more work for the lawyers.

Mr. STANBURY: It may provide a great deal more work for lawyers as well as for social workers. I am suggesting that over a period of some years there will be a great deal of uncertainty until this theory is developed. It may be that the theory should be developed legislatively, as Senator Croll suggested, rather than subjecting the litigants to this process over a period of years.

Mr. BALDWIN: The slings and arrows of litigation!

Mr. MCCLEAVE: Would Mr. Stanbury agree to change the wording to "that the other party to the marriage has treated the petitioner with cruelty," which is the phrase used in the English act?

Mr. STANBURY: I think probably that is better wording. I can pick all kinds of holes in this bill now and I would not want the committee to consider it except as an attempt to be sure that this parliament deals with the subject of divorce during this session. Mr. Prittie in his comments uttered a cry of dismay that no one had bothered to deal with this subject for so long. Now we have finally come to the point where I am sure it will be dealt with; we are going to have a much more rational law on divorce, and I hope one of the reasons is because some of us have taken the trouble to draft bills, inadequate though some of them may be, to indicate to the government that there is strong feeling in the country that this should be dealt with.

Co-Chairman Senator ROEBUCK: Thank you, Mr. Stanbury.

Co-Chairman Mr. CAMERON: Mr. Peters, it is now half-past five. Would you like to start? What does the committee feel? Would you like to leave Mr. Peters till another day? How long will you be, Mr. Peters?

Mr. PETERS: I do not think I will be too long.

Co-Chairman Mr. CAMERON: Then we will hear you now.

Mr. Arnold Peters, Member of Parliament for Timiskaming: Mr. Chairman, I too believed that we needed a change in the divorce laws of Canada, particularly after some small acquaintance with it. I believed that Bill C-19 was probably the best type of legislation that Canada could have, but since I have participated in these hearings I have come to the conclusion that the ultimate is not this type of legislation but marriage breakdown. However, as a legislator I think it is not possible to put the marriage breakdown theory into effect, not for the reason Senator Croll gave, but for a completely different reason. I do not think the courts are capable of administering it,

probably for the reasons that have been suggested as to the ancillary sections that will be necessary to the courts—the social workers and investigating bodies to establish the breakdown of marriage.

To the best of my knowledge the courts have always operated on a set of terms, and I believe the courts would eventually develop the little red book that the senate now uses, which sets out the terms, although it is not in the act, on which the senate operates this divorce court. It sets out a series a regulations and things to do. I think the courts would eventually have to do this. Therefore, it would behove parliament to do that rather than allow the courts to develop by precedent various common-law practices which in effect would establish what we ourselves would establish.

I think that parliamentarians—and this is something that I suppose we are plagued with—are far behind the country. We are conservative, not the people in the country, and if we could come up with machinery to administer the breakdown theory I am quite sure the country would be farther ahead in its thinking than we as legislators. The reason changes have not been made is not the lack of understanding in the country. Of the thousands of letters I have received in the last five or six years I have not had one from any person, to my knowledge, who said he did not agree that the grounds of divorce should be broadened. In most cases they presented a specific case, usually their own, to show why the law was working to their disadvantage. For that reason I think the country has been ready for this for some time.

I also believe the bill I have put forward contains the proposal that was made—which I did not really understand before Mr. Hopkins, legal counsel for the senate, presented it—as to the common-law practice which really should have been attached to Canadian law when it was accepted in the provinces by the various means with which the different provinces got their law from the British precedent, in that at that time in England, where they had a unitarian-type government, maintenance of the wife and custody of the children were already in effect, and what we did in Canada was really contrary to the law. As Mr. Hopkins pointed out, our responsibility is fairly clear, or at least there is certainly an avenue which this committee should consider in terms of maintenance and custody, which has been a debatable point for a long time and which I did not take into consideration.

I am not a lawyer, so I have many difficulties that other people might not have, but I attempted in clause 2 to bring into the federal act the right of passing substantive legislation which the provinces could accept by accepting the legislation, and I believe that where it is applicable the system of provincial administration is probably a very good way of handling divorce legislation in Canada.

I have tried in clause 4 to put in a Canadian domicile similar to that mentioned by a number of other people, giving the wife the same domicile as she would have if she were a single person. I am sure this will satisfy the suffragettes, or whatever we call those advocating the equality of women. Canadian domicile for marriage and divorce purposes should be one of the changes proposed by this committee.

In regard to alimony, custody and maintenance of children, when this bill was prepared for me I took into consideration the provincial arrangements now being made. Because of what Mr. Hopkins said I am of the opinion that this is not necessarily correct and that the committee should study this much further to ascertain whether or not by the granting in the British North America Act to the federal Government the right of marriage and divorce there did not also attach to it the right of the federal Government to provide for the issue of the marriage. If we have the right, then I think the federal Government should exercize it.

In the grounds for dissolution of marriage I have not really added anything to what has already been discussed. In fact, I have only three grounds for dissolution—adultery, desertion and cruelty. Some people argue that adultery should be the only ground. It cannot be correct to maintain the theory that marriage is indissoluble but yet argue that divorce cannot be granted except in the case of adultery, because this means that it is dissoluble under certain circumstances, and I therefore think it foolish not to add other grounds which, in my opinion after studying many, many cases, I find

to be the real underlying causes of divorce. I believe that in many successful marriages adultery would not be certifiable as causing a marriage breadkown, although there may be adultery by both parties, so in my opinion adultery is not that kind of exception.

I think there can be two kinds of desertion. There can be voluntary desertion, where one partner leaves the other, and there can be an involuntary type of desertion which takes place when one partner is incarcerated over a period of time. A person who is incarcerated due to mental difficulty, or is an alcoholic or a drug addict is in most cases deserting the marriage involuntarily to all intents and purposes. I think that desertion, particularly of an involuntary nature, will always have to remain the responsibility of the petitioner. For instance, as you will have noticed in the Ottawa papers last week, a man left his wife in 1928 and was reunited with her only the other day after that period of many, many years, and if that is not considered to be desertion that would obviously not constitute a breakdown of the marriage.

Co-Chairman Senator ROEBUCK: Supposing you said a marriage had broken down by reason of one partner being incarcerated in prison for a period of time, or something of that sort, would not that accomplish what the advocates of marriage breakdown are after and make the thing practical?

Mr. PETERS: I think that is what we are trying to do. I have in mind the fact that I am not a lawyer and therefore probably look at it differently, but I have always been shocked by the fact that lawyers, for the defence and otherwise, the courts, all those connected with the courts, were well aware that many divorce cases brought on the ground of adultery were not really for adultery at all but for marriage breakdown for a number of reasons, and the divorce has been granted on an adultery charge that was obviously phoney. What I am trying to do is to legalize the grounds on which marriages have broken down. I am quite sure we will not have them all, but I have put in a number of limitations. It is two years for wilful desertion. Refusal to consummate the marriage and habitually being guilty of cruelty each has a limitation of two years, but for convictions of crime the aggregate of imprisonment should be more than five years.

This is where I run into difficulty personally with the marriage breakdown theory, because I would think it is entirely up to the offended partner—although that is not the right word—to decide whether or not continual incarceration, or a number of periods of incarceration for varying periods of time, really constitute a breakdown of the marriage. In my experience the wives of some prisoners in the penitentiary still have no desire, even after a long period of time, to obtain a divorce, and it obviously would not be granted except on the request of the petitioner.

In the United States, for instance, a doctor was charged with adultery with a mental patient. Being with one of his mental patients I presume it would be rape. The case involved a great deal of money and was considered to be almost a set-up against the doctor, for the simple reason that unless that type of charge could be instituted no relief for the petitioner would be possible.

It seems to me that there are involuntary grounds of desertion which have to be established to take care of what we would in general terms call the breakdown of marriage theory. I have no particular interest in the time. I allow only one year if the respondent has been guilty of trying to murder the petitioner. Maybe this is too long in view of one of the cases before us the other day. I think the time limits are not too important. With mental confinement, for example, it is almost impossible today to get a medical opinion that someone is permanently mentally disabled, so there should be a period after which the deserted petitioner, though the desertion is involuntary, has the right to obtain relief on that ground.

I believe the sanctity of marriage must be protected, but in Canada we have not protected it if we have 200,000 people living in common-law unions; there is certainly something wrong with the whole religious concept of our nation when this has knowingly been allowed to develop to the stage where it amounts to such a very large proportion.

It seems to me that we must have a period for which the marriage should exist before divorce is possible. Some young people would like to get unmarried a week after the marriage, or after the first set of bills starts coming in and there is not much money to go around. We must therefore have a clause saying that a divorce action could not be instituted until, as this bill suggests, three years has elapsed, except for adultery, non-consummation or depravity. The court should of course be given the right to make exceptions because of circumstances that we will not be able to cover in any kind of bill.

We have covered void, voidable marriages and annulment.

Then we went on to something else that I think has to be covered, although I am not sure whether this is the right wording. It was more or less taken from the New Zealand and Australian acts. I refer to setting up of reconciliation procedures. Under clause 9, a judge can refer a case to social workers. After the judge has heard a summary of the evidence and referred the case to a social worker he cannot hear the case again, it must be heard by another judge. This clause gives the court the right to insist that marriage counselling be engaged in. It gives the judge a considerable amount of power, but does not allow him to rehear that case after an attempt at reconciliation has been unsuccessful.

Mr. McCLEAVE: Why? Is this in the Australian and New Zealand acts?

Mr. PETERS: The reason for it is because in my opinion a judge who has already decided that there are certain factors which have been brought to his attention indicating that with proper counselling there is a chance of the marriage being saved would, when rehearing the case, have a tendency to say, "I thought it could be saved before and I still think so," and he would be prejudiced against those he had sent to the reconciliation service which in that case had been unsuccessful.

Mr. McCLEAVE: What I was trying to ascertain was whether, since you say this reconciliation procedure was taken from the Australian and New Zealand acts, this provision was in those acts as well.

Mr. PETERS: Yes. In other words, we just stole it. I understand it is called plagiarism. Under clause 11 the statements made before the reconciliation service would then not be admitted into court. There is also a provision which prevents the period that they might get together from being considered a bar to marriage being engaged in for a period of time.

I think that is all. I do suggest that we should try in this whole process to make it possible for people whose marriages really have broken down to go to the court nicely, without having to resort to a phoney hotel adultery charge and so on, receive a divorce and come away with their self-respect. Although I think it is necessary to lay the blame on one party, this should be minimized by the court wherever possible so that no stigma attaches to the guilty party, as we have known it in the past. Consideration should also be given to making the cost as reasonable as possible. In my experience, some of the divorce actions before the senate have cost the party $5,000 to $15,000.

Co-Chairman Senator ROEBUCK: Very seldom, Mr. Peters. That might happen when people fight amongst themselves.

Mr. PETERS: I was thinking of one case in particular when a man indicated that he had paid $5,000 in one year for detective fees, although I was not able to establish that. I think the cost should be kept as reasonable as possible, and this should be part of our procedure.

I should also like to suggest that we consider two other things. One is that the problem of marriage should be discussed by this committee in terms of whether or not the ministers and priests of the nation should act in a civil service jurisdiction, marrying people on our behalf. I personally am of the opinion that many ministers and priests are having great difficulty in remarrying people when it is against their convictions, yet our licence to them makes it, not mandatory, but certainly an obligation on them to marry a couple rather than leaving them unmarried.

Mr. McCLEAVE: They can go somewhere else, cannot they?

Mr. PETERS: In some provinces they can and in some they cannot, I understand. It seems to me that some consideration should be given to marriage in terms of the ecclesiastical and state responsibility.

Lastly, I would like to say that in my opinion a suggestion made by one of the witnesses before the committee the other day is well worth while, that a study of the family marital relationship should be referred to some organization which can conduct such a study. I think the Vanier Institute of the Family was mentioned. I would suggest that the divorce law should contain a provision making it mandatory to review marriage and divorce legislation periodically so that we do not have to wait for necessary change until public pressure builds up to its present state. Such a body should be able to recommend amendments on the strength of an almost continuous study by an organization such as the Vanier Institute of the Family.

Co-Chairman Senator ROEBUCK: You could not put that into a bill. There would have to be an understanding in the commons, or perhaps in this joint committee.

Mr. PETERS: I would like to see written into the bill something similar to what is written into the Bank Act, which has to come up periodically. I am of the opinion, as I think most members of the committee are, that the ultimate is the breakdown theory, and although most members of the committee are of the opinion that the time has not yet arrived for us to legislate by simply saying it should be based on marriage breakdown, time will make it much more popular, and the only way I can see of getting it into legislation is for us continually to review it and update the legislation as our court procedures might indicate.

Senator BURCHILL: You do not go along with the new concept of the breakdown of marriage as Mr. Brewin outlined it this afternoon?

Mr. PETERS: Well, I would certainly like to think we could put this into effect now, because it is much more advanced than my thinking has been in this field. I personally do not think the courts could handle it yet.

Senator BURCHILL: But that is not along the lines you have suggested?

Mr. PETERS: No. What I have done is exactly the opposite and set out, to the best of my knowledge, the maximum number of grounds that are legitimate. I do not believe in "quicky" divorces. I believe in the sanctity of marriage as an institution. I have set out what I would consider, not frivolous but real grounds that have developed over the years as effective grounds for divorce, which have continually been arrived at in a roundabout way by calling it adultery.

Mr. Chairman, I apologize for presuming on your time, but I would just like to add this. I believe that consideration also has to be given to parliamentary divorce. If we pass substantive legislation, federal law, allow the provinces to pass enabling legislation and some of the provinces do not take advantage of that opportunity, the Exchequer Court as we have it now should be empowered solely to grant divorces on the grounds provided in the federal legislation and the responsibility of Parliament completely alleviated.

When the legislation was passed setting up the present situation we held out for a five-year review or termination of that legislation, and in my discussions with the Minister of Finance of the time we were assured that this would be granted. However, ministers change and times change and this may not be accomplished. I would like to see a right of petition allowed on much broader grounds so that the Exchequer Court would handle divorces for those provinces which did not have divorce courts, but Parliament in general would be able to handle petitions that were exceptions to what we would consider the normal law and might take into consideration those things that we had not heard of. I do not contemplate getting rid entirely of that right to petition Parliament, but in those fields where the Exchequer Court is now handling divorces I

believe the sole jurisdiction should be given to that court, and the right to petition Parliament should be reserved for other reasons, probably exceptions to the normal grounds.

Co-Chairman Senator ROEBUCK: That would not be covered by our present reference.

Mr. MCCLEAVE: What on earth do you mean "enabling legislation by the provinces"?

Mr. PETERS: As I have said, I am not a lawyer, but as I understand it the federal Government can pass all kinds of legislation and the province then has to pass enabling legislation for their own jurisdiction, and they can take as much or as little of federal legislation as they wish.

Mr. MCCLEAVE: No.

Co-Chairman Senator ROEBUCK: No. What you mean is you would give the province the right to say certain acts of ours shall apply to that province or shall not apply to that province. It that your idea?

Mr. PETERS: This is not what I want. This is what I thought enabling legislation was. What I would like to see is all the provinces having the same law.

Co-Chairman Senator ROEBUCK: Certainly.

Mr. PETERS: I would think the province would have to pass that law rather than the federal Government telling them this was going to be their law.

Co-Chairman Senator ROEBUCK: Oh no. This is within our jurisdiction.

Mr. PETERS: Is it?

Co-Chairman Senator ROEBUCK: Absolutely.

Mr. MCCLEAVE: We are masters in this field, Mr. Peters, thank heavens.

Mr. PETERS: I am pleased to hear that.

Co-Chairman Senator ROEBUCK: There is no need for us to ask the provinces whether we can or cannot. It is ours to say.

Mr. PETERS: Thank you very much, Mr. Chairman.

Co-Chairman Senator ROEBUCK: Thank you, Mr. Peters.

The committee adjourned.

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APPENDIX "77"

C-44.

First Session, Twenty-Seventh Parliament, 14 Elizabeth II, 1966.

THE HOUSE OF COMMONS OF CANADA.

BILL C-44.

An Act to provide in Canada for the Dissolution of Marriage.

First reading, January 24, 1966.

Mr. BASFORD.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1966

26055—3½

1st Session, 27th Parliament, 14 Elizabeth II, 1966.

THE HOUSE OF COMMONS OF CANADA.

BILL C-44.

An Act to provide in Canada for the Dissolution of Marriage.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Short title.

1. This Act may be cited as the *Canada Divorce Act*.

Jurisdiction

2. Courts in those provinces of Canada now or hereafter having jurisdiction to grant a divorce *a vinculo matrimonii* shall have jurisdiction for all purposes of this Act.

Domicile.

3. (1) For purposes of this Act, a party to a marriage who is domiciled in any province of Canada shall be deemed to be domiciled in any other province of Canada.

(2) For the purposes of this Act, where a husband has been domiciled in a province or provinces during a period of the marriage, but is not so domiciled at the commencement of the hearing of a petition by a wife, the wife shall be deemed to be domiciled in a province if, as an unmarried woman, she would be so domiciled and, in such case, the domicile of the wife shall be the domicile of both parties to the marriage.

Interpretation.

4. In this Act,

"petition" includes a cross-petition;

"petitioner" includes a cross-petitioner;

"proceedings" includes cross-proceedings; and

"respondent" includes a petitioner against whom there is a cross-petition.

Explanatory Notes.

This Bill is to provide a law for the dissolution of marriage that will be applicable to all persons domiciled in Canada.

The provisions of the Bill will be administered by those provincial courts now exercising a divorce jurisdiction. Present provincial laws respecting alimony, guardianship and maintenance of children would continue. Present provincial matrimonial laws would also continue in existence but Parliament would retain its jurisdiction over divorce and nullity of marriage.

Grounds of dissolution.

5. A court having jurisdiction under this Act may, upon petition by one of the parties to the marriage, decree dissolution of the marriage upon one or more of the following grounds:

Adultery.

(*a*) that, since the celebration of the marriage, the respondent has committed adultery; or

Desertion.

(*b*) that the respondent has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or

Cruelty.

(*c*) that the respondent has since the celebration of the marriage treated the petitioner with cruelty; or

Sexual offences.

(*d*) that, since the marriage, the respondent has committed rape, sodomy, or bestiality; or

Drunkenness and use of narcotics.

(*e*) that, since the marriage, the respondent has for a period of not less than three years

(i) been a habitual drunkard; or

(ii) habitually been intoxicated by reason of taking or using to excess any sedative, narcotic, or stimulating drug or preparation, or

has, for a part or parts of such a period, been a habitual drunkard and has, for the other part or parts of the period, habitually been so intoxicated; or

Imprisonment.

(*f*) that, since the marriage, the respondent has been in prison for a period of not less than three years after conviction for an offence punishable by death or imprisonment for life, or for a period of five years or more, and is still in prison at the date of the petition; or

Convictions for crime.

(*g*) that, since the marriage and within a period of one year immediately preceding the date of the filing of the petition, the respondent has been convicted:

(i) for attempting to murder or unlawfully to kill the petitioner; or

(ii) for having committed an offence involving the intentional infliction of grievous bodily harm on the petitioner, or the intent to inflict grievous bodily harm on the petitioner; or

Mental illness.

(*h*) that the respondent is incurably of unsound mind and has been under care and treatment for a period of at least five years immediately preceding the presentation of the petition.

Enquiry by the court.

6. (1) On a petition for divorce it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged and whether there has been any connivance or condonation on the part of the petitioner and whether any collusion exists between the parties and also to inquire into any countercharge which is made against the petitioner.

Decree of divorce.

(2) If the court is satisfied on the evidence that—

(*a*) the case for the petition has been proved; and

(*b*) where the ground of the petition is adultery, the petitioner has not in any manner been accessory to, or connived at, or condoned the adultery, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty; and

(*c*) the petition is not presented or prosecuted in collusion with the respondent or either of the respondents;

the court shall pronounce a decree of divorce, but if the court is not satisfied with respect to any of the aforesaid matters, it may dismiss the petition:

Proviso.

Provided that the court shall not be bound to pronounce a decree of divorce and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery or if, in the opinion of the court, the petitioner has been guilty—

Unreasonable delay.

(i) of unreasonable delay in presenting or prosecuting the petition; or

Cruelty.

(ii) of cruelty towards the other party to the marriage; or

Desertion or separation.

(iii) where the ground of the petition is adultery or cruelty, of having without reasonable excuse deserted, or having without reasonable excuse wilfully separated himself or herself from, the other party before the adultery or cruelty complained of; or

Wilful neglect or misconduct.

(iv) where the ground of the petition is adultery or unsoundness of mind or desertion, of such wilful neglect or misconduct as has conduced to the adultery or unsoundness of mind or desertion.

Repeal, R.S., 1952 cc. 84 and 176.

7. The *Divorce Jurisdiction Act*, and Sections 4, 5 and 6 of the *Marriage and Divorce Act*, are repealed.

APPENDIX "78"

C-264.

First Session, Twenty-Seventh Parliament, 14-15 Elizabeth II, 1966-67.

THE HOUSE OF COMMONS OF CANADA.

BILL C-264.

An Act respecting Divorce.

First reading, January 24, 1967.

MR. BREWIN.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1967

1st Session, 27th Parliament, 14-15 Elizabeth II, 1966-67.

THE HOUSE OF COMMONS OF CANADA.

BILL C-264.

An Act respecting Divorce.

HER Majesty, by and with the advice and consent of the Senate and the House of Commons, enacts as follows:

Short title.

1 This Act may be cited as the *Divorce Act, 1967*.

Petition for Divorce.

2. A petition for divorce may be presented to the Court either by the husband or the wife, on the ground that a marriage has irretrievably broken down and that there is no reasonable possibility of reconciliation, and the court may grant dissolution of the marriage in such case.

Presumption that marriage has broken down.

3. Where the parties are in fact living separately and apart and have lived separately and apart for a period of at least one year immediately preceding the date of the commencement of proceedings, then there shall be a *prima facie* presumption that the marriage has irretrievably broken down and that there is no reasonable probability of reconciliation.

Time limit.

4. No petition for divorce shall be presented to the court unless at the date of the presentation of the petition three years have passed since the date of the marriage, provided that a judge of the court may, upon application being made to him in accordance with the rules of the court, allow a petition to be presented before three years have passed, on the ground that the case is one of extreme hardship suffered by the petitioner, and in determining any application under this section for leave to present a petition before the expiration of three years from the date of the marriage, the judge shall have regard to the interests of any children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the said three years.

EXPLANATORY NOTES.

At the present time, generally speaking, the sole ground for dissolution of marriage in Canada is the commission of adultery. There are a number of Bills introduced by private members which are being considered by the Special Joint Committee of the Senate and the House of Commons on Divorce. These Bills propose amendments to the present law which add to the matrimonial offences entitling the husband or wife to obtain divorce.

The purpose of the present Bill, however, is to substitute a totally new principle known as the "breakdown principle". The purpose of this is to achieve the objective of reinforcing the stability of marriage on the one hand, but where a marriage has irretrievably broken down, to enable the empty legal relationship to be discontinued with a maximum fairness and a minimum of distress and humiliation.

The Bill does not provide for divorce by consent, but does provide that a marriage is to be presumed to have broken down where the parties have lived separate and apart for one year. The Bill provides further that no divorce except under special order of the court shall be secured for three years after marriage, and it further provides that a divorce shall not be granted until the court is satisfied that adequate provision has been made for the maintenance of the other spouse and for the custody and maintenance of any children of the marriage.

The proposal is in accordance with representations to the committee made by various parties and notably by the United Church of Canada. It is also in accordance with the proposal contained in the report of a group appointed by the Archbishop of Canterbury published on the 29th of July, 1966 and reviewed by the Law Commission of the U.K.

Court may refuse to grant decree.

5. The court may refuse to grant a decree of dissolution of the marriage

(*a*) where the court is not satisfied that adequate and just provision has been made having regard to the financial circumstances and conduct of the spouses,

(i) for the maintenance of the other spouse, and

(ii) for the custody and maintenance of any child or children of the marriage,

(*b*) where it appears to the court that for some other reason a decree may prove unduly harsh or oppressive to the respondent.

Adjournment of proceedings.

6. In any proceeding under this Act the court may adjourn the proceedings with a view to enabling the parties to seek to effect a reconciliation and for the purpose, if the parties request it, of consulting a qualified person or persons with experience or training in the field of marriage counselling.

Jurisdiction.

7. (1) The courts which shall have jurisdiction to grant decrees dissolving a marriage under this Act shall be the superior courts having civil jurisdiction, in the provinces of Nova Scotia, New Brunswick, Prince Edward Island, Ontario, Manitoba, Saskatchewan, Alberta and British Columbia, and shall have jurisdiction in case either of the spouses is domiciled within the said provinces.

Domicile.

(2) For the purpose of this Act the domicile of a married woman, wherever she was married, shall be determined as if she were unmarried, and if she is a minor, as if she were adult.

Jurisdiction of Senate, 1963, c. 10.

8. The Senate of Canada may dissolve a marriage for the grounds and upon the conditions set out herein, in accordance with the provisions of the *Dissolution and Annulment of Marriages Act.*

Nullity.

9. Nothing herein shall affect the jurisdiction of any court to grant a declaration of nullity of a marriage.

Repeal.

10. The Acts or parts of Acts set out in Schedule I hereto are repealed.

Coming into force.

11. This Act shall come into force on the first day of July, 1967.

SCHEDULE I.

1. *Marriage and Divorce Act*, R.S., 1952 c. 176 except ss. 2 and 3 thereof.

2. *Divorce Jurisdiction Act*, R.S., 1952, c. 84.

3. An Act further to amend the law respecting the Northwest Territories, 1886, c. 25.

4. An Act respecting the application of certain laws therein mentioned to the Province of Manitoba, 1888, c. 33.

5. *Divorce Act* (*Ontario*), R.S., 1952, c. 85.

6. *British Columbia Divorce Appeals Act*, R.S., 1952, c. 21.

Court may refuse to grant decree.

5. The court may refuse to grant a decree of dissolution of the marriage

(a) where adequate and just provision has not been made, having regard to the financial circumstances and conduct of the spouses,

(i) for a spouse,

(ii) for the custody and maintenance of any child of the marriage, or

(b) where it appears to the court that for some other reason a decree may prove unduly harsh or unjust.

Adjournment of proceedings.

6. In any proceeding under this Act the court may adjourn the proceedings with a view to enabling the parties to seek to effect a reconciliation and for the purpose, if the parties request it, of consulting a qualified person or persons with experience or training in the field of marriage counselling.

Jurisdiction.

7. (1) The courts which shall have jurisdiction to grant decrees dissolving a marriage under this Act shall be the superior courts having civil jurisdiction, in the provinces of Nova Scotia, New Brunswick, Prince Edward Island, Ontario, Manitoba, Saskatchewan, Alberta and British Columbia, and shall have jurisdiction in case either of the spouses is domiciled within the said provinces.

Domicile.

(2) For the purpose of this Act the domicile of a married woman, wherever she was married, shall be determined as if she were unmarried, and if she is a minor, as if she were adult.

Jurisdiction of Senate, 1963, c. 16.

8. The Senate of Canada may dissolve a marriage for the grounds and upon the conditions set out herein, in accordance with the provisions of the *Dissolution and Annulment of Marriages Act*.

Nullity.

9. Nothing herein shall affect the jurisdiction of any court to grant a declaration of nullity of a marriage.

Repeal.

10. The Acts or parts of Acts set out in Schedule I hereto are repealed.

Coming into force.

11. This Act shall come into force on the first day of July, 1967.

APPENDIX "79"

C-41.

First Session, Twenty-Seventh Parliament, 14 Elizabeth II, 1966.

THE HOUSE OF COMMONS OF CANADA.

BILL C-41.

An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

First reading, January 24, 1966.

Mr. PRITTIE

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1966

1st Session, 27th Parliament, 14 Elizabeth II, 1966.

THE HOUSE OF COMMONS OF CANADA.

BILL C-41.

An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Repeal: United Kingtom statute, 1867, s. 3, s. 91 (26).

1. The class enumerated as 26 in section 91 of the *British North America Acts, 1867 to 1965*, and extending to all matters coming within the subjects of marriage and divorce, is repealed.

Repeal and substitution: s. 95.

2. Section 95, and the heading thereto, of the said Acts are repealed and the following substituted therefor:

"*Agriculture, Marriage and Divorce and other Matrimonial Causes, and Immigration.*

Concurrent powers of legislation respecting agriculture, etc.

95. In each province the legislature may make laws in relation to agriculture in the province, to marriage and divorce and other matrimonial causes in the province, and to immigration into the province; and it is hereby declared that the Parliament of Canada may from time to time make laws in relation to agriculture in all or any of the provinces, to marriage or divorce or other matrimonial causes in all or any of the provinces, and to immigration into all or any of the provinces; and any law of the legislature of a province relative to agriculture, to marriage or divorce or other matrimonial causes, or to immigration shall have effect in and for the province as long and as far only as it is not repugnant to any Act of the Parliament of Canada."

Short title and citation.

3. This Act may be cited as the *British North America Act 1966*, and the *British North America Acts, 1867 to 1965*, and this Act may be cited together as the *British North America Acts, 1867 to 1966*.

Explanatory Note.

The Parliament of Canada has the exclusive power to legislate divorce reform: yet no government of Canada has brought the subject into the House for a free debate; no government has ever permitted a private member's public bill on the subject to come to a vote; no government has ever referred the subject to a select committee of parliament or to a royal commission for study and report. Politically, the attitude of Canadian governments is to ignore the existence of a grievance and to refuse to exercise the monopoly jurisdiction the federal authority possesses.

The purpose of this Bill, therefore, is to give to the provinces original concurrent jurisdiction with Canada in the same way as the provinces and Canada share jurisdiction with respect to agriculture and immigration. The federal government thus retains legislative power to protect the rights of minorities in any province or to supersede provincial legislation by multi-provincial legislation. On the other hand, this bill would enable a province to opt-out of a continuing federal legislative refusal to initiate divorce reform.

An appreciation of the distribution of substantive and procedural divorce powers under our constitution is found in the opinion of His Lordship Thane A. Campbell, Chief Justice of the Prince Edward Island Supreme Court, in *Reference re Constitutional Validity of an Act to amend an Act for Establishing a Court of Divorce in Prince Edward Island, (1952) 2 D.L.R. 513.*

26055—4

1st Session, 27th Parliament, 14 Elizabeth II, 1966.

THE HOUSE OF COMMONS OF CANADA.

BILL C-41.

An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Repeal: United Kingdom statute, 1867, s. 3; s. 91 (26).

1. The Parliament of Canada has the exclusive power to legislate divorce reform: yet no government of Canada has brought the subject into the House for a free debate: no government has ever permitted a private member's public bill on the subject to come to a vote: no government has ever referred the subject to a select committee of parliament or to a royal commission for study and report. Politically, the attitude of Canadian governments is to ignore the existence of a grievance and to refuse to exercise the monopoly jurisdiction the federal authority possesses.

Repeal and substitution: s. 95.

The purpose of this Bill, therefore, is to give to the provinces original concurrent jurisdiction with Canada in the same way as the provinces and Canada share jurisdiction with respect to agriculture and immigration. The federal government thus retains legislative power to protect the rights or minorities in any province or to supersede provincial legislation by multijurisdictional legislation. On the other hand, this bill would enable a province to override a continuing federal legislative refusal to initiate divorce or other matrimonial causes.

Concurrent powers of legislation respecting agriculture, etc.

2. This Act may be cited as the *British North America Act 1966*, and the *British North America Acts, 1867 to 1965*, and this Act may be cited together as the *British North America Acts, 1867 to 1966*.

Short title and citation.

APPENDIX "80"

C-55.

First Session, Twenty-Seventh Parliament, 14 Elizabeth II, 1966.

THE HOUSE OF COMMONS OF CANADA

BILL C-55.

An Act to provide in Canada for the Dissolution of Marriage.

First reading, January 24, 1966.

Mr. STANBURY.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1966

26055—4½

1st Session, 27th Parliament, 14 Elizabeth II, 1966.

THE HOUSE OF COMMONS OF CANADA.

BILL C-55.

An Act to provide in Canada for the Dissolution of Marriage.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Short title.

1. This Act may be cited as the *Divorce Act*.

Application.

2. The provisions of this Act as to the dissolution of marriage shall be in force in each province and territory of Canada.

Jurisdiction.

3. (1) In each province and territory in which there is a court having jurisdiction to grant a divorce *a vinculo matrimonii*, such court shall have jurisdiction for all purposes of this Act.

(2) In any other province or territory, the Parliament of Canada shall retain such jurisdiction.

Domicile.

4. (1) For the purposes of this Act, a party to a marriage who is domiciled in any province of Canada shall be deemed to be domiciled in every other province of Canada.

(2) For the purposes of this Act, where a husband has been domiciled in a province or provinces during a period of the marriage but is not so domiciled at the commencement of the hearing of a petition by a wife, the wife shall be deemed to be domiciled in a province if, as an unmarried woman, she would be so domiciled and, in such case, the domicile of the wife shall be the domicile of both parties to the marriage.

Interpretation.

5. In this Act,

"petition" includes a cross-petition, and

"petitioner" includes a cross-petitioner.

Explanatory Notes.

The purpose of this Bill is to provide for the dissolution of marriage on a just and common basis throughout Canada.

The law would be administered by existing provincial and territorial courts and by Parliament where no such courts exist.

Essentially, the grounds for divorce provided for in this Bill are adultery, cruelty and desertion, but include involuntary desertion by reason of incurable insanity and three years' separation without reasonable likelihood of reconciliation.

Grounds of dissolution.

6. A court having jurisdiction under this Act, or the Parliament of Canada, may upon petition by one of the parties to the marriage decree dissolution of the marriage upon one or more of the following grounds:

Adultery and sexual offenses.

(*a*) that, since the marriage, the other party to the marriage has committed adultery, rape, sodomy or bestiality;

Cruelty.

(*b*) that, since the marriage, the other party to the marriage has been guilty of cruelty to the petitioner;

Desertion.

(*c*) that, since the marriage, the other party to the marriage has deserted the petitioner for a continuous period of not less than two years immediately preceding the filing of the petition, and there is no reasonable likelihood of cohabitation being resumed;

Separation.

(*d*) that, since the marriage, the parties to the marriage have separated and thereafter have lived separate and apart for a continuous period of not less than three years immediately preceding the filing of the petition, and there is no reasonable likelihood of cohabitation being resumed;

Mental illness.

(*e*) that the other party to the marriage is, at the date of the filing of the petition and at the date of commencement of the hearing of the petition, of unsound mind and there is no reasonable likelihood of soundness of mind being regained.

Repeal, R.S., 1952, c. 84.

7. The *Divorce Jurisdiction Act* is repealed.

R.S., 1952, c. 176.

8. The long title of the Marriage and Divorce Act is repealed and the following substituted therefor:

"An Act respecting Marriage."

Sections repealed.

9. (1) Section 1 of the said Act is repealed and the following substituted therefor:

Short title.

"**1.** This Act may be cited as the *Marriage Act*."

(2) Sections four, five and six of the said Act are repealed.

Coming into force.

10. This Act shall come into force on a day to be fixed by proclamation of the Governor in Council.

APPENDIX "81"

C-19.

First Session, Twenty-Seventh Parliament, 14 Elizabeth II, 1966.

THE HOUSE OF COMMONS OF CANADA.

BILL C-19.

An Act to provide in Canada for the Dissolution and the Annulment of Marriage.

First reading, January 24, 1966.

Mr. PETERS.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1966

1st Session, 27th Parliament, 14 Elizabeth II, 1966.

THE HOUSE OF COMMONS OF CANADA.

BILL C-19.

An Act to provide in Canada for the Dissolution and the Annulment of Marriage.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Short title.

1. This Act may be cited as the *Canada Divorce Act*.

Application.

2. The provisions of this Act as to the dissolution of marriage and as to the annulment of marriage shall be in force in each of those provinces of Canada in which there is a court having jurisdiction to grant a divorce *a vinculo matrimonii*.

Courts having jurisdiction.

3. In each province to which this Act applies, the court, having jurisdiction to grant a divorce *a vinculo matrimonii* shall have jurisdiction for all purposes of this Act.

Domicile.

4. (1) For the purposes of this Act, a party to a marriage who is domiciled in any province of Canada shall be deemed to be domiciled in every other province of Canada.

(2) For the purposes of this Act, where a husband has been domiciled in a province or provinces during a period of the marriage but is not so domiciled at the commencement of the hearing of a petition by a wife, the wife shall be deemed to be domiciled in a province if, as an unmarried woman, she would be so domiciled and, in such case, the domicile of the wife shall be the domicile of both parties to the marriage.

Explanatory Notes.

The purpose of this Bill is to provide a law for the dissolution and annulment of marriage that is common to all persons domiciled in Canada; that is capable of administration by the courts with propriety and justice; and that is founded, in each case, upon a judicial judgment that a marriage relationship is repudiated or does not exist—but without providing means to use the law to escape the marriage relationship.

The Bill proposes to have the law administered by the existing provincial courts under their own rules of procedure. Present provincial laws respecting alimony, guardianship and maintenance of children would continue. The present provincial matrimonial laws would also continue. Parliament would retain its jurisdiction over divorce and nullity of marriage.

Clause 2: This clause applies the divorce and nullity provisions to all provinces having a divorce court. Quebec and Newfoundland do not have such courts.

Clause 3: These provincial courts apply the Act.

Clause 4: At present a court in a province may only hear a divorce action if the husband has his domicile in that province except in certain cases covered by the *Divorce Jurisdiction Act*. *Subclause* (1) gives a court jurisdiction to hear a divorce action if the parties are domiciled in any one of the ten provinces. Thus, for example, a wife in Quebec may petition in Ontario although her husband has changed his domicile to British Columbia. *Subclause* (2) provides for the case where the husband has acquired a domicile outside Canada since the marriage while the wife remains in Canada; under these circumstances, she may acquire a provincial domicile of her own and a court may hear her petition. This provision is wider than the present right given by the *Divorce Jurisdiction Act*.

Definitions. "Petition." "Petitioner." "Proceedings." "Respondent."

5. In this Act,
"petition" includes a cross-petition;
"petitioner" includes a cross-petitioner;
"proceedings" includes cross-proceedings; and
"respondent" includes a petitioner against whom there is a cross-petition.

Grounds for dissolution of marriage.

6. A court having jurisdiction under this Act may, upon petition by one of the parties to the marriage, decree dissolution of the marriage upon one or more of the following grounds:

(*a*) that, since the marriage, the other party to the marriage has committed adultery;

(*b*) that, since the marriage, the other party to the marriage has, without just cause or excuse, wilfully deserted the petitioner for a period of not less than two years;

(*c*) that the other party to the marriage has wilfully and persistently refused to consummate the marriage, if the court is satisfied that, as at the commencement of the hearing of the petition, the marriage had not been consummated;

(*d*) that, since the marriage, the other party to the marriage has, during a period of not less than one year, habitually been guilty of cruelty to the petitioner;

(*e*) that, since the marriage, the other party to the marriage has committed rape, sodomy, or bestiality;

(*f*) that, since the marriage, the other party to the marriage has, for a period of not less than two years

(i) been a habitual drunkard; or

(ii) habitually been intoxicated by reason of taking or using to excess any sedative, narcotic, or stimulating drug or preparation, or

has, for a part or parts of such a period, been a habitual drunkard and has, for the other part or parts of the period, habitually been so intoxicated;

(*g*) that, since the marriage, the petitioner's husband has, within a period not exceeding five years

(i) suffered frequent convictions for crime in respect of which he has been sentenced in the aggregate to imprisonment for not less than three years; and

Clause 6: This clause sets out the grounds for divorce. These grounds are qualified by *Clause 7* which provides that, except in certain cases, no divorce action can be brought sooner than three years after marriage. They are also qualified by *Clause 9* which provides for a reconciliation procedure. Essentially, the grounds hereby provided for divorce are adultery, desertion and cruelty; they are so defined as to prove the repudiation or non-existence of the marriage relationship. *Subclause* (*a*) provides for adultery; *subclauses* (*b*), (*c*), (*f*), (*g*), (*h*), (*j*), and (*k*) are desertion in one form or another; (*l*) is involuntary desertion; (*d*) and (*i*) are cruelty, either habitual or dangerous to the life of the other party; (*e*) is a variety of desertion that repudiates the marriage relationship through perversion or depravity; (*m*) is a general form of physical desertion that may be mutual or by one party but is limited to a minimum five year period; and (*n*) provides for desertion that is unexplainable except by presumption of the death of the missing partner.

(ii) habitually left his wife without reasonable means of support;

(*h*) that, since the marriage, the other party to the marriage has been in prison for a period of not less than three years after conviction for an offence punishable by death or imprisonment for life or for a period of five years or more, and is still in prison at the date of the petition;

(*i*) that, since the marriage and within a period of one year immediately preceding the date of the filing of the petition, the other party to the marriage has been convicted, on indictment, of

(i) having attempted to murder or unlawfully to kill the petitioner,

(ii) having committed an offense involving the intentional infliction of grievous bodily harm on the petitioner or the intent to inflict grievous bodily harm on the petitioner;

(*j*) that a party to the marriage has habitually and wilfully failed, throughout the period of two years immediately preceding the date of the filing of the petition, to pay maintenance to the other party

(i) ordered to be paid under an order of a court in a province, or

(ii) agreed to be paid under an agreement between the parties to the marriage providing for their separation,

if the court is satisfied that reasonable attempts have been made by the petitioner to enforce the order or agreement under which the maintenance was ordered or agreed to be paid;

(*k*) that the other party to the marriage has, for a period of not less than one year, failed to comply with a decree of restitution of conjugal rights made by a court in a province;

(*l*) that the other party to the marriage

(i) is, at the date of the filing of the petition, of unsound mind and unlikely to recover, and

(ii) since the marriage and within a period of six years immediately preceding the date of the petition, had been confined for a period of, or for periods aggregating, not less than five years in an institution where persons may be confined for unsoundness of mind in accordance with law, or in more than one such institution,

if the court is satisfied that, at the commencement of the hearing of the petition, the other party is still confined in such an institution and is unlikely to recover;

(*m*) that the parties to the marriage have separated and thereafter have lived separately and apart for a continuous period of not less than five years immediately preceding the date of the filing of the petition, and there is no reasonable likelihood of cohabitation being resumed, notwithstanding

(i) that the cohabitation was brought to an end by the action or conduct of one only of the parties, whether constituting desertion, or not, or

(ii) that there was in existence at any relevant time a decree of a court suspending the obligation of the parties to the marriage to cohabit or an agreement between those parties for separation;

(*n*) That the other party to the marriage has been absent from the petitioner for such time and in such circumstances as to provide reasonable grounds for presuming that he or she is dead.

When leave required.

7. (1) Subject to this section, proceedings for a decree of dissolution of marriage shall not be instituted within three years after the date of the marriage except by leave of the court.

(2) Nothing in this section shall be taken to require the leave of the court to the institution of proceedings for a decree of dissolution of marriage on one or more of the grounds specified in paragraphs (*a*), (*c*), and (*e*) of section six, and on no other ground, or to the institution of proceedings for a decree of dissolution of marriage by way of cross-proceedings.

(3) The court shall not grant leave under this section to institute proceedings except on the ground that to refuse to grant that leave would impose exceptional hardship on the applicant or that the case is one involving exceptional depravity on the part of the other party to the marriage.

(4) In determining an application for leave to institute proceedings under this section, the court shall have regard to the interests of any children of the marriage and to the question whether there is any reasonable probability of a reconciliation between the parties before the expiration of the period of three years after the date of the marriage.

Clause 7: This clause provides that, normally, a divorce action cannot be instituted within 3 years after marriage except for adultery, non-consummation, and depravity. Leave can be granted by the court in other cases but only under safeguards.

Grounds for annulment of marriage.

8. (1) A court may decree nullity of marriage upon the ground that the marriage is void or upon the ground that the marriage is voidable.

Void marriage.

(2) A marriage is void where

(*a*) either of the parties is, at the time of the marriage, lawfully married to some other person; or

(*b*) the parties are within the prohibited degrees of consanguinity or affinity; or

(*c*) the marriage is not a valid marriage under the law of the place where the marriage takes place, by reason of a failure to comply with the requirements of the law of that place with respect to the form of solemnization of marriages; or

(*d*) the consent of either of the parties is not a real consent because

(i) it was obtained by duress or fraud; or

(ii) that party is mistaken as to the identity of the other party, or as to the nature of the ceremony performed; or

(iii) that party is mentally incapable of understanding the nature of the marriage contract; or

(*e*) either of the parties is not of marriageable age under the law of the place where the marriage takes place.

Voidable marriage.

(3) a marriage, not being a marriage that is void, is voidable, where, at the time of the marriage

(*a*) either party to the marriage is incapable of consummating the marriage, if the court is satisfied that the incapacity to consummate the marriage also existed at the time when the hearing of the petition commenced and that

(i) the incapacity is not curable, or

(ii) the respondent refuses to submit to such medical examination as the court considers necessary for the purpose of determining whether the incapacity is curable, or

(iii) the respondent refuses to submit to proper treatment for the purpose of curing the incapacity,

except that a decree of nullity of marriage shall not be made on this ground where the court is of opinion that by reason of the petitioner's knowledge of the incapacity at the time of the marriage, or the conduct of the petitioner since the marriage, or the lapse of time, or for any other reason, it would, in the particular circumstances of the case, be harsh and oppressive to the respondent, or contrary to the public interest, to make a decree;

Clause 8: This clause sets out the grounds for annulment of marriage.

(*b*) either party to the marriage is
(i) of unsound mind;
(ii) a mental defective;
(iii) subject to recurrent attacks of insanity or epilepsy; or

(*c*) either party to the marriage is suffering from a venereal disease in a communicable form; or

(*d*) the wife is pregnant by a person other than the husband; except that a decree of nullity of marriage shall not be made by virtue of paragraph (*b*), (*c*), or (*d*) unless the court is satisfied that
(i) the petitioner was, at the time of the marriage, ignorant of the facts constituting the ground;
(ii) the petition was filed not later than twelve months after the date of the marriage; and
(iii) marital intercourse has not taken place with the consent of the petitioner since the petitioner discovered the existence of the facts constituting the ground.

Reconciliation.

9. (1) It is the duty of the court in which a matrimonial cause has been instituted to give consideration, from time to time, to the possibility of a reconciliation of the parties to the marriage (unless the proceedings are of such a nature that it would not be appropriate to do so), and if at any time it appears to the Judge constituting the court, either from the nature of the case, the evidence in the proceedings, or the attitude of those parties, or of either of them, or of counsel, that there is a reasonable possibility of such a reconciliation, the Judge may do all or any of the following:

(*a*) adjourn the proceedings to afford those parties an opportunity of becoming reconciled or to enable anything to be done in accordance with either of the next two succeeding paragraphs;

(*b*) with the consent of those parties, interview them in chambers, with or without counsel, as the Judge thinks proper, with a view to effecting a reconciliation;

(*c*) nominate
(i) an approved marriage guidance or other appropriate organization or a person with experience or training in marriage conciliation; or
(ii) in special circumstances, some other suitable person,
to endeavour, with the consent of those parties, to effect a reconciliation.

Clauses 9–12: These clauses provide a reconciliation procedure to be used by the court where possible.

(2) If, not less than fourteen days after an adjournment under subsection (1) has taken place, either of the parties to the marriage requests that the hearing be proceeded with, the Judge shall resume the hearing, or arrangements shall be made for the proceedings to be dealt with by another Judge, as the case requires, as soon as practicable.

Hearing when reconciliation fails.

10. Where a Judge has acted as conciliator under paragraph (*b*) of subsection (1) of section 9 but the attempt to effect a reconciliation has failed, the Judge shall not, except at the request of the parties to the proceedings, continue to hear the proceedings, or determine the proceedings, and, in the absence of such a request, arrangements shall be made for the proceedings to be dealt with by another Judge.

Statements not admissible evidence.

11. Evidence of anything said or of any admission made in the course of an endeavour to effect a reconciliation is not admissible in any court or in proceedings before a person authorized by law, or by consent of the parties, to hear, receive, or examine evidence.

12. A marriage conciliator shall, before entering upon the performance of his functions as such a conciliator, make and subscribe, before a person authorized to take oaths, an oath or affirmation of secrecy.

Repeal. R.S. 1952, cc. 84 and 176.

13. The *Divorce Jurisdiction Act* and sections four, five and six of the *Marriage and Divorce Act* are repealed.

Commencement.

14. This Act shall come into force on a day to be fixed by proclamation of the Governor in Council.

Clause 13: This clause repeals federal laws that are covered by this Bill.

Clause 14: This clause provides for the Act to become effective when proclaimed so as to permit a period during which the provincial courts may, where necessary, amend their matrimonial rules of procedure.

(2) If, not less than fourteen days after an adjournment under subsection (1) has taken place, either of the parties to the marriage requests that the hearing be proceeded with, the Judge shall resume the hearing, or arrangements shall be made for the proceedings to be dealt with by another Judge, as the case requires, as soon as practicable.

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Commencement.

14. This Act shall come into force on a day to be fixed by proclamation of the Governor in Council.

First Session—Twenty-seventh Parliament

1966-67

PROCEEDINGS OF

THE SPECIAL JOINT COMMITTEE OF THE SENATE

AND HOUSE OF COMMONS ON

DIVORCE

No. 28

THURSDAY, APRIL 28, 1966

Joint Chairmen:

The Honourable A. W. Roebuck

and

A. J. P. Cameron, Q.C., M.P.

WITNESS:

James Byrne, M.P., Sponsor of Bill C-16

APPENDICES:

No. 82—Bill C-16, An Act to provide for the Dissolution and Annulment of Marriage. (Additional Grounds for Divorce)

No. 83—Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act. (Additional Grounds for Divorce)

No. 84—Brief by the Government of the Province of Alberta.

No. 85—Statement by the Canadian Catholic Conference.

No. 86—Brief by Daryl E. MacLean, Barrister, Dalhousie, N.B.

No. 87—Brief by the Minus One Club, Red Deer, Alberta.

QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1966

First Session—Twenty-seventh Parliament

1966-67

PROCEEDINGS OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON

DIVORCE

No. 24

THURSDAY, APRIL 20, 1967

Joint Chairmen:

The Honourable A. W. Roebuck, Q.C.

and

A. J. P. Cameron, Q.C., M.P.

WITNESS:

James Byrne, M.P., Sponsor of Bills C-16 and C-79

APPENDICES:

No. 82—Bill C-16, An Act to provide in Canada for the Dissolution of Marriage. (Additional Grounds for Divorce.)
No. 83—Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act. (Additional Grounds for Divorce.)
No. 84—Brief by the Government of the Province of Manitoba.
No. 85—Statement by the Canadian Catholic Conference.
No. 86—Brief by Daryl E. McLean, Dalhousie University, Dalhousie, N.B.
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ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1967

26057—1

MEMBERS OF THE

SPECIAL JOINT COMMITTEE OF THE SENATE AND

HOUSE OF COMMONS ON DIVORCE

FOR THE SENATE

Hon. A. W. Roebuck, Q.C., Joint Chairman

The Honourable Senators

Aseltine	Connolly (*Halifax North*)	Flynn
Baird	Croll	Gershaw
Belisle	Denis	Haig
Burchill	Fergusson	Roebuck—(12)

FOR THE HOUSE OF COMMONS

A. J. P. Cameron, Q.C., (*High Park*), Joint Chairman

Members of the House of Commons

Aiken	Forest	McQuaid
Baldwin	Goyer	Otto
Brewin	Honey	Peters
Cameron (*High Park*)	Laflamme	Ryan
Cantin	Langlois (*Mégantic*)	Stanbury
Choquette	MacEwan	Trudeau
Chrétien	Mandziuk	Wahn
Fairweather	McCleave	Woolliams—(24)

(Quorum 7)

ORDERS OF REFERENCE

Extracts from the Votes and Proceedings of the House of Commons:

March 15, 1966:

"On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—that a Special Joint Committee of the Senate and the House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee."

"By unanimous consent, on motion of Mr. McIlraith, seconded by Mr. Hellyer, it was ordered—That the order of the House of Monday, February 21, 1966 referring the subject-matter of the following bills to the Standing Committee on Justice and Legal Affairs, namely:—

Bill C-16, An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce).

Bill C-19, an Act to provide in Canada for the Dissolution and the Annulment of Marriage.

Bill C-41, An Act to amend the British North America Acts, 1867 to 1965, (Provincial Marriage and Divorce Laws).

Bill C-44, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-55, An Act to provide in Canada for the Dissolution of Marriage.

Bill C-58, An Act respecting Marriage and Divorce.

Bill C-79, An Act to amend the Dissolution and Annulment of Marriages Act (Additional Grounds for Divorce).

be discharged, and that the subject-matter of the same bills be referred to the Joint Committee of the Senate and the House of Commons on Divorce".

March 16, 1966:

"By unanimous consent, on motion of Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Bill C-133, An Act to extend the grounds upon whch courts now have jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief, be referred to the Special Joint Committee on Divorce".

"By unanimous consent, on motion Mr. Stewart, seconded by Mr. Byrne, it was ordered—That the subject-matter of Notice of Motion No. 11 be referred to the Special Joint Committee on Divorce."

26057—1½

March 22, 1966:

"On motion of Mr. Pilon, seconded by Mr. McNulty, it was ordered—that a Message be sent to the Senate to acquaint Their Honours that this House will unite with them in the formation of a Joint Committee of both Houses to inquire into and report upon divorce in Canada, and that the Members to serve on the said Committee, on the part of this House, will be as follows: Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, oyer, Honey, Laflamme, Langlois (*Megantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams."

February 24, 1967:

By unanimous consent, it was ordered—That the subject-matter of Bill C-264, Divorce Act 1967, be referred to the Special Joint Committee on Divorce.

LÉON-J. RAYMOND,
Clerk of the House of Commons.

Extracts from the Minutes of the Proceedings of the Senate:

March 23, 1966:

"Pursuant to the Order of the Day, the Senate proceeded to the consideration of the Message from the House of Commons requesting the appointment of a Special Joint Committee of the Senate and the House of Commons on Divorce.

The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:

That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That twelve Members of the Senate, to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and to sit during sittings and adjournments of the Senate; and

That a message be sent to the House of Commons to inform that House accordingly.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

March 29, 1966.

"With leave of the Senate,

The Honourable Senator Beaubien (*Provencher*) moved, seconded by the Honourable Senator Inman:

That the following Senators be appointed to act on behalf of the Senate on the Special Joint Committee of the Senate and House of Commons to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, namely, the Honourable Senators Aseltine, Baird, Belisle,

Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig, and Roebuck; and

That a message be sent to the House of Commons to inform that House accordingly.

The question being put on the motion, it was—

Resolved in the affirmative."

May 10, 1966:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-19 intituled: "An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief".

The question being put on the motion—

In amendment, the Honourable Senator Connolly P.C., moved, seconded by the Honourable Senator Hugessen, that the Bill be not now read the second time, but that the subject-matter be referred to the Special Joint Committee on Divorce.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

J. F. MACNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

THURSDAY, April 20, 1967.

Pursuant to adjournment and notice, the Special Joint Committee of the Senate and House of Commons on Divorce met this day at 3:45 p.m.

Present: For the Senate: The Honourable Senators Roebuck (*Joint Chairman*), Baird and Burchill—3.

For the House of Commons: Messrs. Cameron (*High Park*) (*Joint Chairman*), Aiken, Fairweather, McCleave and Peters—5.

In attendance: Peter J. King, Ph. D., Special Assistant.

The following witness was heard.

James Byrne, M.P., Sponsor of Bills C-16 and C-79.

The following are printed as Appendices:

No. 82. Bill C-16, An Act to provide in Canada for the Dissolution of Marriage. (Additional Grounds for Divorce.)

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No. 84. Brief by the Government of the Province of Manitoba.

No. 85. Statement by the Canadian Catholic Conference.

No. 86. Brief by Daryl E. McLean, Dalhousie University, Dalhousie, N.B.

No. 87. Brief by the Minus One Club, Red Deer, Alberta.

At 4:30 p.m. the Committee adjourned to the call of the Joint Chairmen.

Attest

Patrick J. Savoie,
Clerk of the Committee.

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The following witness was heard.

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Patrick J. Savoie,
Clerk of the Committee.

THE SENATE

SPECIAL JOINT COMMITTEE OF THE SENATE AND THE HOUSE OF COMMONS ON DIVORCE

EVIDENCE

OTTAWA, Thursday, April 20, 1967

The Special Joint Committee of the Senate and the House of Commons on divorce met this day at 3.45 p.m.

The Honourable Senator ARTHUR ROEBUCK and A. J. P. CAMERON, M.P., (*High Park*), Co-Chairmen.

Co-Chairman Senator ROEBUCK: Honourable Senators and Members of the House of Commons, we have now a quorum and are ready to proceed with this the last meeting of the committee for the hearing of evidence.

We have had a great and, as I think you will all agree with me, a remarkable series of addresses and briefs on the subject to which we are committed. We have just one witness today, James Byrne, M.P., who introduced in the Commons two Bills the substance of which, along with others, was referred to this committee for its consideration. All the other authors of these bills have been heard, with the exception of Mr. Bryne, and if it is the will of the committee we will now hear from him.

Mr. Byrne, will you take the floor?

Mr. JAMES BYRNE M.P.: Mr. Chairman, Honourable Senators and Members of the House of Commons, I want to apologize at the outset for not having prepared a document to present to you, but the fact is that my experience with prepared documents has not been particularly encouraging. Furthermore, my Bill C-16 was referred to this committee rather early in the session at a time when I was preparing my address dealing with capital punishment, and that bill had priority. I was hopeful that this bill would be called, and for that reason of course I left it relatively simple, since one hour is the amount of time allotted for such bills.

I was under the impression that the feeling of the Members of the House of Commons, particularly since the ecumenical council at Rome had been held, was that there was a change in the thinking of adherents of the Catholic faith, of whom I am one, in relation to the question of divorce: not so much that Catholics were changing their attitude towards divorce but rather that they were endeavouring to appreciate the other point of view more fully than had been traditional.

My personal feeling has changed somewhat since I have been a Member of Parliament: one becomes somewhat like a father confessor to one's constituents and begins to hear much more about family relationships. The result has been that in the time I have been a Member the conviction has been taking shape in my mind that something should be done about broadening the grounds for divorce for those who believe in divorce; and indeed the one ground that was deemed the proper one under the existing legislation was probably the one that was least acceptable in the sense, as I see it, that there were other circumstances such as desertion, cruelty, incurable insanity, and so on, that should be considered even before adultery.

If anyone took time to read the evidence that used to come before the members of the House of Commons when the passing of private bills for the dissolution of marriage was the prerogative of Parliament, one could see that much of the evidence was open to the charge of having been fabricated. The fabrication of such evidence was damaging to the morale of one of the parties involved and that person's future happiness so that it seemed improper to continue such legislation.

It was my feeling that, at least at this time, if Catholics showed a disposition to accept a broadening of the grounds for divorce, such legislation might stand a better chance of passing the House during the one hour allotted to the consideration of a private member's bill. Hence the reason why I as a Catholic have undertaken to introduce this bill. That is about all I have to say.

Mr. McCLEAVE: May I ask Mr. Byrne one question, Mr. Chairman. I notice, Mr. Byrne, you do not provide for cruelty in the grounds set out in either of your bills, so that if this approach were adopted it would mean that Nova Scotia, since that province did not repeal its existing statute, would have an extra ground for divorce while the other provinces would have all the other grounds for divorce that you recommend. Have you any particular reason for believing, or have your researches led you to believe, that cruelty should not be a ground?

Mr. BYRNE: I discussed this matter with the Law Officers, at which time I said I had no wish to imply that my bill should provide for any type of frivolous grounds, and it seemed to me that cruelty was something regarding which it was rather difficult to obtain evidence.

I have read, as others have done, that in some instances a man and wife get along—by battering each other about without ever reaching the stage where they wished to separate. I was also anxious to leave it relatively simple and not get into too many details. However, since the question has been referred to, and the committee will undoubtedly be making recommendations, I assure you that I shall be prepared to accept much broader grounds if that is acceptable and has the assurance of passing the House. If that were likely, I would accept much wider grounds than these.

Mr. McCLEAVE: If people fight and enjoy fighting, it is not likely that they will seek divorce on the ground of cruelty. If, however, somebody has suffered physical injury and is black and blue, that person is apt to invoke the ground of cruelty.

Mr. BYRNE: Yes; I agree with you, and if the committee makes a recommendation that is much broader than this, there will be no problem as far as I am concerned: I shall be prepared to support it.

Senator BURCHILL: I have been wondering to what extent Mr. Byrne was influenced, in presenting his bill, by public opinion, particularly in his own constituency.

Mr. BYRNE: I have certainly been influenced by the opinions of my constituents, the representations that have been made to me. The question has been asked: When on earth are you people in the House of Commons going to do something about divorce. For many years I could only reply that it did not seem likely that any action would be taken. Now I believe it is possible. After your constituents have been making persistent representations to you, you become as it were a father confessor.

Mr. McCLEAVE: Or Ombudsman.

Mr. BYRNE: Perhaps that is a better term.

Co-Chairman Senator ROEBUCK: Are there any further questions?

Mr. PETERS: Does Mr. Byrne intend to discuss Bill C-79?

Mr. BYRNE: This seemed necessary because of the situation in Quebec.

Co-Chairman Senator ROEBUCK: You have been speaking of the general one, and Mr. Peters calls attention to the fact that you have introduced two bills and the one to which you have been referring is the one which provides, in Section 1, for the repeal of Section 3 of the Dissolution and Annulment of Marriages Act and the substitution of the proposed Section 3. The old Section 3 is the provision under which The Senate administers divorce for the province of Quebec and the province of Newfoundland. As I read your two bills, you have provided exactly similar amendments for each jurisdiction.

Mr. BYRNE: That is right.

Co-Chairman Senator ROEBUCK: One bill could be made applicable to both jurisdictions.

Mr. BYRNE: Yes.

Co-Chairman Senator ROEBUCK: If there are no more questions from the committee, I think we can thank Mr. Byrne for coming to us. Thank you, Mr. Byrne.

Mr. BYRNE: Mr. Chairman and gentlemen, I wish to thank you for affording me this opportunity of appearing before your Committee.

Co-Chairman Senator ROEBUCK: We have little more to do, but there is something important I wish to bring to your attention.

I should point out that very early in our history we extended an invitation to all the Churches to give us their views on the matters that were before the committee. We have heard from all the major Churches and we have been in touch with the Catholic Church, and very recently a very remarkable and, to me, highly acceptable document was passed by the Canadian Catholic Conference, which I understand is a body composed of 102 Bishops.

I would like to summarize it but I do not think I am capable of doing so. I suppose all members of the committee have read it and what the newspapers have said about it. Personally I feel grateful to the Canadian Catholic Conference for accepting our invitation to give us the benefit of their knowledge, their wisdom and their wishes, which they have done in a comprehensive way in this document.

I think I am safe in saying that their document will be of considerable assistance to us in arriving at decisions necessary to fulfil our duty. I am grateful to them for having given us this document.

Mr. MCCLEAVE: You have the power, Mr. Chairman, to direct that it be printed as part of our proceedings?

Co-Chairman Senator ROEBUCK: I was going to suggest that a motion be made to have the document printed because the one they sent to us, being a Statement of the Canadian Catholic Conference to the Special Joint Committee of the Senate and House of Commons on Divorce, reads into itself a further statement which is entitled: A Statement of the Canadian Catholic Conference to the House of Commons Standing Committee on Health and Welfare, so that both documents should be included in Mr. McCleave's motion if, as I gather, he intends to move it.

Mr. MCCLEAVE: Yes, that they form part of our record. I so move.

Motion agreed to.

Co-Chairman Senator ROEBUCK: There is only one thing more and that is to give you some assurance that the grass has not been growing under our feet during the long interval since we had our last meeting.

As you all know, very early in our history we had the advantage of the assistance of Dr. Peter J. King, Professor of History at Carleton University who has been our executive assistant throughout all these meetings. He and I have been collaborating in getting something on paper, so that we are very nearly ready, at this the concluding meeting, to call for conferences.

If I did not tell you this you would wonder where we were going. Somebody has to do that work. It is the work not of a great body but of one or two persons and that work, now, has been very nearly completed by my Co-Chairman and myself, with the assistance of Dr. King. Very shortly we will call the Steering Committee together for their first look at it and then the general body will have a meeting as soon as possible.

Having got on paper something of a comprehensive character, we are so far advanced that, unless there is controversy among ourselves, which I do not anticipate, I would be disappointed if we were not able to make a report to Parliament very early in the new session. This I regard as something upon which we can congratulate ourselves. It will be gratifying if we can carry out that programme. I would like to see our report in the hands of both Houses at least by the end of May, and perhaps earlier than that.

Mr. McCLEAVE: There is one point I would like to bring up. There is at Dalhousie University a young student who is greatly interested in reconciliation proceedings in different jurisdictions, including those under the British system and some under the American, and I asked her to be good enough to prepare a paper that could be presented as an appendix to our proceedings. I have received only a limited number of copies. I could not ask her to do more because it would have been too expensive for her. She cannot afford it. I have read her material and it is excellent. I do not know whether the committee would want everything of this nature printed but it is highly commendable and would fill only about 25 pages in our Proceedings. It gives first-rate summations in jurisdiction where they have done good practical work in the United States.

Co-Chairman Senator ROEBUCK: You are moving that it be included in our records.

Mr. McCLEAVE: Yes.

Mr. PETERS: I second the motion.

Senator BURCHILL: What is her standing?

Mr. McCLEAVE: She is in the third year of law and there is a family-law section in which she is specializing. There are about fifteen in that class. Mr. Brewin, another member of the committee and myself have been down there to speak to them and they were very much interested in the work of the committee.

Co-Chairman Senator ROEBUCK: Do you suggest that we multigraph the document and circulate it?

Mr. McCLEAVE: I suggest that it become part of our Minutes. Some appendices have been printed. Mr. Savoie can see that it is edited.

Co-Chairman Senator ROEBUCK: Subject to such editing as Mr. Savoie thinks necessary, the document shall be included in our records of today.

Mr. FAIRWEATHER: Mr. Chairman, referring to the Catholic Bishop's presentation, which I am sure was read with great appreciation, do you and your Co-Chairman feel that the Bishops should be thanked?

Co-Chairman Senator ROEBUCK: I would be pleased to receive instructions from the committee to extend its thanks to the Conference.

Mr. FAIRWEATHER: I so move.

Senator BURCHILL: I second the motion that the thanks of the committee be extended to the Canadian Catholic Conference for the informative and highly acceptable document they have placed in our hands.

Senator BAIRD: Why did they not present it themselves?

Co-Chairman Senator ROEBUCK: The full Conference could not be here and I do not suppose they appointed anyone to act in their behalf. They simply gave it to us with great courtesy and consideration. When the Secretary told me it was ready, or very nearly so, and on its presentation to us they were going to give it

to the Press, I said to them, "You would not give it to the Press, would you, before my Co-Chairman and I have at least had a chance to read it", they immediately appreciated our position and exercised great care to see that it was in Mr. Cameron's hands and mine before they gave it to the Press. And that was in complete accord with protocol.

Mr. McCLEAVE: There should be a note on the record that the Members and Senators express their appreciation of the hard work that you, Mr. Chairman, and your Co-Chairman, as well as Dr. King and Mr. Savoie have done in seeking out the widest possible rane of sound opinion in this very difficult field. The results of our efforts will form a fruitful source not only for coming legislation but for possible reform in the next ten or twenty years. We have compiled an outstanding amount of evidence. Perhaps we are not the most spectacular committee in the world, but our work will stand up for a long time.

Co-Chairman Senator ROEBUCK: On behalf of my Co-Chairman sitting beside me, and Mr. Savoie and Dr. King, I thank you for your kind expression, and that is a good note on which to adjourn.

We expected a report from the Attorney General of Manitoba but it has been delayed. However, Mr. Savoie tells us it is on the way and we may expect it. I would like to have a motion to the effect that if it does arrive it shall be made a part of the proceedings of this committee.

Mr. PETERS: I so move.

Motion agreed to.

Co-Chairman Senator ROEBUCK: To that, I may add that very early in our proceedings I communicated with the Attorney General of Ontario and asked him for the opinion of his Department, and his own, on two outstanding questions of law. One was the desirability of the Parliament of Canada exercising its ancillary right to deal with matters incidental to divorce at the time divorce is granted; and, secondly, I pointed out to him that the courts of all the provinces of Canada, with the exception of Ontario have the right to decree judicial separation, which is in effect divorce without the right to remarry. The province of Ontario has not got that right, according to the decision of Judges in Ontario.

In 1930 we passed the Ontario Jurisdiction Act in the Matter of Divorce. We granted the Courts the right to dissolve marriages but we did not include judicial separation, I think inadvertently, and I asked him for his opinion on that regard. He told me he had referred the matter to the Law Officers of his committee and would have a memorandum for us; but afterwards the Government of Ontario put in the Speech from the Throne that paragraph with regard to divorce, and following that, I believe, they appointed a committee to inquire into the whole subject of divorce.

I wrote a letter to the Attorney General, agreeing that it was quite within their rights to proceed as they had done, but I did ask a decision on two questions of law and I intimated I would be obliged to him if he would let me have the answers. I have not heard from him, and of course we must proceed under these circumstances without the advantage of his advice. At all events, should we receive a memorandum from him I would like to have authority to include it in the records of this meeting.

Mr. FAIRWEATHER: Include that in my previous motion.

Co-Chairman Senator ROEBUCK: Thank you. Is there anything else? Your Co-Chairman will call the Steering Committee together for preliminary review, and the general committee very shortly—how soon I cannot tell you.

The hearing was thereupon adjourned.

APPENDIX "82"

First Session, Twenty-Seventh Parliament, 14 Elizabeth II, 1966

THE HOUSE OF COMMONS OF CANADA

Bill C-16

An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce)

First reading, January 24, 1966.

Mr. BYRNE

1st Session, 27th Parliament, 14 Elizabeth II, 1966

THE HOUSE OF COMMONS OF CANADA

Bill C-16

An Act to provide in Canada for the Dissolution of Marriage (Additional Grounds for Divorce)

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Short Title

1. This Act may be cited as the *Canada Divorce Act.*

Application

2. The provisions of this Act as to the dissolution of marriage shall be in force in each of those provinces of Canada in which there is a court having jurisdiction to grant a divorce *a vinculo matrimonii.*

Courts Having Jurisdiction

3. In each province to which this Act applies, the court having jurisdiction to grant a divorce *a vinculo matrimonii* shall have jurisdiction for all purposes of this Act.

Grounds for Dissolution of Marriage

4. A court having jurisdiction under this Act may, upon petition by one of the parties to the marriage, decree dissolution of the marriage upon one or more of the following grounds:

(a) that, since the marriage, the other party to the marriage has committed adultery;

(b) that the other party to the marriage is at the date of the filing of the petition afflicted with an incurable mental illness;

(c) that the parties to the marriage have separated through desertion of one party or otherwise and thereafter have lived separately for a continuous period of not less than three (3) years immediately preceding the date of the filing of the petition;

(d) that, since the marriage, the other party has suffered frequent convictions for crime in respect of which he has been sentenced in the aggregate to imprisonment for not less than three years.

Repeal. R.S. 1952, c. 176

5. Sections four, five and six of the *Marriage and Divorce Act* are repealed.

Commencement

6. This Act shall come into force on a day to be fixed by proclamation of the Governor in Council.

EXPLANATORY NOTES

The purpose of this Bill is to provide for additional grounds for the dissolution of marriage.

The Bill proposes to have the law administered by the existing provincial courts under their own rules of procedure.

A corresponding measure is being introduced to deal with divorces granted by the Senate of Canada.

2. This clause applies the divorce provisions to all provinces having a divorce court. Quebec and Newfoundland do not have such courts.

3. The provincial courts apply the Act.

4. This clause sets out the grounds for divorce.

5. This clause repeals federal law covered by this Bill.

APPENDIX "83"

C-79

First Session, Twenty-Seventh Parliament, 14 Elizabeth II, 1966

THE HOUSE OF COMMONS OF CANADA

Bill C-79

An Act to amend the Dissolution and Annulment of Marriages Act
(Additional Grounds for Divorce)

First reading, January 24, 1966.

Mr. BYRNE.

1st Session, 27th Parliament, 14 Elizabeth II, 1966

THE HOUSE OF COMMONS OF CANADA

Bill C-79

An Act to amend the Dissolution and Annulment of Marriages Act
(Additional Grounds for Divorce)

1963, c. 10

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. Section 3 of the *Dissolution and Annulment of Marriages Act* is repealed and the following substituted therefor:

Officer's Recommendation

"3. The Senate shall adopt a resolution for the dissolution or annulment of a marriage only upon referring the petition therefor to an officer of the Senate, who shall hear evidence, and report thereon, but such officer shall not recommend that a marriage be dissolved or annulled except upon one or more of the following grounds:

(a) that, since the marriage, the other party to the marriage has committed adultery;

(b) that the other party to the marriage is at the date of filing of the petition afflicted with an incurable mental illness;

(c) that the parties to the marriage have separated through desertion of one party or otherwise and thereafter have lived separately for a continuous period of not less than three (3) years immediately preceding the date of the filing of the petition;

(d) that, since the marriage, the other party has suffered frequent convictions for crime in respect of which he has been sentenced in the aggregate to imprisonment for not less than three years."

Commencement

2. This Act shall come into force on a day to be fixed by proclamation of the Governor in Council.

EXPLANATORY NOTE

The purpose of this bill is to amend chapter 10 of the statutes of Canada for 1963 to provide additional grounds for the dissolution of marriage by the Senate.

A corresponding bill dealing with the law of divorce as administered by the existing provincial courts is being introduced as a separate measure.

APPENDIX "84"

BRIEF

To: THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

By: THE GOVERNMENT OF THE PROVINCE OF MANITOBA
LEGISLATIVE BUILDINGS
WINNIPEG 1, MANITOBA

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1. CONCLUSIONS

1. Society generally is in favour of divorce reform.

2. The question of religion is no longer the insurmountable barrier it once was to change in divorce law.

3. Domicile of the husband in the province in which relief is sought should no longer be the only basis for jurisdiction to grant a divorce decree.

4. Common-law relationships are encouraged by the present divorce law and the incidence of them would be decreased by reforming our laws of divorce.

5. The law is being brought into disrepute by the present law of divorce:
   (a) The present law encourages otherwise law abiding citizens to commit adultery, perjury and to enter into collusive agreements;

(b) Those who can afford private investigators and maintenance settlements are granted relief, whereas those who cannot afford them are often forced into a common-law relationship;

(c) Even when an offence is committed and both parties to the marriage are desirous of obtaining a divorce, it may be denied because of collusion subsequent to the offence.

6. There are instances in our present divorce law which encourage parties to seek relief from the courts rather than attempt a reconciliation.

7. The commission of the matrimonial offence of adultery no longer remains acceptable as the sole ground of divorce.

8. The law does not require that proper arrangements for the care of the children of the marriage are made prior to the granting of a decree of divorce to the parents.

2. RECOMMENDATIONS

9. For the court to have jurisdiction, the petition would be required to be filed either:

(a) In the province where the husband is domiciled, or

(b) In the province where the petitioner has been resident for one year immediately prior to the filing of the petition, provided the husband was domiciled in any province in Canada either at the time of the filing of the petition, or at the time of the last cohabitation with his wife.

10. To change the law of condonation, collusion and delay as bars to divorce, with a view to the maintaining of the marriage rather than encouraging divorce.

11. The law be reformed so that the matrimonial offence of adultery is no longer the sole ground for divorce and to consider, particularly in light of all the information and material available to the Joint Committee, the following three approaches to divorce:

(a) Widening the grounds for divorce to those set out in the resolution of the Manitoba Legislature (with grounds of cruelty and desertion not to be defined);

(b) Marriage breakdown being the sole ground for divorce;

(c) Conciliation courts.

12. The Court be required to satisfy itself that proper arrangements for the care of any children of the marriage be a necessary prerequisite for the granting of a decree of divorce to the parents.

13. A marriage should be voidable on grounds such as those contained in *The Matrimonial Causes Act*, 1950 (U.K.). (This recommendation is put forward on the assumption that the Joint Committee's terms of reference include consideration of annulment of marriage).

3. INTRODUCTION

14. On April 9, 1965, the Legislative Assembly of the Province of Manitoba passed a resolution recommending to the Government of Canada that the grounds for the dissolution of marriage be widened and that where a petitioner has for a period of seven years or upwards been continually absent from his or her spouse and has no reason to believe that his or her spouse has been living within that time be allowed to petition for a dissolution of the marriage.

15. The Government of Manitoba accordingly welcomes the establishment by the Parliament of Canada of the Special Joint Committee on Divorce and has followed its deliberations with interest.

16. The resolution of the Legislative Assembly is Appendix A to this Brief.

4. SOCIETY GENERALLY IN FAVOUR OF DIVORCE REFORM

17. There can be little question that throughout Canada the majority of Canadians are interested in seeing our divorce law reformed. Thus, the essential question is to determine the extent and areas in which reform is desirable.

18. Basically, our divorce law is that which existed in England over one hundred years ago, and while that law has and is still being radically changed in England as well as in other common law countries, no such change has taken place in Canada.

19. A perusal of the debate in Hansard on the resolution in the Legislative Assembly (Appendix B) shows that with very few exceptions those opposing the resolution were critical of some of the specific provisions of the resolution rather than the principle of divorce reform. A reading of the published proceedings of the Joint Committee indicates that this attitude was also present in the submissions made to the Committee.

5. RELIGION AS A BARRIER TO DIVORCE REFORM

20. In the past religion has been an almost insurmountable barrier to changes in divorce law in Canada. This position has been modified. Even those whose faith does not permit divorce nevertheless do not object to reform of our divorce law.

21. Excerpts from the Briefs submitted to the Joint Committee and from the debate on the resolution in the Legislative Assembly (Appendix B) appear to bear out this statement.

22. In the brief of the United Church reported at page 373 of Volume 8 of the proceedings of the Joint Committee, the following statement is made at page 376:

> "Since the Christian Church has, in the past, been influential in securing strict legislation regulating divorce, we believe that the Church, while upholding its view on monogamy before its own members and society, should offer to consider reasonable grounds for divorce not only for those of its own members whose marriages have broken down but also for those citizens in our secular, pluralistic society who do not accept the Christian point of view."

23. In the brief of the Canadian Jewish Congress reported at page 732 of Volume 14 of the Proceedings of the Joint Committee, the following statement is made at page 734:

> "We consider revision of these laws as necessary social legislation, and we support it because of our commitment to the preservation of democractic values which include (a) respect for the law, (b) belief that laws must not discriminate against those who are financially unable to obtain redress, and (c) belief that the laws must be instruments of social justice.
>
> "It is in this context that we view the laws governing the divorce procedures in most of the Canadian provinces, which recognize adultery as the sole ground of divorce, as being in conflict with each of these

values, completely inadequate and, in a sense, promoting immorality by making immorality itself or the assertion of it through trumped up evidence as necessary in divorce proceedings."

24. Mr. Russell Paulley (Leader of the New Democratic Party), (Radisson) speaking in the debate in the Legislative Assembly stated:

"Others during this debate Madam Speaker, have taken a stand because of the fact of their particular religious affiliation and I respect them for it. I want to say Madam Speaker, I too am a Catholic; although not a member of the Roman Catholic fraternity I am a Catholic, I am an Anglican and I am proud of it.

"But I want to place on the record Madam Speaker, the position of my church...

"I quote...Madam Speaker from page 11 of the Archbishop of Rupertsland's Third Charge to the Diocesan Synod in June of 1964 here in the City of Winnipeg and I quote from His Grace's text:

'Now we turn to another question, marriage and divorce. In a secular society we have no hope of imposing Christian teaching about divorce on the whole Canadian community, and indeed it is doubtful if we should ever try to impose it. To convince the Canadian people that our Lord's teaching is the only right teaching is one thing; to impose it is another. I believe that the divorce laws of Canada will have to be changed because they no longer reflect the Canadian conscience."

25. In the brief of the Canadian Catholic Conference submitted to the Joint Committee on or about April 6, 1967 and not yet reported, the following statement is made:

"Canada is a country of many religious beliefs. Since other citizens, desiring as do we the promotion of the common good, believe that it is less injurious to the individual and to society that divorce be permitted in certain circumstances, we would not object to some revision of Canadian divorce laws that is truly directed to advancing the common good of civil society.

"It is not for us to go into detail about grounds for divorce which would be acceptable or not; this, we believe, should be left to well-informed consciences of our legislators."

6. DOMICILE AS BASIS FOR DIVORCE JURISDICTION

26. Domicile is perhaps the most difficult hurdle a person seeking a divorce must overcome.

27. At present, a divorce action must be launched in the province of domicile of the husband, in order for the Court of that province to have jurisdiction to grant the decree.

28. Many judges have in the result relaxed the rigorous rules of proof of domicile in an effort to do effective justice between the parties. However, there is always the lingering concern when the proof is borderline, that at a later date, someone may attack the decree on the ground that the Court which granted it was without jurisdiction.

29. Further, since the husband may change his domicile at will, the wife can never be certain when she brings her action that the province in which she sues is in fact the domicile of her husband.

30. *The Divorce Jurisdiction Act* of 1930 allows a wife whose husband has deserted her and has been living separate and apart from her for at least two

years, to sue for divorce in the province in which her husband was domiciled immediately prior to such desertion. Because there must be desertion before the statute can operate, the statute has obvious limitations. There is no right to sue if the separation is due to the husband's cruelty, habitual drunkenness or failure to maintain his wife and children.

31. In cases where separation orders are granted against the guilty husband, the wife is given an order for maintenance against her husband. Often when such an order is made, the husband will leave the province in an effort to avoid having to pay the maintenance. Thus the wife can suffer a double hardship. She is not only deprived of the maintenance but in many cases of the right to have her marriage dissolved.

32. Many submissions to the Joint Committee have advocated that there should be one unrestricted common Canadian domicile. While in principle this would appear to be most expedient and beneficial, it could also cause considerable difficulty and hardship.

33. Firstly, it would be a departure from the existing law of domicile which governs not only divorce but wills, estates, and succession, being matters of property and civil rights and within provincial jurisdiction. Accordingly, confusion could result with two types of domicile.

34. Secondly, a common Canadian domicile could be used as an instrument of abuse and vindictiveness. A spouse resident in British Columbia could institute proceedings in Newfoundland, knowing that the action could not be defended without serious financial hardship or loss of employment to the other spouse.

35. In an effort to maintain the concept of a provincial domicile but alleviate the hardships that it can create, the Province of Manitoba recommends that a change be made in our divorce law to permit a petition to be filed not only in the province where the husband is domiciled, but also where the petitioner has been resident for one year immediately prior to the filing of the petition, provided the husband was domiciled in any province in Canada, either at the time of the filing of the petition or at the time of the last cohabitation with his wife.

36. Likewise, the enactment by the respective provincial governments of the draft statute of the Law of Domicile which was approved by the Conference of Commissioners on Uniformity of Legislation in Canada, at the proceedings of the Third Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada in 1961, would alleviate many of the problems caused by our current law of domicile as it relates to divorce.

7. INEQUITIES AND INADEQUACIES IN THE PRESENT LAW OF DIVORCE

37. While it is recognized that there are other grounds for divorce, viz, rape, sodomy, bestiality and bigamy, for all practical purposes the sole ground for divorce in Manitoba is adultery.

38. At present, a man can be consistently and brutally cruel to his wife, be an habitual drunkard, or fail to maintain his wife and children, and yet the wife cannot have the marriage contract dissolved. On the other hand, a person whose spouse commits an isolated act of adultery is entitled to such relief.

39. Such a law can no longer be considered proper or right and has and can only lead to abuse.

40. There can be no question that one of the reasons for the large number of common-law relationships in Canada is due, at least in part, to the fact that

divorce can be had only on the proof of the commission of adultery by the other spouse.

41. It becomes difficult for the ordinary citizen to respect the law where the parties to the marriage may be denied a divorce because they have entered into a collusive arrangement subsequent to commission of the matrimonial offence.

42. The present system of requiring evidence of adultery as an essential condition for a divorce is an incentive to perjury, collusion or to the commission of adultery.

43. In the briefs already submitted to the Joint Committee, there is ample evidence that our present law of divorce brings law, in general, into disrepute.

44. When a spouse seeks a divorce, her legal counsel must advise her that proof of adultery is a prerequisite. Often to obtain this evidence a private investigator must be employed. The spouse may have to be kept under surveillance for a continued period of time before the necessary evidence is obtained and the attendant expense can be prohibitive.

45. Further, when the parties to a marriage are well-to-do, they are better able to have the marriage dissolved, since there are ample funds available for maintenance settlements. Thus spouses in this financial state are willing to reveal existing evidence of adultery to the other spouse. On the other hand, husbands with less financial resources, may not be willing to disclose evidence, since the wife, upon establishing adultery, would likely succeed in a maintenance action against the husband. The amount the Court might award to the wife may not be an excessive amount for her necessary maintenance but, nevertheless, it could be an oppressive amount for the husband to pay.

46. There are instances in our present divorce law which encourage parties to a troubled marriage to seek relief from the Courts rather than attempt a reconciliation.

47. C.H.C. Edwards, now Dean of Faculty of Law of the University of Manitoba, in a very enlightening article in the *Manitoba Law School Journal*, Vol. I, No. 2, 1963, at page 177, deals with two of these, namely, the absolute bars of condonation and collusion. He points out that the new *English Matrimonial Causes Act 1963* puts an end to the difference which previously existed in England (and still exists in Canada) between the position of a husband and that of a wife. He states:

> "A simple act of intercourse by a husband (unless induced by a fraudulent misstatement of fact) with knowledge of his wife's adultery raised a conclusive presumption of condonation, whereas similar conduct by a wife did not amount to condonation unless there was actual forgiveness."

48. The Act provides that adultery shall not be deemed to have been condoned for the purpose of matrimonial proceedings by reason only of a continuation or resumption of cohabitation between the parties for one period not exceeding three months, or of anything done during such cohabitation, if it took place with a view to effecting a conciliation.

49. Thus, in England, the parties need no longer be deterred from a trial period of up to three months cohabitation (whether or not accompanied by sexual intercourse) by a fear that their genuine attempts at reconciliation will later prejudice their rights to matrimonial relief if these attempts do not succeed.

50. Under Section 3 of the Act, adultery which has been condoned is not capable of being revised.

51. On the question of collusion, Section 4 of the Act still requires the Court to inquire whether any collusion exists between the parties, but where collusion exists it is now a discretionary rather than an absolute bar. The parties are required to disclose to the Court any agreement or arrangement made between them.

52. Dean Edwards, at page 179 of the article, states:

> "The new English Act now not only enables the Court to exercise its discretion when collusion is found, but also enables an application to be made to the Court for its opinion as to the reasonableness of any contemplated arrangements made before the hearing, about such matters as financial provision for the wife and children, the custody of the children, the division of the matrimonial home and its contents, and, of course, costs in general. Thus legal practitioners who in the past have frequently avoided any such arrangements (practical and necessary though they may have been) for fear of the taint of collusion may now take the opportunity of seeking the court's blessing beforehand."

53. Concluding the article, also at page 179, Dean Edwards states:

> "Section 4, relating to collusion, may seem at first sight to be startling, but what possible harm can there be in making open and definite arrangements for the benefit of innocent parties (including the children) when a divorce is pending, and allowing the parties to do decently and properly what is at present so often done furtively and badly?"

54. In addition to the absolute bars of collusion and condonation, there is the discretionary bar of delay which tends to force the "innocent" spouse into Court to obtain a divorce rather than become involved in attempts at reconciliation. The "innocent" spouse has to be concerned whether the "offending" spouse will disappear, whether the witnesses will always be available, or whether the Court will deny relief on the ground that the application should have been made earlier.

55. The present law does not require that proper arrangements for the children of a marriage be made prior to the granting of a decree of divorce to the parents, and the Province of Manitoba supports the view of those who have taken the position before your Committee that such arrangements be a prerequisite to the granting of a divorce.

56. *The Matrimonial Proceedings (Children) Act*, 1958 (6 & 7 Eliz. 2, c. 40) particularly commends itself to the Province of Manitoba. A copy of this Act is to be found in Appendix 1 at page 25 of Vol. 1 of the proceedings of the Joint Committee.

8. REFORM OF THE BASIS ON WHICH DIVORCE IS TO BE GRANTED

57. The resolution of the Legislature Assembly (Appendix A) recommends that the grounds for dissolution of marriage be:

(a) Adultery.
(b) Desertion for three years.
(c) Cruelty.
(d) Incurable unsoundness of mind, where there has been continuous care and treatment for at least five years.
(e) Rape, sodomy or bestiality on the part of the husband.
(f) Judicial separation for at least three years.

(g) Presumption of death of the other spouse, where the other spouse has been continually absent for at least seven years and the petitioning spouse has no reason to believe that the other spouse has been living within that time.

58. With respect to desertion and cruelty, the Government of Manitoba would not recommend that these two grounds be defined by statute. It is submitted that the circumstances of each case would vary greatly and that it would be in the best interests of society to permit the Court with the abundance of common law available to it, to decide in a particular case whether the ground alleged had been established.

59. When the resolution was debated by the Legislative Assembly, the marriage breakdown theory as the sole ground for divorce had not been fully developed and had not received the thorough and thoughtful examination it now has.

60. The procedure of having the Court enquire into the condition of the marriage and its probable survival rather than determining the guilt or innocence of a person against whom the commission of any offence has been alleged would certainly appear to be more in keeping with the thinking of present day society.

61. It is the view of the Government of Manitoba that this theory has merit and warrants the Committee's thorough study and fullest consideration.

62. Since the Committee's recommendations will no doubt have a profound, long-term effect on what changes are made in our law of divorce and matrimonial causes, the Government of Manitoba would recommend that the Joint Committee also enquire into the functions and operations of the conciliation courts used in the State of California.

63. Not too much is known about these courts but to the extent of the information available, it would appear that they have been extremely successful in saving marriages and reuniting families.

9. JURISDICTION OF MANITOBA COURTS TO DEAL WITH DIVORCE AND MATRIMONIAL CAUSES

64. *The Divorce and Matrimonial Causes Act,* 1857, 20 & 21 Vcit. c. 85 (Imp.) enacted a substantive law of divorce and matrimonial causes which by virtue of an *Act Respecting the Application of Certain Laws therein Mentioned to the Province of Manitoba,* 51 Vict. c. 33 (Can.), S. 1, is in force in the Province of Manitoba, and the Court of Queen's Bench of the Province of Manitoba has jurisdiction to administer that law by virtue of *The Queen's Bench Act,* R.S.M. 1954, c. 52, S. 50. (See Appendix C).

65. Any doubts in this regard were resolved by the decision of the Privy Council in *Walker v. Walker* 1919 A.C. 947.

66. Since *The Matrimonial Causes Act,* 1857, included not only jurisdiction as to divorce but also judicial separation, restitution of conjugal rights, maintenance, alimony and an action for damages against the adulterer in a divorce action; these additional remedies are available in Manitoba.

67. The Court of Queen's Bench of the Province of Manitoba has exercised jurisdiction in these areas and its right to do so has not been successfully challenged.

68. Although there was earlier legislation relating to the maintenance of wives and children, in 1936 Manitoba enacted *The Wives' and Children's Maintenance Act* which has substantially the same provisions as the present statute (R.S.M. 1954, C. 294). (See Appendix D).

69. Under the present Act an aggrieved husband or wife may make application before a County Court judge or a police magistrate for a separation order.

70. Under this statute a wife may obtain an order if the husband has been convicted of an assault upon her, has deserted her without lawful excuse, has been guilty of persistent cruelty to her, is an habitual drunkard, or has neglected or refused without reasonable excuse to provide reasonable maintenance and support. The order for separation may provide that the wife be no longer bound to cohabit with her husband, for custody of children, support for the wife and children, and costs. The statute further declares the grounds upon which a husband may obtain an order against his wife.

71. The issue of whether *The Wives' and Children's Maintenance Act* encroaches upon the federal jurisdiction of "Marriage and Divorce," or is within the bounds of provincial competence as affecting only "Property and Civil Right," would appear to have been put beyond question by *The Adoption Act Reference* 1938 S.C.R. 419.

72. Speaking of *The Children of Unmarried Parents Act and The Deserted Wives' and Children's Maintenance Act,* both Ontario statutes, the latter being similar to *The Wives' and Children's Maintenance Act.* Duff, C.J. at page 419, stated:

> "...these statutes broadly speaking, aim at declaring and enforcing the obligation of husbands and parents to maintain their wives and children and these, self-evidently are peculiarly matters for provincial authority."

73. Other provinces have comparable legislation to *The Wives' and Children's Maintenance Act,* and beyond doubt the Act serves a vital role in matrimonial matters. Rather than become involved in the somewhat costly and cumbersome procedure of obtaining a judicial separation in the Court of Queen's Bench, the "Family Court," as it is called in Winnipeg, handles by far the bulk of domestic matters other than divorce.

74. The proceedings in the Family Court are initiated by the laying of an information, usually after consultation with a family counsellor, where the appropriate complaint is made. There are no pleadings and counsel need not formally enter the picture until the hearing.

75. The preservation of a court or tribunal which is easily accessible, inexpensive, and with family counsellors available, is of paramount interest to all. Perhaps our Family Court should be considered the formative stage of an expanded program for establishing an institution, body or court concerned primarily with promoting continued union and advising people whose marriage has broken down.

76. There is in Manitoba a dearth of judicial opinion delineating the precise constitutional authority of the Province and the Dominion to legislate on matters ancillary to divorce.

77. No doubt, the reason for this is due to the fact that the Court of Queen's Bench of the Province of Manitoba has jurisdiction to deal with all matters of divorce and matrimonial causes; Parliament and the Legislative Assembly having adopted for Manitoba the Law of England as of 1870 so far as the same would be applicable to matters within their respective jurisdictions. Accordingly, the question of whether in a specific case the jurisdiction of the Court

stems from the Dominion by the Act of 1888 or from the Province by the *Queen's Bench Act* has been largely academic.

78. One case in which the question was dealt with was *Mitchell v. Mitchell & Croome* 44 Man. R. 23. In this case the Court of Appeal of the Province of Manitoba held that a claim for damages against a co-respondent is a matter of "Property and Civil Rights in the Province" and not a matter of "Marriage and Divorce" within the jurisdiction of the Dominion.

79. In delivering the judgment of the Court, Richard J.A., at page 27, stated as follows:

> "The claim against the co-respondent, in the form it is before us, arises out of the action for divorce but is only incident thereto. In many divorce actions no claim is made for damages. The claim does not affect the marriage status, which is dealt with in divorce actions without regard to any claim there may be for damages. It seems clear therefore that the claim for damages against the co-respondent is a matter of property and civil rights in the province and within the jurisdiction of the provincial Legislature and not a matter of marriage and divorce within the jurisdiction of the Dominion. The Appeal Court of Alberta has so held in the case of *Elkowech v. Elkowech* [1921] 2 W.W.R. 345, 16 Alta. L.R. 19, which was followed by the Court of Appeal in Saskatchewan in *Rider v. Rider and Maynard* [1925] 1 W.W.R. 1051, 19 Sask. L.R. 384.
>
> "If the claim against a co-respondent were considered to be a part of and not as merely incident to a divorce action it would still be that, while the Dominion has exclusive jurisdiction over the substantive law of divorce which has been introduced into this province, the administration of justice relative thereto is within the competence of the province: *Bilsland v. Bilsland,* 31 Man. R. 422, [1922] 1 W.W.R. 718."

80. This decision was approved and adopted by the Court of Appeal of the Province of Ontario in *Mowder v. Roy* 1946, O.R. 154 at page 166.

81. However, the problem of whether any amendment to our federal law of divorce is *ultra vires* of the Parliament of Canada could be overcome by the province passing an Act similar to Section 10 of *The Matrimonial Causes Act* R.S.O. 1960, c. 232, providing that any provisions of the federal Act which "are or may be within the legislative competence of" the Legislative Assembly are enacted by the Province.

82. To date, the judicial view has been that the legislative power to deal with the substantive law of alimony (See *Rousseau v. Rousseau* (1920) 3 W.W.R. 384 (B.C.) and *Holmes v. Holmes* (1923) 1 D.L.R. 294, (1923) 1 W.W.R. 86, 16 Sask. L.R. 390) and maintenance. See *Langford v. Langford* (1936) 1 W.W.R. 175, 50 B.C.R. 303) belongs to the provinces.

83. In Manitoba, Section 51 of *The Queen's Bench Act* empowers the Court to grant alimony and while on numerous occasions the section has been dealt with by the Court, the Province's right to grant jurisdiction has not been challenged.

84. An exhaustive review of the law of alimony as it exists in Manitoba was given by Williams, C.J.Q.B. in *Jackowicz v. Bate* (1959) 66 Man. R. 174.

85. Until the word "divorce" as used in Section 91 (26) of the *B.N.A. Act* has been judicially defined, the question of whether judicial separation or restitution of conjugal rights is within exclusive provincial or federal authority or are susceptible of treatment either by the Province or the Dominion, is not likely to be answered.

86. The Honourable Mr. Justice Bora Laskin, in his *Canadian Constitutional Law* (3rd Edition 1966) at page 1028, asks, but does not answer, the question. He is content to refer the reader to *Power on Divorce* (2nd Edition 1964).

87. Power, at page 1, states:

> "The word 'divorce' in sec. 91 has not been judicially defined. Since, however, the *B.N.A. Act* of 1867 was passed by the imperial parliament after its enactment of the *Divorce and Matrimonial Causes Act* of 1857 in which 'divorce' means the dissolution of a marriage—divorce a *vinculo matrimonii*—it has been assumed, and the assumption "must now be considered beyond question, that the word has at least the same meaning in the *B.N.A. Act*. It seems, however, that the contention is at least an arguable one especially since divorce is associated in sec. 91 (26) with the word "marriage', that 'divorce' therein includes 'judicial separation,' formerly known as *'divorce a mensa et thoro'*. Although parliament is given exclusive authority over 'marriage and divorce,' except the 'solemnization of marriage in the province' no dominion legislation deals with judicial separation but should parliament contemplate the passing of a comprehensive Act in the exercise of its powers over 'marriage and divorce' it will, perhaps, consider whether it has jurisdiction to include provisions governing that subject and the advisability of doing so."

88. It would seem that an argument could be made that since by *The Divorce and Matrimonial Causes Act*, 1857, the term *"divorce a mensa et thoro"* was replaced by the term "judicial separation," that Parliament intended the term "divorce" to be restricted to "dissolution of marriage" and that the words "Marriage and Divorce" in Section 91 (26) of the *B.N.A. Act* are to be read "Marriage and Dissolution of Marriage."

89. This latter view would appear to be supported by Martin, J. A. in *Rousseau v. Rousseau* (supra) where, at pages 386 and 387, he indicates that before the province could be said to be encroaching on the federal field, the provincial legislation would have to affect the validity of the marriage contract. Surely, two persons who are living separate and apart under a decree of judicial separation are in law nonetheless married.

90. Another distinction is that while jurisdiction for dissolution of marriage is based on domicile, jurisdiction for judicial separation is based on residence—(See *Jacobs v. Jacobs and Ceen* (1950) p. 146).

10. ANNULMENT OF MARRIAGE

91. On the assumption that the Committee's term of reference includes consideration of annulment of marriage, the Government of Manitoba would recommend that in addition to any other grounds on which a marriage is presently by law void or voidable, a marriage should be voidable on the grounds:

(a) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage; or

(b) that either party to the marriage was at the time of the marriage of unsound mind or suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) that the respondent was at the time of the marriage suffering from venereal disease in a communicable form; or

(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

92. It would be a condition of granting relief under (b), (c), and (d) that the Court be satisfied:

(i) that the petitioner was at the time of the marriage ignorant of the fact alleged;

(ii) that proceedings were instituted within a year from the date of the marriage; and

(iii) that marital intercourse with the consent of the petitioner had not taken place since the discovery by the petitioner of the existence of the grounds for a decree.

93. The foregoing grounds are largely those contained in *The Matrimonial Causes Act*, 1950 (U.K.).

All of which is respectfully submitted.

APPENDIX A

CERTIFIED COPY of a Resoution agreed to in the Legislature of Manitoba on Friday, April 9th, 1965, on motion of Mr. Gray as amended by Messrs. Hillhouse and Johnston.

* * *

RESOLVED that this Legislative Assembly recommends to the Government of Canada:

(a) that dissolution of marriage may be claimed by either husband or wife on the grounds that the respondent:

(i) has since the celebration of the marriage committed adultery; or

(ii) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or

(iii) has since the celebration of the marriage treated the petitioner with cruelty; or

(iv) is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition; or

(v) has, there the wife is the petitioner, been guilty since the celebration of the marriage, of rape, sodomy, or bestiality; or

(vi) has been legally separated from the petitioner for at least three years by virtue of a judgment of a court of superior jurisdiction on grounds on which an order of separation can be made under The Matrimonial Causes Act, 1857 (Imp); and amendments thereto; and

(b) that any married person who alleges that reasonable grounds exist for supposing that his or her spouse is dead, may present a petition to the Court to have it presumed that the said spouse is dead and to have the marriage dissolved; and that for such proceedings, the fact that for a period of seven years or upwards the other party to the marriage has been continuously absent from the petitioner, and the petitioner has no reason to believe that the other party has been living within that time, shall be admissible in evidence as prima facie proof that the other party is dead.

* * *

Certified to be a true copy:
Charland Prud'homme,
Clerk of the Legislative
Assembly of Manitoba.

APPENDIX B

EXCERPTS FROM DEBATES AND PROCEEDINGS OF LEGISLATIVE ASSEMBLY OF MANITOBA

Vol. XI, No. 14; 2:30 p.m., Friday, March 5th, 1965.
4th Session, 27th Legislature, at Page 297.

Madam Speaker: The proposed resolution standing in the name of the Honourable the Member for Inkster.

Mr. Gray: Madam Speaker, I beg leave to move, seconded by the Honourable Member from Seven Oaks: Resolved that this Legislative Assembly recommends to the Government of Canada that it take steps to introduce amendments to the laws governing dissolution of marriage by divorce, to provide the following as reasons for dissolution of a contract of marriage, any one of which may be applicable: (1) Adultery; (2) Desertion for more than two years; (3) Persistent physical or mental cruelty; (4) Insanity, continuous or recurrent; (5) Imprisonment for two or more years; (6) Legal separation for more than two years.

Madam Speaker presented the motion.

Mr. Gray: Madam Speaker, the resolution speaks for itself. It was debated in this House for many times, and I felt the justification of this change is so strong that it should be introduced again. I shall be very brief in my remarks, except reading to you some supports of men in this world who have made a study of it. The Library, this library and others, have much material in support of it which I am not going to read, but I have just taken out some of the most important items.

In 1886, the Parliament of Canada enacted a law stating that, and I quote: "To remove all doubts, all laws of the United Kingdom after July 15, 1870 are to be regarded as being in force in the Northwest Territories unless Parliament repeal or alter them." These Territories are later Manitoba—The United Kingdom's divorce law, with adultery the only admissible cause for divorce. This act has not been revised and it means, Madam Speaker, the people of Manitoba are subject to divorce laws which are 107 years old.

In that 107 years attitudes towards divorce have changed so radically that I can say without fear of contradiction that all religious institutions, with probably the single significant exception of the Roman Catholic Church and its communicants, will accept liberalized divorce laws. Indeed, even the Roman church is currently reviewing its stand on divorce as we have noticed in the press during the last few years. Does the state have the right to legislate for morality? Does the state have the right to impose the standards of conduct, for example, of every citizen regardless of his or her faith of lack of faith? I believe the answer of these questions to be known, and I believe that all the honourable members, upon reflection, will agree with me.

To return to the existing situation, what have our rigid divorce laws accomplished? Undoubtedly they have prevented a large number of divorces. They have also, however, done much to increase the cruel practice of desertion, the incidence of couples living apart, separated without the opportunity to attempt to build a proper home for their children with another mate. They have sustained and extended the practice of common law marriages, in which children who may be the product of such alliances have no right to their father's name. Moreover, it has not been demonstrated that unhappy marriages, which by virtue of the divorce laws have been forced to continue, provide a better home environment for the children than do homes created by remarriage. What sort of companionship and understanding exists in a home where the husband hates the wife; or where the wife is incurably insane, living in our mental institutions; or

where the man is an habitual criminal of low character. There are shared experiences in such homes to be sure, but few of them can be pleasant. Few of them can have a healthy influence on children.

Our present divorce laws have also forced many of our citizens into acts of collusion and perjury in order to gain relief from a marriage which has become intolerable for both parties. No one will ever convince me that a man or a woman bent on meeting his mistress or her lover secretly will leave the doors unlocked so that detectives are able to barge in and take pictures.

A divorce law authority, Mr. Power, has written—and I have his book right here—"Undoubtedly there are matrimonial offenses such as actual cruelty and desertion which are often more serious insofar as they render life intolerable than an isolated act of adultery is, and it offends the idea of justice that a young man and woman whose fate is to be married to a partner who has become incurably insane should be unable under the law to obtain release from that tragic reality."

We will not allow people to obtain release from this sort of tragic reality unless they first prostitute themselves, make a vulgar display of themselves in front of paid strangers. The whole process disgusts everyone with a concern for the dignity of man. In allowing divorce on the grounds of adultery, we have made divorce in some circumstances, a regrettable necessity. Let us now ensure that we establish an idealistic set of circumstances in which divorce is possible. I'm definitely certain, on reading most of the material I have in front of me, that people could live happier if they had other opportunities or other reasons to start a new life.

Mr. T. P. Hillhouse, Q.C. (*Selkirk*): Madam Speaker, in rising to support this resolution I do so in respect of the principle embodied therein, but unfortunately I cannot support the specific grounds which the Honourable Member for Inkster has included as grounds for divorce. I feel therefore that this resolution should be amended, and the amendment which I intend to move will be in conformity with the grounds for divorce that prevail in the United Kingdom.

In supporting this resolution, Madam, I do so with a full knowledge that it is not going to solve or in any way assist our grave social problem of marriage break-ups. In my opinion, that is about the gravest social problem with which we are confronted today. But I do feel, Madam, that where a marriage has broken up, where it is beyond repair, that it is foolish to allow that marriage to persist. I think that these people who have tried to make a go of marriage, who have failed, should be given an opportunity and a chance to start afresh. Divorce, Madam, is not what ends a marriage, it is simply the legal recognition that a marriage has failed and humanly speaking is beyond repair.

It is true that in Canada today adultery is the only ground for divorce, but speaking as a lawyer, the adultery alleged in a divorce petition, although constituting the legal grounds for granting the divorce, is in my opinion in very few cases the actual cause of the people going to court and seeking a divorce. In my opinion, that marriage was broken up before these people came into court. It is my opinion, Madam, that there are as many causes of marriage failure in this province as there are human frailities, and I think the time has come for us to recognize these other causes of marriage failure and include them in grounds for divorce.

We, in Canada today, in spite of the fact that we recognize that marriages are in most instances broken up before people come to court, we still persist in making a petitioner in a divorce action to allege and prove adultery. Now to me, I think that's absolutely absurd, because all we are doing is forcing these people in some instances to commit an act which is abhorrent to them or in other instances, to set up a set of circumstances from which a court could legally presume that adultery had taken place.

I think the day has come when we must face up to this problem squarely and we must do something to bring it more in line with modern thinking. I think that we must today, Madam, recognize some of the other causes which result in a marriage break-up, and I think too that we should recommend to the Government of Canada that the grounds for divorce in those provinces wishing to enact complementary legislation to that enacted by the Dominion of Canada should be brought into line with the grounds for divorce prevailing in the United Kingdom.

For those reasons therefore, Madam I support this resolution in principle, but I feel that it should be amended to bring the grounds for divorce in line with those prevailing in the United Kingdom. I therefore wish to move, seconded by the Honourable Member for St. George, that the resolution be amended by deleting all words and figures after the word "Canada" as it appears in the second line thereof and substituting therefor the following: The dissolution of marriage may be claimed by either husband or wife on the grounds that the respondent: (1) Has since the celebration of the marriage committed adultery; or (2) Has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or (3) Has since the celebration of the marriage treated the petitioner with cruelty; or (4) Is incurably of unsound mind and has been continously under care and treatment for a period of at least five years immediately preceding the presentation of the petition; (5) That dissolution of marriage be granted on the petition of a wife on the grounds that her husband has since the celebration thereof been guilty of rape, sodomy or bestiality; and (6) That any married person who alleges that reasonable grounds exist for supposing that the spouse is dead may present a petition to the court to have it presumed that the said spouse is dead and to have the marriage dissolved, for such proceedings the fact that for a period of seven years or upwards the other party to the marriage has been continuously absent from the petitioner and the petitioner has no reason to believe that the other party has been living within that time shall be evidence that he or she is dead until the contrary is proved.

Madam Speaker presented the motion.

Mr. R. O. Lissaman (*Brandon*): Madam Speaker, I would like to move, seconded by the Honourable Member for Morris, that the debate be adjourned.

Madam Speaker presented the motion and after a voice vote declared the motion carried.

The adjourned debate on the proposed motion of the Honourable the Member for Inkster.

Vol. XI No. 23 2:30 p.m. Friday, March 12th, 1965,
4th Session, 27th Legislature, at Page 551.

Madam Speaker: Agreed? The adjourned debate on the proposed resolution of the Honourable the Member for Inkster and the proposed amendment thereto by the Honourable the Member for Selkirk. The Honourable the Member for Brandon.

Mr. R. O. Lissaman (*Brandon*): Madam Speaker, I would like to at the outset of this discussion inform the members that I am expressing my own personal views in this matter, and I'm in no way speaking for the Party. The divorce situation in this country is—as mature people look at it today, is a situation, a condition, which does require the thinking and examining of sensible people. Personally, my own inclination would be, from purely personal experience, to say, well let's leave matters well enough alone. Lately I suppose I doubt very much if my wife could trade me off even if she had the opportunity, and I

can assure the members that I am quite content with my mate in life. However, it is rather unfortunate, but it is a fact that legislation must reflect the will of the people, and I have thought for the past several years, with the creeping—certainly continually—reducing of the standards, lowering the standards of moral behaviour in this country, that this is but one of the many undesirable behaviours of society that we are reaping.

Now, certainly I am at least one generation removed from young people contemplating marriage at this time, but when you compare the atmosphere and environment of two generations, there is not much in common when it comes to the actual formation of moral standards and so on, and right here I would like to say that I have the greatest respect for young people, probably far greater than one of their compatriots, a person of their own age, because I think they face an almost intolerable situation as compared to boys and girls in my youth. I think many of the members here will agree that we—our first reading started off with Horatio Alger, this brave young lad from the country who came to town and worked hard. It helped a bit, of course, to marry the boss's daughter, but he married successfully and ended up living happy ever after; and there was some value to this. I have heard psychologists run down the value of Horatio Alger as reading matter for young people, but it certainly did give inspiration and an uplift. And then, as we of my generation attended movies and plays, the movies and plays were generally of an uplift nature. You came away from them—certainly there was the odd tragedy—but you came away from the entertainment in that day with an uplift, with some inspiration, and a general tendency to feel that the world was all right. Now compared to this, present-day entertainment seems to be a terrible ordeal to go through. It seems that every writer must present you with a psychiatric problem or something. Or if this is not his particular meter, why then he takes you through all the by-ways and alleys of really the gutter-type of living, and it seems that a person, if they want to be assured of having a best seller, why they just need to introduce all the smut that they can.

Now certainly I believe, and I believe other members must feel this way, that a generation of youth today, feeding on this sort of material, formulating their opinions and basing their concepts of how to live on this sort of thinking—true, there are those who will see beyond it, see that these are studies presented to you, and it's wise not to choose this way of life as presented in much of this reading material and entertainment, but there will be many who do not look beyond it, and so I think we can look for a continued reduction of moral standards unless the common sense goodwill of man takes over, and in this manner I would suggest. I myself would be reluctant to agree to any rigid censorship but I do believe that in the type of stuff that is available now on the newstands and in the entertainment world, that there should be at least the restraint of common decency. Material and situations should not be presented which go beyond the bounds of reasonable decency, and I can assure you that much of the literature that is available does exceed these bonds.

Now, coming back to the divorce situation, you might say, "Well what has this all to do with it?" but I think it does have a great deal, because as the old saying: "As the twig is bent, so inclines the tree," and I think there is a real danger in our present trend of society to the family and the marriage state, but at the same time I think all sensibly mature people, and particularly those who enjoy a happy and satisfactory marriage relationship, have a particular sympathy towards those who have not been so fortunate.

As you are aware, Madam Speaker, many of the citizenry at large do not differentiate between federal and provincial matters. They do not realize the jurisdiction of either government, and I have had several people come to me at different times asking me to help them in some matters of obtaining a divorce, a divorce situation, and I have assured them that there was very little that a

provincial member could do, but since people like to unburden themselves I have heard some really disturbing situations described to me and I think all of us would agree that probably nothing could be worse than to be doomed to be living with an individual with whom you had nothing in common, and even beyond this, one possibly irritating the other, so I must come to the conclusion that reasonable and sensible people must agree that there must be more easily available outlets so that these people can be freed of such a situation and be given a new chance.

Now I think that we should certainly look at any degree of relaxation in the divorce laws very seriously, because often even to those seeking divorce, divorce may not necessarily be the answer. If we make it too easily available there will not be the effort to compromise and get along with each other and both parties, once freed, do take along with them some stigma of failure. This applies, of course, in more disastrous ways upon the children, if there are children of such a marriage, and every effort should be made to keep a couple together wherever it is possible, but since this House will not be determining what the laws will be, and in effect even the amendment, supposing the amendment passes by the Member for Selkirk, sent to Ottawa, I am sure this will not be interpreted literally but merely as a request to re-examine and liberalize our divorce laws. And because of this, Madam Speaker, and because of my feelings I have expressed, I find that I will be voting in favour of the motion as amended.

Mr. Schreyer: Madam Speaker, I would like to take a few minutes to speak to this resolution, I believe it's the kind of resolution, the subject matter of which lends itself to extended discussion and debate, and it's not my intention to speak for more than just a few minutes.

The members who have spoken previously have seemed to be of a concensus that divorce laws in this country should be changed, moderated, eased, or liberalized if you like, and I think that in the slow course of events, legislation having to do with social matters, that it is time now to make or to ask for this change. The Member for Brandon, as I understood him, decried or seemed to discern a trend toward lower standards of social conduct and I must agree with him. In my opinion, I seem to detect or discern this also. I don't know if this is common with each passing generation to think that their generation is going to ruination and damnation, but I feel very strongly, after trying to keep up with changing events around me, that there is some trend toward a lowering of standard social conduct, sort of a trend toward licentiousness if you like, etc. etc., but yet at the same time I don't think that this resolution asking for a moderation in the divorce legislation would lend itself, or has anything directly to do with this trend. I think that it is really beastly for the State to prevent by law, prevent people who cannot abide each other, cannot tolerate each other very much in any case, to prevent them from taking their separate ways and trying to find a better life and rearrange it so that they may live more happily.

Now of course a very basic argument is that liberalized divorce will make for a situation of increased divorce and that many innocent children will suffer. There may be something to that, but on the other hand I would submit that children who live in a home where the parents are forever quarrelling or who have no feeling of respect for each other in any case, that the children living in such a home are suffering as much, or at least almost as much as if the parents were separated and remarried and living more happily.

I have here a memorandum that was submitted to the Federal Minister of Justice relative to the question, the problem of divorce, and it is a submission by a group of farm women, and I consider—that is not to say anything about city women—but I consider farm women, the kind of women who are busy in farm organizations, etc., do have the highest sense of social conduct, social standards, moral standards, etc., and they are asking for a change, a liberalization of our

divorce laws. They are asking for it along the lines proposed by the Honourable Member for Inkster and, not exclusive also, the Honourable Member for Selkirk whose amendment by the way recommends itself very highly to this group.

I think, Madam Speaker, that people, legislators, can go along for years, decades, opposing a certain change in the law, in the case of divorce law for example, and then change in society around them catches up and it becomes manifestly clear to them that it is indeed time to change the law, and I would hope that honourable members here will see fit to pass this resolution which would have the effect of making a formal request to the Federal Government to make or to initiate the necessary changes.

And with that, Madam Speaker, I think I have made my contribution to this particular debate. I certainly intend to vote for the resolution even though I am, like the Member for St. Boniface, a member of the Roman Catholic faith. It's not so surprising that Roman Catholics should vote for a resolution such as this inasmuch as, even though we may find divorce something which we would not ourselves as members of that particular faith wish to avail ourselves of, nevertheless, because we do not choose to does not mean that we must cast our vote in the negative in order to deprive other people who think otherwise of a chance to make something of their life when it has come to a sad state because of incompatibility.

Mr. Johnson: Madam Speaker, I won't be long on this matter, but I would like to speak to this amendment which I endorse. That is the Honourable Member for Selkirk's amendment of the matter before us. You know, we hear—ever since I came to understand the nature of things, I have come to feel more and more and I hear it almost monthly in the course of activities in our province, why are our divorce laws so archaic? I don't think we are, contrary to what we hear from time to time, that we are a generation of people going to ruination, where social conduct, certainly our exposures are much greater; but I think we tend sometimes too to go in cycles. I have had occasion recently to read some of the sagas that go back a thousand years and in those days, the old vikings used to meet once a year at the Althing and you came to the Althing and if you thought your partner had been unfaithful, you named her and if proven guilty, or named by a second party, she lost her head.

We've advanced a little bit since those days, but in those days of course, they had this most expeditious method of separating partner and spouse. Recently I have had brought to my attention a very sad case of this nature where desertion—a woman had been deserted for a five year period and for three or four years had been trying to get a divorce, chased the other partner out to another province, and through her father and her fiance, or present fiance she has been trying to initiate divorce proceedings. After five years and $1200 in trying to find him, trying to find all the kind of evidence they need these days, investigators, lawyers and other jurisdictions, she is becoming somewhat impoverished and at that point came to myself. However, this is I think, not uncommon because when in my small orbit I hear of these actual cases one sees the futility of some of our existing laws. I am most heartened especially by the attitude taken by progressive people like the Member from St. Boniface, and the Member from Brokenhead in this regard. I think regardless of our certain matters of conscience and so on, that in the public interest, in our modern society and in our modern way of thought, some real good can come from the kind of resolution by the Honourable Member from Selkirk.

I think however, that it would concern me, I'm sure that in bringing a resolution like this to the Federal Government's attention, I'm sure that the matter of psychiatric opinion should be one of a panel where you don't want one or an isolated psychiatric opinion standing up. I'm sure the courts would, or some regulations governing the laws could cover that kind of event because much like

having a pony these days a lot of women have their own psychiatrist and we don't want to overdo or get some rather quick judgments in this regard, in certain areas. I do think though that the desertion and the mental cruelty and the bestiality, and these sections as outlined here, are very good, and I just wanted to rise on this debate to support this amendment of the Honourable Member from Selkirk and hope that it is forwarded to Ottawa and that the authorities there see fit to take action in this regard.

Mr. Hillhouse: Madam, I'd simply like to thank all the members in the House who have spoken on behalf of this amendment. I would also like to thank the Honourable Member for Inkster for having—(Interjection)—Yes. Do you want to speak?

Mr. Fred Groves, (*St. Vital*): I'm sorry. I'd like to adjourn the debate, if he is going to close...

Madam Speaker: Is the honourable member closing the debate? The Honourable Member for St. Vital.

Mr. Groves: I apologize to the honourable member. I move then, seconded by the Honourable Member from Winnipeg Centre that the debate be adjourned.

Madam Speaker presented the motion and after a voice vote declared the motion carried.

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Madam Speaker: Agreed. The adjourned debate on the proposed resolution of the Honourable the Member for Inkster and the proposed amendment thereto by the Honourable Member for Selkirk. The Honourable the Member for St. Vital.

Mr. Fred Groves, (*St. Vital*): Madam Speaker, I think a vast majority of Canadians are not satisfied with our antiquated divorce law. These laws are different in some of the provinces, they are difficult to operate, they are embarrassing to comply with in many cases and they are inadequate for many people. However, while the majority might agree that change in these laws are necessary, there is not a substantial agreement amongst these people that what the changes should be. In my view I agree that the grounds for divorce should be widened to include perhaps desertion for a period of at least five years or to finalize a long period of legal separation, but this is the extent to which I would be prepared to agree in any change in the grounds for divorce. Cruelty both mental and physical cannot really be properly defined in my opinion and can be open to too broad an interpretation or to too narrow a one. The elected representatives of the people I think when we're dealing with the matter of divorce would find it impossible to have the courts interpret their intentions accurately at the time any extension was made to include cruelty. It is just such misrepresentation of the term cruelty that has made people cynical and disrespectful of what we call Hollywood style divorces. Laws to protect against physical cruelty should be altered to fit the current needs without tampering with our divorce laws. Cruelty in a sense is a form of a sickness and where it is not a form of sickness I think could be dealt with through our criminal code or some other law without actually changing our law in respect of divorce.

I also submit Madam Speaker, that insanity is no longer an incurable disease and there have been a number of awkward cases where one partner to a marriage has been deemed to be incurably insane, has been divorced from their spouse in some other jurisdiction and later on cured of their so-called incurable insanity and prepared to take up their married life where they left off and shocked into finding that their marriage no longer existed.

Habitual drunkenness Madam Speaker, is also a form of sickness that is not entirely incurable. I think that the resolution that we have before us and the amendment go too far in liberalizing our divorce law. The Honourable Member for Inkster asks for a period of desertion not more than two years. I submit Madam Speaker, though there are grounds for I think extending the grounds for divorce to desertion but certainly not for a period as short as two years. Persistent physical and mental cruelty I have already dealt with. I do not think that the grounds for divorce should be enlarged to include these.

Insanity is not incurable and certainly I am not in agreement with this provision that asks for the enlargement of grounds on the basis of imprisonment for two or more years. Legal separation, I think if a legal separation has gone on for a good many years and there is reason to believe that it is permanent then this may be some grounds for enlarging the grounds for divorce.

The Honourable Member for Selkirk amends the resolution to include other things. Cruelty I have already dealt with, Madam Speaker, and again I ask how does one define cruelty. It is a form of sickness and I maintain that a person, that in many cases where a person is inclined to be cruel this is something that is known prior to the marriage and should be taken into consideration by the parties at that time.

With respect to mental illness we all know I am sure of the near miracles that have taken place in our mental institutions. Many of these people have come out of these institutions cured and I think this should not be grounds for the enlargement of the divorce law.

Madam Speaker, I would like to repeat what I said at the time this resolution was before us, or one similar, and that is, two years ago, or 1964, and that is that I am going to oppose this resolution on the grounds that in my opinion a marriage contract is a contract that is entered into by two persons before God and is a contract for life.

At this time, Madam Speaker, again I would like to say that I think divorce is a federal matter and that the Federal Government has facilities to properly study any changes that might be made in this law. It's time too, Madam Speaker, when we're talking of this subject that we might review the vow that is taken by our young people when they get married. I think that one of our problems today has been this vow is not taken seriously enough. When one gets married one takes the other party to be his lawfully wedded wife or husband, to have and to hold from this day forward, for better or for worse, for richer or for poorer, in sickness and in health, to love and to cherish, until death do us part. According to God's holy ordinance and thereto they pledge each other their troth.

Madam Speaker, I think that this is a vow or an oath that is taken before God and one that should not be taken lightly by the parties concerned and one that they should think over many times during the course of their married life. I'm inclined to agree with some of the remarks that the Honourable Member for Brandon made the other day, about the fact that we are living in an age of moral decay in many instances. And it is difficult with the type of movies, the type of TV programs and the type of books that are available to our young people to retain many of our moral standards, particularly those standards that we have always held high with respect to marriage. This is all the more reason, Madam Speaker, why I think that it is our duty as parents and as counsellors to young people contemplating marriage, that we should be preparing them more for their embarkation on the sea of matrimony and preparing them for the seriousness of the vows which they take at the time they embark on that sea.

So although I am in agreement with a good lot of what has been said about the difficulties that married people find themselves in these days, I find too that we should not tamper with the divorce law lightly, we should remember that

marriage is a contract for life taken before Almighty God and I am therefore not prepared to support either the resolution or the amendment.

Mr. Albert Vielfaure (*La Verendrye*): I do not rise at this moment, Madam Speaker, to say that I am violently opposed to this resolution, or that I don't see its merit. However, being a strong believer in the sanctity of marriage, I do not take this resolution lightly and I understand, I think I understand the intentions of the mover, which are certainly not to liberalize divorce laws but rather to help those who are in trouble. However, Madam Speaker, I wonder if by liberalizing our divorce laws we might not be encouraging many of our young people who are getting married today in thinking in the line, "Well, we don't have to take it too too seriously, there will be an easier way out in the future." And I certainly think that when we look across the line and see how lightly for example the word "cruelty" is used there for applying for divorce, I wonder sometimes if my wife won't divorce me every week for just being away from home all the time. Mind you, I'm not worried to that point yet. However, I think we should take this very seriously, and we should also, although it doesn't concern this resolution directly, I think us legislators should take a very good look at the advertising that is going on in this country and the falsification of marriage. If we look around today, practically every billboard shows a woman more as an instrument of promoting the sales of some product rather than as a future mother as was wanted by God. Now I don't intend to make a sermon here. However, when I see our young generation growing with this advertising literature stands all around, I think they will have to receive very good education at home and in school if we are not asked to liberalize divorce laws again in the future.

Madam Speaker, again I repeat, I understand the ideas of the amendment of the Honourable Member from Selkirk, which is to help those that are in difficulty rather than just liberalizing the divorce laws, I should say that at this time I am not convinced that this will do as well as it is thought it would do in here and in my estimation might cause more people to think more lightly of marriage, and therefore at this time I am not prepared to support this resolution.

Mr. D. M. Stanes (*St. James*): Madam Speaker, rightly or wrongly, I look upon this resolution as a general expression of thought to the Federal Government, and therefore I don't think one should go in to any specific detail. I agree with the philosophy behind it in there should be some relaxation on the grounds for divorce, but one also must be very conscious as I am that by relaxing too much can be worse than the present situation. I'm a little concerned on the question of cruelty—who shall be the judge? It can be a farce like there is in some other areas, and after all as was pointed out by the Honourable Member from St. Vital, in many cases is a sickness. The other item of unsound mind is also a sickness, in which we are making great strides in curing people and bringing them back to society; and the fifth item is also in many cases a mental sickness, and I don't think anyone can say what progress will be made in curing these sicknesses in the next few years. Probably by the time this resolution does get to Ottawa, the matter will have been gone into in very much greater detail with more information at hand.

However, there is one item which I feel is left out, and that is on the amendment, and that is the sixth item which was on the original resolution, legal separation for more than two years. I would therefore like to pose an amendment, Madam Speaker, a sub-amendment, seconded by the Honourable Member for Churchill, that the resolution be amended by adding (7) has been legally separated for at least three years.

Madam Speaker presented the motion.

Madam Speaker: The Honourable the Member for Kildonan.

Mr. James T. Mills, (*Kildonan*): Madam Speaker, also speaking as a Roman Catholic in the House, I feel it my duty to participate in the debate. As other members of my church have stated, I feel somewhat as they do. I feel that in my position as a Catholic I have to turn down the theory of divorce, but that's my own conscience; but I also have to legislate to other constituents in my area which they feel with the divorce laws we have at present, they are very strict. But I feel there should be other alternatives rather than to bring out a resolution as strong and as direct as we have brought up in this House. There must be other alternatives. I was fortunate the other night in picking up a brief which I think could add a bit of solution to this before we carry on the drastic measures we are planning on doing. I would like to read out the foreword of this brief. This brief is based on a Conciliation Court of Los Angeles County. I would like to read one or two paragraphs here. The December 1962 issue of Reader's Digest in an article entitled: "The Walk-in Court that Rescues Rocky Marriages declares, most divorce courts pit troubled husbands and wives against each other as bitter adversaries. Los Angeles has a new approach...a Conciliation Court." In 1956, the Journal of the American Bar Association carried an article on Conciliation Courts of Los Angeles entitled: "An Instrument of Peace." The function of the Court is to render compatible husbands and wives whose marriages are threatened with divorce. Although not restricted to aiding families with children, the disastrous impact upon children of broken homes emphasizes the importance of the work of this Court, and approximately 15,000 children have been restored to their parents through reconciliation effected in courts since 1954." Madam Speaker, I feel as I said before, rather than go ahead, I would like to see a court similar to this inaugurated in the Province of Manitoba.

Madam Speaker: The Honourable Member for St. John's.

Mr. Saul Cherniack, Q.C. (*St. John's*): Madam Speaker, I am bound to tell the Honourable Member from Kildonan that as soon as he has a resolution drafted along the lines that he wishes to see carried out here, I would be honoured if he would allow me to associate myself with it and second it, because the court that he envisages is one which could be of very great benefit to the people in this province. We have very busy courts today. We have a Magistrate's Court which deals with humanity on all occasions and hasn't time really to deal with any particular problem which arises except in a superficial and quick manner. We have the Family Court which takes a very serious view on the entire question of separation and the Wives and Families Maintenance Act. The judges of that court take very great pains to look into the problems that have occurred and are presented to them with the objective to help cure what appears to be a problem and save a marriage. In my opinion, that court is overloaded, and that court does not have sufficient assistance in preparing itself by having case workers look into the problem, investigate the background and follow up in the future when marriages aren't being kept together.

We have the Court of Queen's Bench which deals with divorce, divorce only, and that's a very cut and dried court where the background of the problem is not looked at at all; all that is looked at is the question of proof, in our courts, of adultery, proof of domicile, proof of the various matters, proof of marriage, whatever has to be presented, and it's not unknown that in twenty minutes a divorce may be granted. When I say it's not unknown, I think that's probably the average.

Now, Madam Speaker, if the Honourable Member for Kildonan is serious, and when I say "if", I know he is serious, but if he really means to carry out a progressive measure in this province to see what can be done about saving marriages, then by all means anything that can be done in this Legislature to create or to augment the work that may be done in a court such as he describes

would be a tremendous contribution to this province. I urge him to do it, and I urge him not to hide behind the Cabinet or behind the party which is in power but rather come out in the open and bring out a resolution such as he suggested; and I think that it will obviously receive tremendous support in this House.

I would like to second what has been said by the Honourable Member for St. James in that this resolution does not in itself legislate. It sets out suggested grounds for divorce and it recommends them for consideration to the Parliament of Canada. As such, I think that the principle is more important than the detail; and as such I think that if we agree that our present divorce law is not up to the mark for present-day society, then we should vote in favour of this resolution, or another resolution which is watered down if necessary. It seems to me that if certain members, and two honourable members spoke today, saying that they agree that what we have today is not adequate for our needs, but they think that the suggestions go too far, I suggest to them that they should nevertheless support it, in order to indicate to the Parliament of Canada that we feel that the law as it exists today is not a proper one in dealing with the problem of marital relations.

I want them to mention a third point, which I think should be brought to the attention of the Honourable Members for St. James and St. Vital, both of whom—and I think also it was mentioned by another speaker—and that is the interpretation of the word "cruelty". I think you do our courts an injustice in suggesting that they are not capable of defining cruelty as this Legislature would want them to do. It is true that there are courts south of us that use the term cruelty for any ridiculous thing in order to be able to dissolve a marriage; but that is done surely with the co-operation and consent of the legislative bodies, because here in this province we have a definition of cruelty. It is one which is found in the Wives and Childrens Maintenance Act and it does speak of persistent cruelty as being a ground for separation. It has been contested time and again in the courts and there are many decisions and precedents defining the term "persistent cruelty" as it is meant by the Legislature under The Wives and Childrens Maintenance Act. And there is sufficient law, both in this province and elsewhere to give us good cause to have a great deal of confidence in our courts, in our judiciary, to be able to interpret the will of this Assembly, so I think that they were unfair in suggesting that the definition would be so vague as to be able to be misused. I can assure you from my experience—and I believe I speak for the vast majority of members of my profession who've appeared in the Family Court, that the question of cruelty is one which has clearly defined characteristics which the courts recognize and which they make sure about. Our courts and I think our lawyers are deeply conscious of the responsibility placed on them to always try to keep a marriage together before they do anything in terms of separation or divorce. It is my experience that just about every lawyer, and certainly every court, recognizes this responsibility and does look into the question in the hope that a marriage may be made sound again.

Having said that I must immediately contradict myself, Madam Speaker, by saying that this does not apply in Court of Queen's Bench when you deal with the question of divorce itself. What I have siad applies to the question of separation. When it comes to divorce the ground fo adultery is all that is necessary once you have placed yourself within the jurisdiction of the court, and although the court might feel that there is great hope for this marirage in terms of bringing the people together, it is my interpretation that the court, if it finds adultery, must grant a decree nisi. And this alone is an indication that when you have a very hard and fast rule such as we have here, the application of it derogates against the possibility of a marriage being saved by the court itself.

I should also say one other factor and that is that I don't recall any case in my own experience where adultery was the original cause in a divorce. It seems to me that in all the cases that I can think of the grounds for the separation

preceded any act of adultery. The grounds of the separation were cruelty. The grounds of the separation might have been desertion. The grounds for the separation might be incompatibility, or many, many factors, and after there has been a separation, after the marriage has been broken in all respects except in the concept of the legal aspect, then with the couple separated, with the people living their own lives as if they were single, adultery has taken place and the divorce has come into court. So that I suggest to you that we are no longer being at all realistic in thinking in terms of the present grounds as being the reals grounds, and that we would be much more realistic if we washed out all these various reasons here and said there has to be a review. But if we said that we would be behind in our times because we have had—well I think I received it while I was in this Assembly, but in any event I've had for some time a very well documented pamphlet issued by the United Church of England and I've seen it in the hands of many people.—(Interjection)—Pardon? Of Canada, yes, thank you,—The United Church of Canada. I have seen reports of other religious bodies that have looked into the question of divorce and I commend to the attention of those members here who have not read this United Church review on marriage and divorce as being something which commands a great deal of respect because the studies given in that pamphlet or booklet indicate clearly that we must, in order to accept society for what it is and not wear blinkers about it, we must do our best to see to it that we make our society adapt to the requirements that modern technology bring before it. It's a peculiar thing that we read so much and hear so much about common law marriage and about illegitimacy, and all the problems that come as a result of it, and we are just wearing blinkers, we are just blind to the problem if we don't at the same time recognize that by keeping these hard and fast rules we are in part participating in perpetuating the problems that occur in society as a result of broken marriages, that are broken, that cannot be mended but are still tied together by an artificial legal concept.

Madam Speaker: The Honourable the Member for Selkirk.

Mr. T. P. Hillhouse, Q.C. (*Selkirk*): Madam Speaker, I rise to address myself to the amendment to the amendment which reads that—it gives an additional ground for divorce, "has been legally separated for at least three years." Now I don't know if the honourable member realizes what is involved in this amendment to the amendment, whether he is referring to a judicial separation or whether he is referring to a separation order which was granted under The Wives and Childrens Act by a police magistrate, but I take it that he means a legal separation regardless of the court from which it emanated. Now on that basis Madam you would actually, indirectly, be conferring jurisdiction to grant divorce on a police magistrate, because a police magistrate has jurisdiction to grant a legal separation under the provisions of The Wives and Childrens Maintenance Act simply on the grounds of assault. And "assault" is a legal term which has a very definite legal meaning; and assault doesn't have to mean cruelty, it doesn't have to mean inflicting bodily harm. As long as I reach out with the intention of striking somebody and as long as I strike that person, or if I am prevented from striking that person because that person jumped out of my way, I am guilty of an assault. Now that in effect is what you are asking the Parliament of Canada to add as a ground for divorce, because that is a ground for granting a legal separation.

Now as to the remarks by the Honourable Member for Kildonan, I respect his conscience, I respect the fact that he is a member of a church to which I do not belong, and I give him full credit and the full right to stand up in this House and express his creed and faith; but I do suggest this to the honourable member do not by your action prevent anybody else or another person from taking advantage of a law which is not biding on their conscience; and please keep in mind this, that divorce is only the legal recognition that a marriage has broken

up. The marriage was broken up long before the divorce decree was ever granted.

Mr. Mills: On a point of privilege may I ask one question? You mention that I as a Roman Catholic, state that I am not in favour of divorce but I also want to inflict this on my fellow constituents and other friends in this House. This is not what I said.

Mr. Hillhouse: Then please do not because your conscience doesn't allow you to take advantage of it, to impose your conscience on somebody else.

Mr. Mills: I am not forcing my conscience on someone else, sir.

Mr. Hillhouse: I submit you are if you are taking this attitude. Now the Honourable Member for Kildonan also raises the question that we should have more efforts and more attempts made to bring about conciliations. I would like to point out to this House that in our Wives and Childrens Maintenance Act there is a section which says, "Before a public hearing of any proceedings under this Act the judge or police magistrate shall consider, having regard to the information, whether it will be well to hear the parties in private with a view to settlement by mutual consent of the matters in question; and if he thinks fit he may summon the parties to appear before him, and shall hear them in private with the intent before mentioned and may receive in their presence information from any person whom the judge or magistrate believes to have a knowledge of the relationship of the parties." Now that is a procedure which is fairly generally carried out in our courts at the magisterial level. There's very few police magistrates are prepared to grant an order under The Wives and Childrens Maintenance Act without calling the parties into his private chamber and discussing the matter with them, with a view to seeing whether reconciliation cannot be effected. It's true that in the Queen's Bench, perhaps due to the pressure of business or perhaps due to the fact that the judges there realize that the marriage has broken up that that procedure is not followed. But there is nothing to prevent any Queen's Bench judge if he so desires for calling the parties together in his chamber privately and seeing if a settlement or a reconciliation cannot be effected.

Now the Honourable Member for Kildonan mentions the fact that surely there is some alternative. I don't want to be facetious, Madam, but I say the only alternative to divorce is not to get married, because the number of divorces will never exceed the number of marriages.

Now a great deal has been made here too about legal cruelty. The Honourable Member for St. John's has dealt with that very fully, and as far as our courts are concerned they are not going to place the interpretation of some of the United States courts on what constitutes cruelty. They are not going to consider it cruel because a man has halitosis or a man has dandruff or a man hangs from a chandelier or some of the silly notions that they have in California. Legal cruelty in Canada is that cruelty which must be established according to the laws of England in order to entitle a person to a divorce or a separation on that ground; and that cruelty has been so well defined by so many decisions that our judges in Canada and in Manitoba particularly are bound to follow these decisions. Legal cruelty is one of the hardest things to prove because in a great number of instances you are trying to prove a state of mind. You are trying to prove what the actions of the spouse in default, what effect those actions have had on the other person and in a great number of instances it is and it largely becomes a medical matter. You've got to prove that that cruelty is such that it is endangering or has endangered the health of the other party, and I think any lawyer will agree with me that legal cruelty is one of the hardest things to establish in our courts, because as I said, it is largely a state of mind.

Now I do hope that this House will carry this resolution as amended. I don't think they should vote for the sub-amendment because I think the sub-amendment is going a little too far and I don't think that the Honourable Member for St. James who moved that sub-amendment was fully aware of the legal impact of his so doing.

Mr. Groves: —on a matter of keeping the records straight, I think that the Honourable Member from Selkirk gave the Honourable Member for Kildonan a lecture which he didn't deserve. The Honourable Member from Kildonan stood up and made exactly the same statement that the Honourable Member for St. Boniface made and the Honourable Member from Brokenhead, and that statement was that he being a Roman Catholic did not accept the principle of divorce but that he was not going to try and impose those views on others.

Madam Speaker put the question.

Honourable Gurney Evans, (*Minister of Industry and Commerce*), (*Fort Rouge*): Madam Speaker, I would just like to say a very brief word about my own position. I am in the difficult position of not knowing how to vote on this question except that I am of the opinion that voting for this particular resolution and the amendment and the sub-amendment is less desirable than voting for it. It's a matter of detail. I believe that the situation confronting the divorce courts and those concerned with divorce matters is such that does require the most earnest study and I support the resolution to that extent, that it does bring to the notice of this Legislature and is intended to bring to the notice of the Government of Canada, the views of the members here on this particular resolution. But I think it's in the detail in which I find fault and it is the detail that causes me to vote against all the resolutions that are on the Order Paper.

There is nothing to indicate here that we are asking the Government of Canada to consider the matter on a broad basis. It names specific items which are recommended specifically to the Government of Canada as grounds for divorce. Technical or legal difficulties have been raised about the item in the sub-amendment. Other considerations have entered into those items one to six in the amendment, and equally so with respect to the items in the main motion, and so with these specific details in which the resolution as worded now would recommend to the Government of Canada that dissolution of marriage may be claimed by either husband and or wife on the grounds that the respondent—then we name the six items—and add the further one that has been suggested by the Honourable Member for St. James. There is nothing suggestive about it; it is simply a categorical imperative in that sense that we ask the Government of Canada to consider these as the specific grounds for divorce. I am not in agreement with a number of them and for that reason cannot support either the sub-amendment, the amendment or the main motion.

Mr. Paulley: Madam Speaker, just a word or two. It is rather hard to speak on this resolution directly to the amendment to the amendment because it is dealing with one specific, namely the question of legal separation. However I will try to do so because I reserve my privilege a little later to speak on the whole aspect in the field of divorce.

I would suggest that the Honourable Member for St. James has raised a very interesting point when he suggests the amendment to the amendment which will insert a clause number seven dealing with legal separation for more than three years. You will recall Madam Speaker that the original resolution as proposed by my colleague from Inkster in clause six used the words "Legal separation for more than two years." The Member for St. James has now reinstated this particular clause with the exception that the two is now changed to three.

I listened with a great deal of interest to the arguments as proposed by the Honourable Member for Selkirk and his reference to The Wives and Childrens

Maintenance Act. But I think my honourable friend from Selkirk, in all due respect to his knowledge of the law has omitted the important part or the important contention as contained in the resolution as proposed originally by the Member for Inkster, now the endeavour of the Member for St. James to have it reinstated, is the period of time—from the time that the magistrate under The Wives and Childrens Maintenance Act has declared a legal separation. I would say that my friend from Selkirk might have a point that a legal separation by a magistrate became grounds for divorce immediately on receipt of the legal separation by the magistrate. But such is not the case Madam Speaker insofar as this resolution is concerned, or the amendment, because it imposes a length of time of the legal separation and as my colleague for Inkster implied or meant—and I am sure this is the contention of the Member for St. James—that if a couple after having been legally separated for a period of two or three years have not become reconciled to each other, notwithstanding how that separation came about, then it may be a ground for the consideration of the granting of a divorce. I think this is the point that my honourable friend the Member for Selkirk has overlooked completely for I am sure this is the intention in the resolution, in the original resolution and in the amendment as proposed by the Member for St. James. It's not the question again to recapitulate; it's not the question as to whether a magistrate has granted the legal separation under The Wives and Maintenance Act or any other Act, it's the fact or question that the separation has been for a period of time during which no reconciliation has taken place and to all intents and purposes they are a couple living apart. I think this is the point Madam Speaker that the members of this Assembly should take under consideration in dealing with the amendment to the amendment; not the point as raised by the Honourable Member for Selkirk.

Mr. Hillhouse: Madam, would the honourable member permit a question?

Mr. Paulley: Providing it's not too technical...

Mr. Hillhouse: No, no, no. It's quite factual. Does the honourable member imply in his remarks that a lapse of three years would change the nature of the order made by the magistrate, would it make an order of the Court of Queen's Bench or would it still remain an order of the magistrate?

Mr. Paulley: I suggest, Madam Speaker, in answer to my honourable friend it wouldn't matter whether it was an order of a magistrate or an order of a justice of the Queen's Bench. It's a fact, a fact of being separated for a period of three years that we are contending within this matter, not who made it, but the fact that a couple for a period of three years under a legal separation have not become reconciliated in order to live together. That is the fact, notwithstanding Madam Speaker, I respectfully suggest who originated the original legal separation.

Honourable Robert G. Smellie, Q.C., (*Minister of Municipal Affairs*), (*Birtle-Russell*): Madam Speaker, the question of divorce is one that has perplexed all of us from time to time. Those of us who when we were married accepted a vow and who heard the person performing the marriage ceremony in most cases say, "now what God has joined together let no man put asunder," and accepted these words in all seriousness. This is a question that has really bothered many of us, and yet I am sure that those of us who have had the opportunity to carry on the practice of law in this province have been made very clearly aware that this is one of the most serious problems that besets people in our society from time to time.

I am sure that the Honourable Member for Selkirk has had people who have come in to his office and who have in fact had their marriage ruined; who have in fact been living separate and apart from one another, but who have in fact under our present laws no cause for divorce. I must disagree with him when he

suggests that by accepting the amendment proposed by the Honourable Member for St. James that we are in fact letting a police magistrate make an order of divorce. Because when the matter comes before the police magistrate this is the beginning of a procedure which may or may not come to a conclusion, and I am sure that the Honourable Member for Selkirk knows as well as I do and any other members who have had experience in this thing that in many cases where an application is made to a police magistrate or to a county court judge under The Wives and Childrens Maintenance Act, that a reconciliation is effected. But I know of no case where an order has been granted and where the parties have remained separate and apart leading their own separate lives for a period of three years or more, where a reconciliation has subsequently been effected. There may be some. There may be some. But I know of none in my experience. So Madam Speaker, if after that period of three years has elapsed as suggested by this amendment are we still going to insist that these unhappy people have either got to go out and purposely commit adultery in order to provide grounds for divorce, or, as happens infrequently I trust, but occasionally, where perjured evidence is given to our courts in order to obtain divorce on the only grounds that is now available to them.

I suggest Madam, that in my view this is not right. That in such a case where there has been a legal separation that has continued for a period of three years, there is no marriage left. There is a legal bond that unites those two people but there is in effect, no marriage. And that while we are considering or while we are asking the Federal House to consider broadening the grounds upon which divorce can be granted, I think that this is one of the things that should be included.

I cannot agree with the remarks of the Honourable the Minister of Industry and Commerce either, because although we have set out in these resolutions specific terms, although we have set out in these resolutions the things that members or some members of this House believe should be taken into consideration as grounds for the granting of divorce by our courts, we know in passing this resolution that this is not going to be the final decision, that this is only going to be a request made of the House of Commons, the Government of Canada, to consider the advisability of broadening the law and making possible what society in general has accepted, the idea of divorce, but not on the present restrictive grounds that pertain particularly in this province.

And so, Madam Speaker, I intend to vote for the sub-amendment as proposed by the Honourable Member for St. James.

Madam Speaker: The Honourable Member for Carillon.

Mr. Leonard A. Barkman, (*Carillon*): Madam Speaker, I have very little to add to this debate but it seems to be customary in this House that if someone tends to vote against the resolution, to declare himself. Madam Speaker, coming from the area that I do, I guess I do not really have to declare myself as to how I'm going to vote. I am happy though that I can vote as my conscience dictates me, and I'm very happy that I can vote as my conscience dictates me knowing that I will by a large percentage vote the way the people of Carillon would wish me to vote. Possibly some day as Carillon becomes more wicked and more central I will have to change my mind.

Madam Speaker: Are you ready—

Mr. W. G. Martin, (*St. Matthews*): Madam Speaker, dealing with the sub-amendment I am a litle bit confused. I have been heartily in support of the amendment because I think the time has come for us to have some relaxation in our marriage laws. But in the amendment—or rather in the sub—rather in the amendment, "has deserted the petitioner without cause for a period of at least three years." The sub-amendment says "three years after legal separation has

been brought to pass." Now I know out of my own experience that there are many cases where there has been unhappiness in the family circle and going on for some length of time, but before three years have transpired there has been reconciliation. Suppose, hoping all the time that there might be this reconciliation, it doesn't take place, then they proceed along the lines of legal separation which will take three years and so you are going to have those added years of misery, unhappiness and in many cases sort of "hell on earth". So I'm opposed to the sub-amendment but I'm heartily in support of the amendment.

Madam Speaker presented the motion and after a voice vote declared the motion carried.

Mr. Hillhouse: The yeas and nays, Madam.

Madam Speaker: Call in the members. The question before the House the proposed sub-amendment of the Honourable the Member for St. James: (7). Has been legally separated for at least three years.

A standing vote was taken, the result being as follows:

YEAS: Messrs. Alexander, Baizley, Beard, Bilton, Bjornson, Carroll, Cherniack, Cowan, Gray, Harris, McDonald, McGregor, McKellar, Mills, Moeller, Paulley, Peters, Schreyer, Seaborn, Smellie, Stanes, Steinkopf, Strickland, Watt, Witney, Wright and Mrs. Morrison.

NAYS: Messrs. Barkman, Campbell, Desjardins, Evans, Froese, Groves, Guttormson, Harrison, Hillhouse, Hryhorczuk, Jeannotte, Johnson, Johnston, Klym, Lissaman, Lyon, McLean, Martin, Molgat, Patrick, Shewman, Shoemaker, Smerchanski, Tanchak, Vielfaure and Weir.

Mr. Clerk: Yeas, 27; Nays, 26.

Madam Speaker: I declare the motion carried. The proposed amendment as amended by the Honourable the Member for Selkirk.

Mr. Paulley: Madam Speaker, I move, seconded by the Honourable Member for Inkster the debate be adjourned.

Madam Speaker presented the motion and after a voice vote declared the motion carried.

Vol. XI No. 31 2:30 p.m. Friday, March 19th, 1965
4th Session, 27th Legislature, at Page 758

Madam Speaker: Agreed. The adjourned debate on the proposed resolution of the Honourable the Member for Inkster and the proposed amendment as amended by the Honourable Member for Selkirk. The Honourable the Leader of the New Democratic Party.

Mr. Paulley: Madam Speaker, this has been a very interesting debate on the question of divorce and it seems to me that there is considerable opinion that the laws of Canada should be changed respecting the grounds for divorce. I may say Madam Speaker that while I may not agree with all of the grounds that are contained in the amendment to the resolution or indeed so far as the resolution itself is concerned, I am convinced however that the time has come for the Dominion authority who basically controls divorce, to take another look at the situation.

I do however, Madam Speaker, wish to make a comment or two on some of the matters that have been discussed during this debate. I am particularly concerned and intrigued with some of the comments made by some of the members in this debate when they refer to the younger people of today. Some of them have suggested Madam Speaker, that our youth of today are more irresponsible than they were in our time or in our mother's time or in our grandfather's time. Madam Speaker, I want to reject this entirely. I think that the youth

of today are if anything far more responsible, notwithstanding police spokesmen's orations, notwithstanding some criticisms of social workers and the likes regarding the youth of today, I think by and large we should be proud of our young men and our young women today.

We discussed here a few moments ago questions dealing with the possible use of marihuana in the university receiving great and vast headlines and comments in our daily paper, and it is suggested that there was about six or seven of a student population of approaching 2,000 or in excess of it—6,000—6,000, that may be partakers of this. And what is the net result Madam Speaker? Another blot, another blot on the youth of today. And I can't reject this more vigorously Madam Speaker. I think I know what the trouble is with the youth of today. I think they're too open. I think they realize facts and face up to facts and the facts of life as well, far more than we did. I think they are subjected to more close scrutiny than was the case when we were younger. They can't lead the secluded lives that many of us and our ancestors were privileged to lead. So I say I think our youth of today are far more honest than we were; far more open and far more forthright. They'll call a spade a spade. They will have their associations and their groups to consider such things as sex and related subjects. But they'll do it Madam Speaker in the open today, whereas we went behind a high board fence and in a smutty atmosphere to consider the same thing because of the fears that we had. They'll smoke their cigarettes and their pipes and their cigars in the open today, whereas in our day we'd go and peel some bark off the cedar posts that were along the railroad track. This is what we did, and I frankly confess it. But what are we today doing, or many of us, and all too many of us? We're saying that because of the honesty of our young people they're immoral, they're immature. And I say Madam Speaker, that this is not so. We have more young people today going to our universities and our higher schools of learning; we have more young people taking an active part in affairs of state and politics today than we had. And I don't think Madam Speaker that I could use a better example than my colleague for Brokenhead who came into this Assembly at the age of 22.

So I say Madam Speaker, that when we're dealing with the question of divorce let's divorce any consideration or suggestion of immaturity or immorality in regard to this question of the youth of today. I'm satisfied Madam Speaker, that in a considerable number of instances in the field of divorce it's not those who have been married two or three years who are applying for divorce and obtaining the same, but in many cases it is people who have been married for fifteen or twenty years. And I say, let us not stand up in this House and say to those who are following us today, you're immoral, you're immature, you don't know where you're going. Let us reject this and give the youth of today credit for the job that they are doing. And when I say this I realize, I realize as every member of this Assembly will, that there are youngsters who will make mistakes and go down the wrong path. But Madam Speaker, I suggest that their likelihood of being caught is far greater today because we're living in a system of society where we're all exposed at all times in our most innermost lives and our social associations. So I say Madam when we're dealing with this question let's not, let's not deride the youth of today, for if need be these youths that some of us criticize today were called on to protect us in another great conflict they would bear the brunt in order if necessary to preserve the democracy as we know it today. So let's give them credit for what they are and the good job that they are doing and not use this Assembly or any other to deride them and speak ill of them. So I say—

Mr. Fred Groves (*St. Vital*): I'm sorry to interrupt the honourable member but I was wondering if he would tell us who which member castigated the youth of today the way he describes it.

Mr. Paulley: I am saying to my honourable friend if he would take the trouble as I did to read some of the comments that have gone on in this House during this debate he would find the source, the same source as I; and if he's not keeping up to his homework then let him get cracking and do a little reading or a little listening while the debates are taking place. If my honourable friend had been in the Assembly at the same time and all of the time like I have in this debate, he would know. I'm not naming any member but I'm saying that this has been said in this debate.

Now Madam Speaker, others have said and touched on the necessity for premarital education. I heartily endorse this. This is something that should be done, something that is necessary. Many of us have attempted this in our own homes with our offspring and I'm sure the majority may have done this. Many of us before we were married attended seminars within our respective churches or with our ministers on the problems of marriage. But I say Madam Speaker, that more emphasis is necessary in this field. Others during this debate Madam Speaker, have taken a stand because of the fact of their particular religious affiliation and I respect them for it. I want to say Madam Speaker, I too am a Catholic, although not a member of the Roman Catholic fraternity I am a Catholic, I am an Anglican and I am proud of it.

But I want to place on the record Madam Speaker the position of my church, which church I have the honour of being a warden for my rector in Transcona for fifteen years. I want to place on record the official position of our synod here in the Diocese of Rupertsland on this question, and state what the Archbishop of Rupertsland, who incidentally is the Primate of all Canada, had to say to the recent synod meeting held in Winnipeg in June of last year. And I think Madam Speaker, that if members listen to me they will gather from my remarks of a changing attitude within the church itself, because it wasn't too long ago that the Anglican church had the same approach and the same outlook as the other churches who call themselves Catholic had. But there is a change within the Anglican fraternity of the approach—not insofar as the adherents themselves are concerned but the approach and the recognition of the situation as it affects all of us in this province in this Dominion.

I quote now Madam Speaker from page 11 of the Archbishop of Rupertsland's charge to the diocesan synod in June of 1964 here in the City of Winnipeg. And I quote from His Grace's text: "Now we turn to another question, marriage and divorce. In a secular society we have no hope of imposing Christian teaching about divorce on the whole Canadian community, and indeed it is doubtful if we should ever try to impose it. To convince the Canadian people that our Lord's teaching is the only right teaching is one thing; to impose it is another. I believe that the divorce laws of Canada will have to be changed because they no longer reflect the Canadian conscience. But I also believe that as Christians we should do all in our power to protect the family stability and to protect the children who are the chief victims in a divorce. Divorce should never be easy. In the Christian community we shall order our practice so that those who believe in Jesus Christ may really follow Him. For one thing we must surely ask that those who are married in church should mean the solemn promises that they make. They should really intend a lifelong union. I do not believe," His Grace continues to say, "that people should get married in church only because it is a more attractive social event than a civil marriage. There is good hope that at our next general synod our Canon Law will be amended, so that we can support more surely those who seek Christian marriage and also deal in pastoral concern and consistent principles with those who, despite their Christian hopes, come to a time when divorce and remarriage seems to them the only solution. A truly Christian rule about divorce will always be stern. What Christian morality is not. But a truly Christian discipline for church members will be one in which mercy and truth are met together."

I think Madam Speaker that this is the approach in this very important matter that we in this Assembly should take. We may not agree entirely with the grounds that are suggested for the changing of the basis under which divorce may be made possible in Canada, but let us realize that notwithstanding what we may think of the other, whether we as individuals attempt to live a true Christian life or not, there are those who may need the changes that are suggested in this in order that they may unshackle themselves from situations which are at the present time preventing them from leading a full life which might as His Grace suggests lead to a full Christian life.

Mr. R. O. Lissaman (*Brandon*): Madam Speaker...the Honourable the Leader of the NDP has made rather a blanket allegation that speakers in this debate downgraded the youth of this country. I fail to catch any of this reflection in any of the debate so far, and I would ask him to identify who he thinks has downgraded the youth.

Mr. Paulley: Madam Speaker, I refuse to do that. I'm not privileged to do it, but I will point out to my honourable friend if he would meet me, the passage that I was referring to. And I did not state that all members of this House took that attitude. I said "some".

Mr. Hillhouse: That is the point, Madam Speaker. He has said "some". Now, I spoke on this debate. I would like to know from the honourable member whether I'm classified among those "some".

Mr. Paulley: I assure my honourable friend for Selkirk he was not.

Mr. Hillhouse: Okay that's all I wanted...

Mr. Paulley: And the Member for Brandon was not.

Mr. Vielfaure: Madam Speaker, I'd like to ask the same question.

Mr. Paulley: It was—if the member asked it, I ask him, the member who has just asked the question, to read his speech when he speaks of the lack of morality among our young people today. And if I have taken him out of concept then I apologize to him, but my impression was it was the Honourable Member from La Verendrye who spoke of a lack of morality among some of our youth today.

Mr. Albert Vielfaure (*La Verendrye*): I must confess that I don't speak as often as my honourable friend and I haven't read my speech that much, but I certainly had no allegations of that kind. I spoke of immorality of the advertising, the billboards that we saw around, but certainly not the youth.

Mr. Paulley: Madam Speaker, then in order to clear the record, I accept the contention and the position taken by my honourable friend. I apologize that if I misunderstood his remarks, I mean him no ill will, and if unfortunately I've attributed this to any member of the House I sincerely apologize and I hope my apologies will be accepted. But I think that I can say in saying this, that this has been said on numerous occasions, so may I change my text. That many people have this approach and if I've offended anybody in this House, Madam Speaker, I ask your apology and the apologies of the member. I mean no ill will when I say what I said here this afternoon.

Madam Speaker: The Honourable Member for Wellington.

Mr. Richard Seaborn (*Wellington*): Madam Speaker, I'll be very brief, for the other day I supported the sub-amendment submitted by the Honourable Member for St. James, and in doing so I think that I voted rather unwisely. I must confess that this is one subject that places me on the horns of a dilemma for I have seen the consequences of marriage failures manifested in many many ways, and if I think of this matter from a purely human standpoint, then I am inclined to agree that some leniency or relaxation of our divorce law should be considered. However, I do feel that these tragic failures are not a cause in

themselves but are the result in part of a general moral and spiritual decline in our national life. And reference to the one book that reveals the Christian precepts that we should follow has persuaded me that marriage is indeed a very solemn thing and should not be dismissed lightly. I do feel therefore that a relaxation as considered in this resolution and in the main amendment would be wrong and consequently I'll be voting against them.

Madam Speaker: Put the question.

Mr. Gray: Madam Speaker, I'm sorry, I waited for somebody else that wishes to speak.

Mr. John P. Tanchak (*Emerson*): Are you—is the honourable gentleman—

Madam Speaker: The Honourable Member for Inkster.

Mr. Gray: I'm not closing the debate.

Mr. Tanchak: Oh, I'm sorry. I thought the honourable member was closing the debate.

Mr. Gray: No, I'm not. Do you want to go ahead?

Mr. Tanchak: No, I'll wait. I'll wait. I was going to adjourn it.

Madam Speaker: The Honourable Member for Inkster.

Mr. Tanchak: Madam Speaker, I thought that the honourable member was closing the debate. I was going to adjourn it.

Madam Speaker: Put the question.

Mr. Tanchak: Madam Speaker, I move seconded by the Honourable Member from Carillon that the debate be adjourned.

Madam Speaker presented the motion and after a voice vote declared the motion carried.

Vol XI No. 40 2:30 p.m. Friday, March 26, 1965
4th Session, 27th Legislature, at Page 998

Madam Speaker: The proposed resolution standing in the name of the Honourable the Member for Inkster and the proposed amendment in amendment thereto by the Honourable the Member for Selkirk. The Honourable the Member for Emerson.

Mr. Tanchak: Madam Speaker, in his absence I adjourned the debate on behalf of the Honourable Member for Portage la Prairie.

Madam Speaker: The Honourable the Member for Portage la Prairie.

Mr. Gordon E. Johnston (*Portage la Prairie*): Madam Speaker, I am generally in agreement with the resolution. However, on reading it over more carefully I felt further amendment was in order, in order to more sharply define and clarify certain sections of the amendment. So, I beg to move, seconded by the Honourable Member for Assiniboia, that the resolution as amended be further amended by: 1. Placing the letter (a) before the words "That dissolution of marriage may be claimed by either husband or wife on the grounds that the respondent:" 2. By changing the numbering of the present paragraphs (1) to (4), both inclusive, and substituting therefor the letters (i) (ii) (iii) and (iv): 3. By deleting the present paragraph (5) and substituting therefor but numbering same (v) the following: "(v) has where the wife is the petitioner been guilty since the celebration of the marriage, of rape, sodomy or bestiality or:" 4. By deleting the present paragraph (7) and substituting therefor but renumbering same as (vi) namely: "(vi) has been legally separated from the petitioner for at least three years by virtue of a judgment of a court of superior jurisdiction on grounds on which an order of separation can be made under The Matrimonial Causes Act, 1857 (Imperial) and amendments thereto," and 5. By deleting the

present paragraph (6), renumbering same as (b) and substituting therefor the following: "(b) That any married person who alleges that reasonable grounds exist for supposing that his or her spouse is dead, may present a petition to the court to have it presumed that the said spouse is dead and to have the marriage dissolved, and that by such proceedings the fact that for a period of seven years or upwards the other party to the marriage has been continuously absent from the petitioner and the petitioner has no reason to believe that the other party has been living within that time, shall be admissible in evidence as prima facie proof that the other party is dead."

Madam Speaker presented the motion.

Mr. T. P. Hillhouse, Q.C. (*Selkirk*): Madam Speaker, I would like to address myself to this amendment and to further explain to the House that one of the main reasons for bringing it in is, firstly, to correct what was considered an error in grammar and an error in syntax. If the honourable members will take a look at the resolution as amended on the Orders for the Day, they will find that it reads, "that dissolution of marriage may be claimed by either husband or wife on the grounds that the respondent:" Then it goes on to list (1) (2) (3) and (4). Now number (5) is completely dissociated from the others because it's only on the petition of the wife. Number (6) is one which is available to both husband and wife and invokes the seven-year rule. Now if you read on, you have No. (7) which is completely dissociated from the first portion of the resolution, and in its present location it doesn't make sense, so for that reason it was felt that dissolution of the marriage may be claimed—that would be sub-paragraph (a). Then (1) (2) (3) and (4) would be (i) (ii) (iii) and (iv). Then we move number 7 up and make it sub-paragraph (b), but in order to get away from collusion and connivance which would result if this sub-paragraph (7) were left in its present form, we have inserted therein a separation granted by a superior court on grounds available to a petitioner under The Matrimonial Causes Act. Now the reason why we have done that is because we have felt that the members of this House did not want to make available grounds for divorce in this province which are grounds for divorce in some of the states in the Union, particularly Nevada, and by putting this in and qualifying the separation as being a separation granted by a superior court under The Matrimonial Causes Act, we are making it necessary, in order to get that separation, for the respondent to have been guilty of offences under The Matrimonial Causes Act which would give rise to a legal separation.

Now going back to the original amendment as it was made, simply a legal separation, I pointed out to the Court that this in effect would give to a police magistrate under The Wives and Children's Maintenance Act jurisdiction in divorce.

A Member: You pointed out to the House.

Mr. Hillhouse: Yes, to the House—I'm sorry. It's all the legal minds in here—they get me confused. I pointed out to the House that if we left it in its present form it in effect would be giving divorce jurisdiction to a police magistrate. Now one of the cardinal principles of matrimonial offences is that there must be no connivance or no collusion, and when an Information is laid before a police magistrate for a breach of The Wives and Children's Maintenance Act by a lawyer there need be no evidence as to whether or not there was collusion or connivance there at all. As a matter of fact, the wife could lay a charge against her husband of assault; the husband could appear in court and he could plead guilty to that charge—no evidence taken at all. A week later, the wife could go back to the same court and by virtue of the assault ask the magistrate to grant her an Order of Separation under the provisions of The Wives and Children's Maintenance Act. The husband could appear and he could agree to the order being granted. Now, if we leave this in, this resolution in its present form, we

creating that situation, and I suggest that we're making a mockery out of our matrimonial laws. And I feel, Madam, that this amendment as moved by the Honourable Member for Portage la Prairie should be accepted by this House, because I think it puts this resolution back into the place where it rightfully belongs as a serious resolution, and does not grant divorces for petty reasons.

Now, I know my learned friend—I know that the Honourable Leader of the NDP raised the point that it was the separation for three years. But I take the different view. I take the view that the separation in respect of the judicial separation must be for some legal ground, and I take the view too that the best legal grounds are those grounds set out in The Matrimonial Causes Act, because if we allow separations to be recognized as grounds for divorce, which were granted by a police magistrate, I think we're making a mockery out of the whole situation. And I therefore, Madam, Commend it most highly to this House to pass this resolution as amended by the Honourable Member for Portage.

Mr. D. M. Stanes (*St. James*): Madam, I rise on a point of order. I didn't want to interrupt the Honourable Member from Selkirk, but I wonder whether it is in order for this House to amend a motion which has been passed, and then re-introduce it having been amended?

Mr. Hillhouse: . . .Madam Speaker. . .spoken on it.

Mr. Gray: Madam Speaker, at the outset I wish to thank the honourable members of this House for the friendly discussion on this subject. I'm going to support the amendment to the amendment. I'm supporting the amendment and I'm supporting the original motion, because it is an improvement. In the last —what they say 170 years—it's definite improvement. And if you can't get a whole loaf of bread now, we'll be satisfied with a half a loaf. The very fact, however, that the honourable members here have shown such a friendly attitude and sympathy to those who suffer of the lack of law as to getting a divorce, in my opinion it's a very encouragement, and it will be well received by the people and particularly by those who are badly in need of some improvement of the divorce laws.

I have received many letters, very pathetic, tragic letters, but I have thrown them out because none of them wanted to have their names known, and I realize that a letter read must be tabled, and I had to respect their wishes. But I have taken the liberty of a case, just one case out of the many, which perhaps will indicate—it's not a letter—which perhaps will indicate one of the tragic situations. It will only take me a minute or two to present it to you, and I shall not occupy the time of the Legislature because I think that the situation is well known and well understood by everybody. But just a typical case.

This lady told me that she married a Canadian airman in England during the last war. She was 20 years of age, with a daughter who was then three months old. She and the child came to Canada in 1945 and were reunited with her husband. Her husband took her to his sister's house and there they stayed for three years. During all this time her husband never worked, and she was the bread-winner for the family, being a registered nurse. She worked very hard and her husband never provided for the family at any time. Their son was born in 1947 and she worked all during her pregnancy. Her husband got gratuity money, but drank every cent of it. He would take off for days at a time on a drinking spree along with his kind of women. After this gratuity money ran out, and if she didn't give him money for his drinks, he beat the children until she was forced to give the money. Finally, the break came for her out of this nightmare life when an uncle of hers and his wife came to visit her. They realized the predicament she was in and so offered to take her and the children to their home in Western Canada. She got a legal separation from her husband and he was to maintain the children. That was 17 years ago, and she has never received one penny from him. She always worked hard to maintain her children

and while she worked and—for them, she finally saved what she thought was a lot of money, to pay a lawyer $750.00 which he in turn paid to a detective in Ontario to track her husband down. But it was to no avail; they could not locate him. For the past four years she has been living common law. She met this man seven years ago, and after going steady for a few years they had no alternative but to live together as man and wife. They were happy, but they both knew that their socalled marriage was not the ideal marriage that they would both like. They have their own home, free of debt. She says he is a wonderful husband to her and an excellent father to the children. At present they are expecting a baby in July. She can't help but feel sorry that this baby, as it was now, it will be illegitimate.

And similar letters I've received which I said I am not going to read. I think that the attitude taken by the Legislature is a marvellous one, a wonderful one, and a human one. And something should be done. One of the amendments or the original motion I respectfully urge should be carried and save thousands of tragedies similar to those that I have just presented to you now. So again, I pray that any of the amendments—I'm going to vote for the amendments and the amendments and the motion—should be carried in this House.

Madam Speaker: Are you ready for the question?

Mrs. Carolyne Morrison (*Pembina*): I wish to move, seconded by the Honourable Member for Winnipeg Centre, that the debate be adjourned.

Madam Speaker presented the motion and after a voice vote declared the motion carried.

Vol. XI 2:30 p.m. Friday, April 9th, 1965,
4th Session 27th Legislature at Page 1414.

Madam Speaker: The adjourned debate on the proposed resolution of the Honourable the Member for Inkster, and the proposed amendment in amendment thereto by the Honourable Member for Selkirk and the proposed subamendment of the Honourable the Member for Portage la Prairie. The Honourable the Member for Pembina.

Mrs. Morrison: At the outset of my remarks, Madam Speaker, I want to make it clear to the members of this House that the views I will be expressing on the subject of divorce are my own personal views; and I want also to assure the members that the statements I make are the result of much thought and consideration, much soul-searching on my part, because we are dealing with a very serious topic.

I consider this subject of divorce to be the most serious problem we have debated in this Legislature because we are dealing with family life which is the foundation of our nation. I realize there are many people who cannot conscientiously accept what divorce stands for. They believe there should be no such privilege of divorce. I sympathize with them in their views because I too find there are occasions when I cannot conscientiously agree with some of the views which are considered by many people to be quite acceptable in our present day society. Each of us has to live with our own conscience and so I believe we each have to govern ourselves accordingly.

And so Madam Speaker, there are those who feel that marriage vows should never be cast aside, that what God has joined together should never be torn asunder. What a wonderful world it would be if this were possible, if such perfection could be realized. But since the world is made up of human beings we do not get perfection. I want to say again, Madam Speaker, the statements I make on this subject are the result of I might say, years of observation and serious thought. I am sure we all know cases of marriage where one member in

the partnership turned out to be, and I can think of no better description than to say, they turned out to be a "rotter" and for this type of marriage to try to hang together was a tragedy, especially when children were victims in such situations. Eventually the marriage broke up, a divorce was obtained and the innocent partner of the tragedy sooner or later married again and found complete happiness for themselves and their children; was able to take their rightful place in society and live the kind of life which I believe our Creator intended them to live. This is the type of situation, Madam Speaker, that makes me feel that there very definitely is a place for divorce in our society.

And now we come to the question of what is wrong with our present divorce laws. The answer to the question I believe is this: Our divorce laws are too rigid. In trying to keep people married we are promoting perjury. We are promoting sham adultery. We are promoting common-law relationships. We are promoting an immoral society. And I would ask us is this something we should be proud of? I don't think so.

And now Madam Speaker, I would like to consider another view in our society. We all know persons of very fine character who, because of mistaken choice, find they are completely incompatible and that life together is completely intolerable. These people have had to go through the most degrading experiences in order that they eventually can start a new life for themselves. Should we as lawmakers not show some concern for these people? Expecially the children, innocent children, who should be growing up in a normal, healthy, happy family life but who through no fault of their own are being deprived of what is their God-given right. Only within the past month, Madam Speaker, I have talked with school teachers who have in their classes children with very high intelligence ratings but because they are growing up in what we call "broken homes", because they are deprived of the loving guidance of two interested parents, they are so pitifully frustrated that they are well on the way to becoming delinquents. Is this the life we want for these children? Or should we make some attempt to improve this situation? Surely if our present day divorce laws are in any way responsible for this type of misery, the time is long overdue when these laws should be revised. Again I must emphasize, Madam Speaker, that this is a serious situation. I want to make it very clear that I never wish to see our divorce laws in Canada as frivolous and ridiculous as those in the land to the south of us but I do feel there is need for a more realistic attitude.

My purpose in adjourning this debate was to take time to study the amendment proposed by the Honourable Member for Portage la Prairie. I find this amendment acceptable, Madam Speaker, and I will be giving it my support.

Mr. Gray: Madam Speaker, I think I have still an opportunity to speak under the amendment to the amendment. Every time the Clerk checks me of the. . .

Madam Speaker: The Clerk informs me that the Honourable Member from Inkster spoke on the 26th of March to the subamendment; so he has no right to speak.

Mr. Gray: So have no right to speak. Well it's too bad. You missed a lot.

Madam Speaker put the question and after a voice vote declare the motion carried.

Mr. Gray: . . .carried. I'm not calling for the yeas and nays. It's carried that settles it.

Madam Speaker: The proposed motion as amended in amendment. The proposed motion as amended in amendment. . .

Madam Speaker put the question and after a voice vote declared the motion carried.

Madam Speaker: The proposed motion of the Honourable the Member for Inkster as amended.

Madam Speaker put the question and after a voice vote declared the motion carried.

Mr. J. M. Froese (*Rhineland*): Yeas and Nays, Madam Speaker.

Madam Speaker: Call in the members on the main motion.

Hon. Gurney Evans (*Minister of Industry and Commerce*) (*Fort Rouge*): Members say so, how many members ask?

Madam Speaker: Call in the members. The question before the House. The proposed resolution of the Honourable the Member for Inkster, as amended.

A standing vote was taken, the result being as follows:

YEAS: Messrs. Alexander, Baizley, Beard, Bilton, Bjornson, Campbell, Cherniack, Cowan, Desjardins, Gray, Guttormson, Hamilton, Harris, Harrison, Hillhouse, Johnson, Johnston, Klym, Lissaman, Lyon, McDonald, McGregor, McKellar, Martin, Mills, Moeller, Patrick, Paulley, Peters, Roblin, Schreyer, Shewman, Schoemaker, Smellie, Stanes, Steinkopf, Strickland, Tanchak, Watt, Weir, Witney, Wright and Mrs. Morrison.

NAYS: Messrs. Barkman, Evans, Froese, Jeannotte, McLean, Molgat, Seaborn, Smerchanski and Vielfaure.

Mr. Clerk: Yeas, 43; Nays, 9.

Madam Speaker: I declare the motion carried.

Vol XI 2:30 p.m. Tuesday, March 9, 1965
4th Session, 27th Legislature, at Page 408.

Madam Speaker: Agreed? The adjourned debate on the proposed motion of the Honourable the Member for Inkster and the proposed amendment thereto by the Honourable the Member for Selkirk. The Honourable the Member for Brandon.

Mr. R. O. Lissaman (*Brandon*): Madam Speaker, if anyone wishes to speak in the meantine I have no objection, but I wonder if the House would allow me to have this matter stand.

Madam Speaker: Agreed?

Mr. Laurent Desjardins (*St. Boniface*): Madam Speaker, I'd like to say a few words on this resolution.

Madam Speaker: The Honourable Member for St. Boniface.

Mr. Desjardins: Madam Speaker, I think that all the members of this house are aware that I am a member of the Roman Catholic Church. I think also that all, or most of the members anyway, also know that the church that I belong to, the Roman Catholic Church, do not recognize divorce; that is, does not recognize divorce for the people of their faith. Now, after having said this, I certainly do not wish to give you the information that I will oppose this resolution. I would like to make it clear that I'm speaking for myself only, that I might be criticized but this is my feelings on this, and I would like to go on record as being in favour of the amendment. As I say, I can only let my conscience guide me on this question, and I feel—I cannot see how I can, in this House, fight and suggest that we should have freedom for certain groups, for certain people, and also advocate that the government should not bring any restrictive legislation unless it is absolutely necessary, I can't see how I could see my way clear to oppose this.

I think that I should be honest and fair, and this, first of all, will not affect those who do not believe in divorce because of religious convictions. It is not going to affect them at all, and I consider that I am one of the lawmakers of this

province, and that, while we are studying laws, I think that we should have all the people of Manitoba in mind.

Right now, the way this is, I think that we are only encouraging adultery and more perjury. I feel that at times, in my mind anyway, they're certainly not suggesting that adultery should be permitted, but I think that there might be other points that might even be in certain occasions more important than that. It might be that a person commits adultery once—might be that a couple is very happy and they could be happy—they could forget this mistake—and then you can go ahead and have the divorce. In another case where the man will beat up his wife, she cannot have a divorce. I think that this should be permitted for those that do recognize, do accept divorce. I think that will help in certain financial arrangements when some people will leave either husband or wife.

There is one—as I say I'll vote for this resolution; I want to go in favour of this principle—in the amendment there is something that I would hope that my colleague would make sure—I'm not quite sure of Number (4), where we're speaking of incurable disease, mental disease. It seems to me that we're finding something new in this field every day and I'd want to make sure that somebody comes back, that this is a sickness after all and I think that we're committed to—I think that everybody when they get married feels that they have to stick by their partner in sickness. I can understand if there's positively proof that this person will never recover fully—but I think we should be very careful on this.

I would prefer the amendment instead of the resolution. I could not support the resolution, especially because of Number (6) where legal separation for more than two years—I can't see that at all; somebody could again make a mistake. None of us are perfect and I don't think that because you make a mistake and you have to serve two years this should be grounds for divorce.

So again, Madam Speaker, I would say that I'm definitely speaking only for myself, I'm not speaking—representing or even speaking for any religious group or any other group, and I feel that here in Manitoba anyway—if I was to try to prepare legislation for people of my own church, of course, I wouldn't take the same attitude—but for the people of Manitoba here I will go along with this amendment.

Madam Speaker: Agreed to have it stand?

APPENDIX C

Excerpts from the Queen's Bench Act, R.S.M. 1954 c. 52.

JURISDICTION

Jurisdiction of Court

49. The court is and shall continue to be a court of record of original jurisdiction, and shall possess and exercise all such powers and authorities as by the laws of England are incident to a superior court of record of civil and criminal jurisdiction in all matters civil and criminal whatsoever, and shall have, use, enjoy, and exercise, all the rights, incidents, and privileges, of said courts as fully to all intents and purposes as the same were, on the fifteenth of July in the year 1870, possessed, used, exercised, and enjoyed, by any of Her late Majesty's superior courts of common law at Westminster, or by the Court of Chancery at Lincoln's Inn, or by the Court of Probate, or by any other court in England having cognizance of property and civil rights, and of crimes and offences. R.S.M., c. 44, s. 49.

Of What Court May Hold Plea.

50. The court shall hold plea in all and all manner of actions, suits, and proceedings, cause and causes of action, matters, suits, and proceedings, whether

at law, in equity or probate, or howsoever otherwise, as well criminal as civil, real, personal, and mixed or otherwise howsoever; and may and shall proceed in all such actions, suits, proceedings, and causes by such process and course of proceedings as are provided by law, and as shall tend with justice and dispatch to determine the same, and the said court may and shall hear, decide, and determine, all issues of law or of fact when the issue of fact is submitted to it by law, and the court may and shall, with or without a jury, as provided by law, decide and determine all matters of controversy relative to property and civil rights both legal and equitable, according to the laws existing or established and being in England, as such were, existed, and stood, on the fifteenth day of July in the year 1870, so far as the same can be made applicable to matters relating to property and civil rights in this province; and all matters relative to testimony and legal proof in the investigations of fact and the forms thereof, and the practice and procedure in the court, may and shall be regulated and governed by the rules of evidence, and the modes of practice and procedure as they were, existed, and stood, in England on the day and year aforesaid, except as the said laws and the said rules of evidence and the said practice and procedure and the forms thereof may have been already changed or altered or shall hereafter be changed or altered by any Act or Acts of this Legislature or of the Parliament of Canada, or by any Act or Acts of the Parliament of the United Kingdom affecting the province, already passed or that shall hereafter be passed within their respective powers, or by any rule or rules, order or orders, of the court lawfully made or that shall hereafter be made, or by this Act;

Proviso as to Rights Acquired Under Laws of Assiniboia

Provided, always, that nothing herein contained shall affect any civil rights lawfully acquired or existing under the laws of Assiniboia on the day and in the year aforesaid. R.S.M., c. 44, s. 50.

Note: As to laws in force in province subject to jurisdiction of Parliament of Canada—See s. 4, c. 124, R.S.C. 1927.

Alimony

51. The court shall have jurisdiction to grant alimony to any wife who would be entitled to alimony by the law of England, or to any wife who would be entitled by the law of England to a divorce, and to alimony as incident thereto, or to any wife whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her by the law of England to a decree for the restitution of conjugal rights; and alimony, when granted, shall continue until the further order of the court. R.S.M., c. 44, s. 51.

Note: As to registration of alimony judgments, see The Judgments Act.

Criminal Conversation

52. The court shall have jurisdiction to entertain an action for criminal conversation. The law applicable to such actions shall be as the same was in England prior to the abolition of such action in England; and the practice shall be the same as in the other actions in the court, as far as it is applicable. R.S.M., c. 44, s. 52

ALIMONY AND MAINTENANCE

Enforcement of Orders, etc. for Alimony or Maintenance

90A. (1) A decree, order, or judgment for alimony or maintenance may be enforced in the same or the like manner as any other decree, order, or judgment of the court may be now enforced.

Appointment of Receivers

(2) The court may appoint a receiver of any moneys due, owing, or payable or to become due, owing or payable to, or earned or to be earned by, the person

against whom a decree, order, or judgment for alimony or maintenance has been made to the extent of the default and, in addition, to the extent of instalments due or to become due under the decree, order, or judgment.

Court's Discretionary Powers Not Diminished

(3) Nothing in this section shall interfere with the court's discretionary control over arrears of alimony or maintenance or the power of the court to alter, vary, and rescind a decree, order, or judgment for alimony or maintenance or to deprive the person in whose favour such decree, order, or judgment has been made of arrears in whole or in part or to determine the extent to which payment of arrears of alimony or maintenance shall be enforced. S.M. 1963 c. 16, s. 4.

APPENDIX D

R.S.M. 1954
C. 294

An Act respecting the Maintenance and Protection of Wives and Children

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Short Title

1. This Act may be cited as: "The Wives' and Children's Maintenance Act." R.S.M., c. 235, s. 1.

INTERPRETATION

Definition of "Habitual Drunkard"

2. In this Act, "habitual drunkard" means a person who by reason of frequent drinking of intoxicated liquor is incapable at times of managing himself and his affairs, or is an unfit and improper person to have the custody and control of his infant children, R.S.M., c. 235, s. 2.

FATHER'S LIABILITY TO SUPPORT CHILDREN

Liability of Father to Maintain Children

3. (1) Nothwithstanding any other Act or subsection (2), a man is legally liable to support, maintain, and educate, his children or the children of his wife, up to the age of sixteen years. Am.

Liability of Mother to Maintain Children

(2) A married woman or widow is subject to the same liability for the support, maintenance, and education, of her children as that to which a man is subject for the support, maintenance, and education, of his children. Am. R.S.M., c. 235, s 3; R. & S., S.M. 1945 (1st Sess.), c. 69, s. 1; am.

PROCEEDINGS TO ENFORCE LIABILITY

Application to County Court Judge or Magistrate in case of assault, desertion, etc.

4. Where a married man

(a) has been convicted of an assault upon his wife;

(b) has deserted her without lawful excuse;

(c) has been guilty of persistent cruelty to her;
(d) is an habitual drunkard; or
(e) has neglected or refused without reasonable excuse to provide reasonable maintenance and support for her or her children;

the wife or any person on her behalf may, from time to time, make an application to either a County Court judge or a police magistrate for an order. R.S.M., c. 235, s. 4.

Application to County Court Judge or magistrate in case of desertion of Child

5. Where any person who has the control of, or who is the guardian or parent of, or is charged with or liable for the support and maintenance of any child under the age of sixteen years

(a) has neglected or refused without reasonable excuse to provide reasonable maintenance and support for the child; or
(b) has deserted the child;

any person on behalf of the child may, from time to time, make an application to either a County Court judge or a police magistrate for an order. R.S.M., c. 235, s. 5.

Application by Woman Who Has Lived With a Man for a Year

6. Where

(a) a woman has lived and cohabited with a man for a period of one year or more; and
(b) he is the father of any child born to her;

she, or any person on her behalf, may, within one year from her ceasing to live and cohabit with him, make an application under sections 4 and 5 in respect to herself and her child for an order under sections 13 and 17, and this Act, mutatis mutandis, applies in such a case. R.S.M., c. 235, s. 6; am.

Where Wife is Habitual Drunkard

7. Where the wife of a married man is an habitual drunkard, the married man may make an application either to a County Court judge or a police magistrate for an order under section 18, and this Act, mutatis mutandis, applies in such a case. R.S.M., c. 235, s. 7; am.

Form of Application

8. (1) Application to a County Court judge under this Act shall be made on affidavit setting forth the cause or causes of complaint, and the judge shall in writing appoint a time and place for the hearing of the matter, which may be before the judge making the appointment or some other judge having jurisdiction within the judicial district.

Service

(2) Service of a copy of the appointment may be made upon the person complained against either in the manner provided for the service of writs by The County Courts Act or by any person on behalf of the complainant.

Witnesses

(3) Witnesses may by subpoenaed in the same manner as in a County Court action. R.S.M., c. 235, s. 8.

Note: As to Powers of Judge—See sec. 31 The Interpretation Act.

Information

9. Applications made to a police magistrate shall be made by laying an information upon oath. R.S.M., c. 235, s. 9.

Note: Procedure—See The Summary Convictions Act.

Grounds in affidavit

10. An affidavit or information made or laid under this Act may contain one or more grounds of the complaint set forth in sections 4 and 5. R.S.M., c. 235, s. 10.

One Information for Two Complaints

11. Where a married woman is entitled to make an application under section 4 against her husband, and also under section 5 in respect of her or their child, the application may be made by her or some one on her behalf by making one affidavit or laying one information, and in such a case an order may be made under both sections 13 and 17. R.S.M., c. 235, s. 11; am.

Hearing

12. Proceedings under this Act shall be heard and determined by a County Court judge or police magistrate within the judicial district in which the cause of complaint wholly or partially arose. R.S.M., c. 235, s. 12

CONTENTS OF ORDERS

Scope of Order

13. The judge or police magistrate, if he finds the complaint made under section 4 proven, may make an order or orders containing any or all of the following provisions:

Cohabitation

(a) That the wife be no longer bound to cohabit with her husband.

Custody of children

(b) That the legal custody of any child of the marriage between the wife and the husband, while under the age of twenty-one years be committed to the wife.

Access to child

(b1) That the husband have access, at such times and subject to such conditions as the judge or magistrate thinks convenient and just, for the purpose of visiting the child. S.M. 1955 c. 83, s. 1.

Note: Adopted Child Included—See Part VIII of The Child Welfare Act.

Weekly or Monthly Payments

(c) That the husband pay to the wife personally, or for her use to any third person on her behalf, such weekly, bi-weekly, semi-monthly or monthly sum as the judge or magistrate may, having regard to the means of both the husband and wife, consider reasonable.

Costs

(d) That in addition to the ordinary costs reasonable solicitor's costs be paid.

Forbidding Interference

(e) That the husband shall not enter upon any premises where the wife is living apart from her husband. R.S.M., c. 235, s. 13.

Husband Prohibited Entry

14. (1) Where the order made contains a provision under clause (e) of section 13, the husband shall not thereafter enter upon the premises. Am.

Penalty

(2) A husband who violates this section is guilty of an offence and liable, on summary conviction, to a fine of not more than one hundred dollars. Am. S.M. 1945 (1st Sess.), c. 69, s. 2: am R.S.M., c. 235, s. 14: am.

No Order to be Made When Guilty of Adultery or Desertion

15. Where it is proved that the wife has

(a) committed adultery which the husband has not condoned or connived at, or by his wilful misconduct conduced to; or

(b) deserted her husband without lawful excuse;

no order shall be made under section 13 for the support and maintenance of the wife. R.S.M., c. 235, s. 15; am.

No Order When Separation Agreement in Certain Cases

16. (1) Where the husband and wife have separated by mutual agreement, and the wife has agreed in writing to release her husband from liability for her support and maintenance, no order shall be made under this Act for her support and maintenance.

Limit of Application of Section

(2) This section does not apply

(a) where in a separation agreement, the husband has agreed to contribute to the support and maintenance of his wife and is in default therein under the agreement;

(b) where, in a separation agreement, the husband has not provided suitably therein according to his circumstances for the support and maintenance;

(c) where the wife has become, or is likely to become a public charge or in need of public assistance. Am. R.S.M., c. 235, s. 16; am.

Court May Order

17. The judge or police magistrate if he finds the complaint made under section 5 proven, may make an order or orders containing any or all of the following provisions:

Weekly or Other Payments

(a) That the man pay to a person appointed by the judge or magistrate such weekly, bi-weekly, semi-monthly or monthly sum for the maintenance and support of the child as the judge or magistrate having regard to the means of the man considers reasonable.

Payment of Costs

(b) That in addition to the ordinary costs reasonable solicitor's costs be paid. R.S.M., c. 235, s. 17; am.

Scope of order:

18. The judge or police magistrate, if he finds the complaint made under section 7 proven, may make an order or orders containing any or all of the following provisions:

Cohabitation

(a) That the husband be no longer bound to cohabit with his wife.

Custody of Children

(b) That the legal custody of any child of the marriage between the husband and the wife, while under the age of twenty-one years, be committed to the husband.

Payments to Wife

(c) That the husband pay to the wife personally, or for her use to any third person on her behalf, such weekly, bi-weekly, semi-monthly or monthly sum as the judge or magistrate may, having regard to the means of both the husband and wife, consider reasonable.

Forbidding Interference

(d) That the wife shall not enter upon any premises where the husband is living apart from his wife. R.S.M. c. 235, s. 18.

Wife Prohibited Entry

19. (1) Where the order made contains a provision under clause (d) of section 18, the wife shall not thereafter enter upon the premises. Am.

Penalty

(2) A wife who violates this section is guilty of an offence and liable, on summary conviction, to a fine of not more than one hundred dollars. Am. R.S.M., c. 235, s. 19; am.

HEARINGS

Hearing in Private

Matrimonial Causes (Amended Procedure)

(H. L.) 25 Geo. 5, 2 (ii).

20. (1) Before a public hearing of any proceedings under this Act, the judge or police magistrate shall consider, having regard to the information, whether it will be well to hear the parties in private with a view to settlement by mutual consent of the matters in question; and if he thinks fit he may summon the parties to appear before him and shall hear them in private with the intent before mentioned, and may receive in their presence information from any person whom the judge or magistrate believes to have knowledge of the relationship of the parties. Am.

Order Where no Settlement Made.

(2) Where, upon the hearing no settlement is arrived at but the parties consent, the judge or magistrate may make an order authorized under this Act, or in case there is no settlement or consent he may adjourn the hearing of the complaint upon such terms as to the intervening period as are within his jurisdiction to order upon the determination of the complaint. Am. R.S.M., C. 235, s. 20; am.

Interim Payments to Wife.

(3) The judge or police magistrate may include in the terms of adjournment an order that the husband pay to the wife personally, or for her use to any third person on her behalf, such weekly, bi-weekly, semi-monthly, or monthly sum, as the judge or police magistrate may, having regard to the means of both the husband and wife, consider reasonable. S.M. 1955 c. 83, s. 5.

Hearing May be Private.

21. Notwithstanding anything contained in this or any other Act upon the hearing the judge or magistrate may direct that it be held in private, and in that case no person other than the parties and their professional representatives and witnesses shall be present. R.S.M., c. 235, s. 21.

EVIDENCE

Wife a Compellable Witness.

22. In proceedings under this Act the parties are competent and compellable witnesses against one another. R.S.M., c. 235, S. 22; am.

Onus of Proof.

23. In proceedings under this Act the onus of proof of lawful excuse or reasonable excuse is upon the person alleging it. R.S.M., c. 235, s. 23; am.

VARYING ORDER

Judge or Magistrate May Vary or Discharge Order on Fresh Evidence.

24. On the application of the wife or husband or other person and upon cause being shown upon fresh evidence to his satisfaction, any judge or magistrate sitting in the judicial district in which any order under this Act was made may at any time

(a) alter, vary, or discharge any order; and

(b) increase or diminish the amount of any weekly, bi-weekly, semi-monthly or monthly payment ordered to be made. R.S.M., c. 235, s. 24; am.

Discharge of Order on Cohabitation or Adultery.

25. Where a married woman against whose husband an order is made for the payment to her or on her behalf of a weekly, bi-weekly, semi-monthly or monthly sum for her maintenance and support,

(a) voluntarily resumes cohabitation with her husband; or

(b) commits adultery;

the husband may apply to a judge or police magistrate sitting in the judicial district in which the order was made, who, upon proof of such fact may discharge wholly or in part the order. R.S.M., c. 235, s. 25; am.

ENFORCEMENT OR ORDER

Bond or Deposit.

26. (1) Where an order is made by a judge or magistrate, he may require the person against whom it is made to enter into a bond in a sum not exceeding five hundred dollars, with or without sureties, who shall severally justify and be approved by the judge or magistrate, conditioned for the fulfilment of the order, or he may require the person to make a deposit not exceeding two hundred and fifty dollars to secure the fulfilment of the order.

Committal in Default.

(2) Where the person does not furnish the bond or make the deposit as required, the judge or magistrate may commit the person to the common gaol of the judicial district for such period as he directs, there to remain unless the bond is sooner given or cash deposit made. Am. R.S.M., c. 235, s. 26; am.

Comimttal in Default of Payment

27. (1) Where a person against whom an order is made refuses or neglects, from time to time, to fulfil it, any judge or police magistrate in the judicial district in which the order was made, upon an application in that behalf, may commit the person to the common gaol for a period not exceeding forty days unless the order is sooner obeyed. Am.

Proof of Service

(2) In proceedings under this section it is not necessary for the applicant to prove that the person against whom the order was made was served with a copy of the order or orders or a minute thereof. Am. R.S.M., c. 235, s. 27; am.

Orders in duplicate

28. (1) Every order made under this Act shall be made and signed by the judge or police magistrate in duplicate.

Filing of Order in County Court

(1A) Where an order is made under this Act the party in whose favour it is made, shall, before an application may be received under subsection (1) of

section 27, file one of the duplicate originals of the order in the County Court of the district in which the cause of complaint wholly or in part arose, or in which the party against whom the order is made resides, or in any case coming within section 31, in the County Court of the district where the complaint is heard. S.M. 1955 c. 83, s. 8.

Subsequent Order

(2) Where an order has been filed, any subsequent order whether by way of variation, appeal, or otherwise, including an order made under subsection (6), shall be filed by the party in whose favour the order is made in the same County Court, and shall operate as an amendment or discharge, as the case may be, of the original order so filed.

Order a Court Judgment

(3) Every order made under this Act, if it is filed in a County Court as herein provided, shall, subject to subsection (3A), be conclusively deemed to be, for all purposes, a judgment of the County Court and enforceable as such.

Form and Effect of Certificate of Judgment

(3A) Where a certificate of judgment, based on an order for maintenance filed in a County Court as herein provided, is issued from that court, it shall include, in addition to the matters set out in the form in Schedule A to The Judgments Act, a certificate that the judgment is an order for maintenance made under this Act; and if it is registered in a land titles office it is a judgment for maintenance to which section 9 of The Judgments Act applies. S.M. 1958, c. 74, s. 1.

Fee

(4) A fee of fifty cents shall be paid upon every order filed. R.S.M., c. 235, s. 28; am.

Filing of Orders in Land Titles Office

(5) Every order made under this Act, may, without being filed in the County Court, be registered in any land titles office in the province and, if so registered, is an order to which section 9 of The Judgments Act applies.

Order Discharging or Postponing Order Registered in L.T.O.

(6) Where an order made under this Act or a certificate of judgment based on such an order filed in the County Court has been registered in a land titles office under The Judgments Act,

(a) if the order was made by a judge of a County Court, a judge of that County Court; or

(b) if the order was made by a police magistrate, a police magistrate in the judicial district in which the order was made;

upon application of any person interested, and after the party in whose favour the order was made has been given notice in such manner, including service by mail or by public advertisement, as the judge or police magistrate may require, if he is satisfied that in the circumstances it is reasonable and proper to do so, may make an order

(c) discharging or partially discharging the judgment or the original order in so far as it affects certain lands described in the order; or

(d) postponing the judgment or the original order in so far as it affects certain lands described in the order to allow registration of a mortgage, lease, or encumbrance specified in the order with priority over the certificate of judgment or original order, as the case may be. S.M. 1963, c. 96, s. 2.

Execution Under Order

29. (1) A distress warrant issued by a police magistrate or an execution issued out of a County Court for the recovery of any sums ordered to be paid under this Act may be executed against the personal estate of the person indebted, and the exemptions provided by The Executions Act do not apply thereto. Am.

Note: Respecting Distress—See The Summary Convictions Act.

No Exemption Under Registered Certificate or Judgment

(2) The exemptions provided in The Judgments Act do not apply to the enforcement of a certificate of judgment issued upon a judgment obtained under section 28. Am. R.S.M., c. 235, s. 29; am.

Appointment of Receiver

30. (1) Where an order made under this Act has become a County Court judgment, an application may be made to the court by or on behalf of the person in whose favour the order is made for the appointment of a receiver; and the court may appoint a receiver of any moneys due, owing, or payable, or to become due, owing, or payable to, or earned or to be earned by, the person against whom the order was made to the extent of the default and in addition to the extent of instalments due or to become due under the order. Am.

Reduction of Exemption

(2) A judge has the same power to reduce the amount of exemption in a case coming under subsection (1) as he would have under The Garishment Act. Am.

Application of Sec. 8

(3) Section I of this Act does not apply to applications under this section. Am. R.S.M., c. 235, s. 30; am.

SERVICE OUTSIDE PROVINCE

Service Outside Province

31. (1) Where it is made to appear to the judge or police magistrate that the married man or other person against whom the complaint is made under section 4, 5 or 6 is outside the province, the judge or magistrate may order the summons to be served upon the defendant wherever he may be found, and he may also direct the manner of proving the service. Am.

Place of Application

(2) In any case mentioned in subsection (1) the application may be made to a judge or a police magistrate within the judicial district in which the applicant resides; and, upon filing of the proof of service, the judge or police magistrate may proceed to hear and determine the complaint in the same manner as though a summons had been served upon the defendant in the province. R.S.M., c. 235, s. 31; am.

Note: See Gagen v. Gagen (1934), 3 W.W.R. 84.

LIMITATION

Limitation

32. No limitation contained in any statute or law operates to bar or affect the right to take proceedings under this Act or to enforce any order made hereunder. R.S.M., c. 235, s. 32; am.

APPEALS

Appeals

33. (1) In the case of proceedings taken before a County Court judge, an appeal lies therefrom in the same manner as an appeal from a judgment of the County Court.

Idem

(2) Subject to subsection (4) in the case of proceedings taken before a police magistrate, an appeal lies therefrom in the manner provided in The Summary Convictions Act as amended from time to time heretofore or hereafter.

Effect of Appeal

(3) Where an appeal is taken from an order made under section 13 and section 17, or either of them, the appeal shall not operate as a stay of proceedings, but the order may be enforced as though no appeal were pending unless the judge or magistrate who made the order otherwise orders. Am. R.S.M., c. 235, s. 33; am.

Exception as to Security in Transcript of Evidence

(4) Where a person appeals against an order made by a magistrate under section 4, 5, or 7, unless the appeal court otherwise orders, he shall not be required

(a) to deposit any money or other security for the costs of the appeal; or

(b) to furnish a transcript of the evidence taken in the proceedings before the magistrate;

and where the appeal court orders him to deposit money as security for costs, the amount to be so deposited shall be in the discretion of the appeal court. S.M. 1964, c. 59, s. 1.

SAVING CLAUSE

Rights to be Additional

34. The rights given under this Act are in addition to and not in substitution for any rights that may be given under any other law. R.S.M., c. 235, s. 34; am.

REGULATIONS

Regulations

35. Notwithstanding anything in this Act the Lieutenant-Governor-in-Council may make regulations,

(a) requiring proceedings under this Act in any part or parts of the province to be heard and determined before a specified magistrate or magistrates;

(b) requiring proceedings under this Act to be heard and determined at sittings of the magistrate specially fixed and apart from the general business of the magistrate. R.S.M., c. 235, s. 35.

APPENDIX "85"

STATEMENT
OF THE
CANADIAN CATHOLIC CONFERENCE
TO
THE SPECIAL JOINT COMMITTEE
OF THE SENATE AND HOUSE OF COMMONS
ON
DIVORCE

April 6, 1967

The Canadian Catholic Conference is pleased to accept the invitation to present a statement to the Special Joint Committee of the Senate and the House of Commons on Divorce. We offer the following considerations and recommendations regarding proposed changes in Canadian divorce laws.

The Canadian Catholic Conference, the national organization of the Catholic Bishops of Canada, carries on its activities through an administrative board and various elected commissions and committees. The general secretariate of the Conference is in Ottawa.

We have already submitted a statement to the House of Commons Standing Committee on Health and Welfare concerning the changing of federal legislation relative to contraception (September 9, 1966). The principles embodied in that submission are equally essential to a precise understanding of the present submission. For this reason, we include the earlier statement as an appendix.

I

THE ROMAN* CATHOLIC CHURCH AND THE INDISSOLUBILITY OF MARRIAGE

The Roman Catholic Church maintains that valid marriage is indissoluble. All her members, whatever be the laws of their country, are therefore committed to remain faithful to this sacred law on marriage. When two baptized persons marry, they are united until death by a bond that is both natural and sacramental.

Marriage in Christ is a sacrament of salvation, and the Church received from her Founder the responsibility of providing her members with the means necessary to live their Christian faith. Therefore, in this area the Church must make her own distinctive laws.

It is helpful to recall some of the reasons underlying the Church's position on the indissolubility of the marriage bond. They are rooted in the natural law, namely, the basic obligations which the Creator Himself has placed on His handiwork. But these reasons transcend the natural law and arise also from the new meaning which Jesus Christ has given to marriage.

The voluntary, permanent and exclusive union of husband and wife becomes, through the grace of the sacrament, the symbol and witness of God's redemptive plan. This is true at several levels.

* Roman Catholic Church signifies all Catholics in communion with the Holy See.

1. First, as regards conjugal love: this love, ever faithful and ready to forgive and meet changing circumstances, ever generous, striving to overcome egoism and self-seeking, ever trusting and reverential, sharing joys and sorrows, is both the manifestation and extension of the love that God offers to all men in Jesus Christ.

2. Moreover, through the procreation and education of the children, to which marriage is ordained by its very nature, the couple shares intimately in God's work of creation and salvation.

3. Finally, the Christian home, built on fidelity and the irrevocable gift of husband and wife to each other and to their children, is likewise witness to that profound unity which the Church is called to foster among all men. Herein lies a dignity which makes sacred the bond that unites them.

In this new dimension given by Christian marriage to the union of man and wife, human love finds its true maturity. Conjugal love, when inspired by the Gospel, is able in a special way to foster and develop the potentialities of each spouse, as well as the spiritual riches that they bring to their mutual lives.

Although many married couples may never attain this high ideal of conjugal love and fidelity, nevertheless the Church wishes to encourage and maintain it by her doctrine and laws. In the eyes of the Catholic Church, this ideal corresponds to the deepest longing of mankind, and represents a standard that serves well in times of difficulty.

Nevertheless, in serious and exceptional cases, it can happen that after a number of years a validly married couple may feel obliged to discontinue their common life. This decision may involve the good of the spouses themselves for whom life together may have become unbearable. The decision may concern also the good of the children whose human and religious stability is gravely endangered by the atmosphere of constant disagreement in the home. In these cases, the Church, having seriously examined the facts, permits what is known as "separation". In our view, there should be a civil procedure for a judicial separation upon certain limited grounds which, while not permitting the parties to remarry, would protect the rights of the children and the civil rights of the parties.

When the judicial separation does not provide sufficient safeguards for the rights of the partners and their children, Catholic couples are permitted to seek a civil divorce. They are then freed, before civil law, of all legal responsibility binding them to each other, and are juridically separated. Nevertheless, the Church, while tolerating such a recourse to civil divorce, continues to consider the married couple bound to each other. According to the mind and law of the Church, they remain mutually pledged to each other until one of them dies. Thus they are not free to remarry.

II

THE ROMAN CATHOLIC CHURCH AND PROPOSED CHANGES IN DIVORCE LEGISLATION

So far, we have discussed the teaching of the Church in regard to her own members. The Catholic Church maintains that civil authority has no power whatsoever to dissolve the marriage bond, and many non-Catholics restrict that power to divorce on grounds of adultery. It is possible however even for these, out of respect for freedom of conscience, to tolerate a revision of existing divorce legislation, with a view to obviating present abuses.

The Church, when asked for her opinion by civil legislators, must look beyond her own legislation to see what best serves the common good of civil society. With this in mind, and given the fact that a divorce law already exists in Canada, we offer the following considerations:

1. It is alleged that present divorce laws encourage perjury and collusion, if not adultery itself. To this is added the fact that the party considered innocent in the eyes of the law may be the more responsible for the marital discord; or, responsibility may be mutual. It is also true that judicial procedure, when carried on in a hurried and superficial manner, leads to further scandal and even injustice.

This situation, aggravated by the sincere conviction of many citizens that present legislation is defective, contributes to a widespread disrespect for law in general. In view of these considerations, the question arises whether the present law is conducive to the good of society.

2. Canada is a country of many religious beliefs. Since other citizens, desiring as do we the promotion of the common good, believe that it is less injurious to the individual and to society that divorce be permitted in certain circumstances, we would not object to some revision of Canadian divorce laws that is truly directed to advancing the common good of civil society.

It is not for us to go into detail about grounds for divorce which would be acceptable or not; this, we believe, should be left to the well-informed conscience of our legislators. However, we cannot overemphasize that an indiscriminate broadening of the grounds for divorce is not the solution to the problem of unhappy marriages. Such legislation undoubtedly would contribute to destruction of the essential values on which our society is built. In working out any changes that they think should be made in the present law, legislators must never lose sight of the sacred value of the family, the primary and basic cell of society. Their aim should be to avoid anything that might seriously endanger peace, love, frankness, stability and trust that make the home the base and centre of the well-being of the state.

III

PROPOSED PROGRAMS TO STRENGHTEN FAMILY LIFE

Divorce may cause problems more serious than those it seeks to control. Once a family has been disrupted, there arise special difficulties regarding the material, psychological and spiritual welfare of both parents and children. This is particularly true for children of adolescent age.

The best solution is to be found in an extensive rethinking of the entire body of legislation dealing with marriage and the family. An eventual revision of the divorce law makes sense only if it is part of a wide, positive policy for strengthening family values, and particularly for ensuring the serious motivation and proper preparation of couples intending marriage.

Social science confirms that the majority of family problems that end in divorce have their roots in the levity and lack of forethought with which many, especially younger people, approach marriage. The subsequent bitter disenchantment and crises should surprise no one.

It is the responsibility of civil authority to seek by appropriate laws to prevent such situations. To this end, we present the following considerations:

1. We urge your committee to consider how governments can best encourage public support for much more extensive research into all questions concerning marriage and the family.

Adequate research into marriage, its successes and its difficulties, is required for any proper revision of legislation, for realistic educational programs to prepare out citizens for lasting marriages, as well as for counselling and reconciliation services for marriages that are experiencing difficulties. Your committee appropriately urge legislators and public authorities at all levels to give serious consideration to opportunities for supporting research into family questions.

2. We also urge your committee to study seriously ways in which public authorities at all levels, in dialogue and co-operation with religious groups and interested private organizations, may give effective support to programs of education for marriage. Many other groups and Churches appearing before you have made similar proposals. The experience of the Catholic Church in this area lends strength to our conviction concerning the need of these courses.

3. There is also need for a broad common policy to strenghten family values in existing homes that require help in their difficulties. The basic causes of marital conflicts are often found in the inadequate family training that the partners received, and in the insecurity and discord of the homes in which they were reared. If the young do not learn from the counsel and example of their elders that love must build itself on self-denial and generosity, they are not likely to learn it at all.

4. Moreover, we earnestly ask that, as a service to couples in difficulty, the civil authority establish agencies to study each case carefully, and to seek positive remedies, taking account of the religious convictions of each couple. The experience of psychologists, sociologists, social workers and spiritual advisers whom we consulted shows that couples very often can be fully reconciled through the attentive and devoted work of these agencies. Those seeking divorce should first be directed to them. Civil society, and not just the Churches, should take an active lead in such attempts at reconciliation.

This calls for important changes in the procedures of divorce courts, where they exist. It is important that these courts include specialists in the social and pastoral sciences as well as in civil law. In this way, each case would be studied thoroughly while taking into account all the human dimensions of the problem.

We are grateful for the opportunity to present our views on this important matter which involves so intimately the future welfare of our country.

Schedule I

STATEMENT
OF THE CANADIAN CATHOLIC CONFERENCE
TO THE HOUSE OF COMMONS
STANDING COMMITTEE ON HEALTH AND WELFARE

* * * *

(Not for publication
Until After Presentation
to the House Committee)

The Canadian Catholic Conference thanks the House of Commons' Standing Committee on Health and Welfare for the invitation to testify on the subject matter of Bills C-22, C-40, C-64, and C-71.

The C.C.C. is the national organization of the Catholic Bishops of Canada. At present there are 101 episcopal members of the C.C.C., which carries on its activities through an administrative board and various elected commissions and committees. The general secretariate of the C.C.C. with its offices in Ottawa carries out the national policy of the C.C.C. through various departments, e.g., ecumenism, liturgy, lay apostolate, social action.

The invitation to give evidence before this committee is welcome for two reasons in particular.

First of all, it presents an opportunity for the C.C.C. to make its views known on proposed legislation affecting marriage and the family, an area of great concern to the Church as well as to society at large.

Secondly, it provides an opportunity for the C.C.C. to situate its particular observations on the above-mentioned bills in the broader perspectives of pertinent teachings of the 2nd Vatican Council.

Our comments are now being asked on proposed changes in Article 150 of the Criminal Code which would make it no longer a crime punishable at law to give information about or to distribute the means of preventing conception.

Because of the lively interest evoked by the hearings before this Committee, legislators in general and Catholic legislators in particular want to know our position.

The questions may arise. First, how should one conceive the role of a Christian legislator faced with any controversial moral issue? Second, what are our views on the proposed changes in the Criminal Code?

The first and more general question might be put in this way. Are legislators who are loyal to their Church bound to vote for laws prohibiting what the Church declares to be wrong? Are they obliged by their allegiance to the Church to work for the repeal of laws which allow what the Church holds to be wrong?

These questions could touch the legislative attitudes of a number of men in public life. We think therefore that they are quite properly presented before this committee, which is necessarily concerned with anything that might be an obstacle or aid to the legislative process in the question of the proposed changes of Article 150 of the Criminal Code.

To put our remarks on the role of the legislator into proper perspective, to avoid in so far as possible all misunderstanding, we will refer at some length to the teachings of the 2nd Vatican Council. The Council has given all of us deeper insights into the nature of the Church, the relationship of her official teaching authorities to her other members and of all of them to the political community. In particular we have in mind the council document that treats of the Church and politics and of the role of the Christian in the political community. Since it has special relevance to our appearance here, we include as an appendix to our present statement Part II, chapter 4 of the *Pastoral Constitution on the Church in the Modern World,* which is titled "The Life of the Political Community."

A simple and evident truth is proposed by this Constitution. The same persons are members of the religious community which is the Church and of the political community which is the State. The two institutions "serve the personal and social vocation of the same human beings" (*Church in the Modern World,* No. 76). The obvious ideal, then should be "wholesome mutual co-operation" for the benefit of human persons (*loc. cit.*).

> The political community, the Constitution says,
>
> "exists for that common good in which the community finds its full justification and meaning, and from which it derives its pristine and proper right. Now the common good embraces the sum of those conditions of social life by which individuals, families, and groups can achieve their own fulfilment in a relatively thorough and ready way" (*ibid.,* No. 74).
>
> The Church for its part
>
> "has also the right to pass moral judgments, even on matters touching on the political order, whenever basic personal rights or the salvation of souls make such judgments necessary. In so doing, she may use only those helps which accord with the gospel and with the general welfare as it changes according the time and circumstance" (*ibid.,* No. 76).

The Church recognizes that her role and competence are not to be confused with the role and competence of the political community. Thus "the faithful will be able to make a clear distinction between what a Christian conscience leads them to do in their own name as citizens, whether as individuals or in association, and what they do in the name of the Church and in union with her shepherds" (*loc. cit.*).

It is significant for our present purpose to note the Council teaching that within the political community Christians act "in their own name as citizens" (*loc. cit.*). Their actions, to be sure, should be guided by a well-formed Christian conscience, "for even in secular affairs there is no human activity which can be withdrawn from God's dominion" (2nd Vatican Council, *Dogmatic Constitution on the Church,* No. 36). But the fact remains that their decisions and actions in the political sphere must be their own. Their rights and duties as citizens do not flow from the fact that they belong to the Church.

Thus in the solemn *Dogmatic Constitution on the Church,* which is held by many to be the most basic document emanating from the Council, we read:

> "Because the very plan of salvation requires it, the faithful should learn to distinguish carefully between those rights and duties which are theirs as members of the Church, and those which they have as members of society. Let them strive to harmonize the two, remembering that in every temporal affair they must be guided by a Christian conscience— In our time it is most urgent that this distinction and also this harmony should shine forth as radiantly as possible in the practice of the faithful, so that the mission of the Church may correspond more adequately to the special conditions of the world today" (No. 36).

The same truth is explicitly taught again by the Council in its *Decree on the Apostolate of the Laity.* The layman is told that he must take on the renewal of the temporal order as his own special obligation. He must be guided by the light of the gospel, the mind of the Church and Christian love, yet in the temporal sphere he is exhorted to act on his own responsibility:

> "As citizens they must co-operate with other citizens, using their own particular skills and acting on their own responsibility" (No. 7).

The Christian legislator then has a Christian conscience and if it is truly formed it will be thoroughly imbued with Christian principles. But it remains his conscience. The Church may play a major role in the formation of that conscience through her teachings on the social order and the moral aspects of the political order. But these teachings do not properly extend to the technical areas of social or political questions. It will be up to the legislator to apply his principles to the concrete and often complicated realities of social and political life and to find a way to make these principles operative for the common good. He should not stand idly by waiting for the Church to tell him what to do in the political order. The ultimate responsible conclusions are his own as he fulfils the task he has along with all other legislators. That task is the promotion of the common good through the provision of wise and just laws.

At this point we are now able to return to the questions asked earlier, the answers to which we said were important in view of the legislative proposals before this committee.

Are Christian legislators bound to vote for laws which forbid what the Church forbids? Are they bound to oppose laws which permit what the Church forbids?

Perhaps we can see now that the questions answer themselves in the light of the principles of the 2nd Vatican Council which we have just cited.

The Christian legislator must make his own decision. The norm of his action as a legislator is not primarily the good of any religious group but the good of all

of society. Religious and moral values are certainly of great importance for good government. But these values enter into political decisions only in so far as they affect the common good. Members of Parliament are charged with a temporal task. They may and, in fact, often will vote in line with what the Church forbids or approves because what the Church forbids or approves may be closely connected with the common good. Their standard always lies in this question: Is it for or against the common good?

A willingness to honour this truth stressed by the Council and to trust the Christian legislator to fulfil his function in the light of his Christian conscience and his technical competence is the surest pledge of our desire to join with all men of good will in the building of a truly human world open to supernatural and Christian values.

And now, applying the foregoing arguments, we may approach more directly matter of Article 150 of the Criminal Code.

In our minds it is of the utmost importance to make it clear that our not opposing a change in the present law would not imply approval of contraception or of all methods of regulation of births. This is an entirely different question and we are not dealing with it in this statement.

Civil law (we use the term in the broad sense which includes criminal law) and morality are different in important respects; yet they have areas in common too. Civil law and moral law are neither completely distinct nor completely one. Not every evil deed calls for a civil law to forbid it. Those wrong deeds that can do notable harm to the common good constitute, in certain circumstances to be described below, proper subject-matter for criminal laws of the political community. Other wrong deeds are in truth forbidden by God's law and the wrongdoer will have to answer to God for his transgressions. It could be alleged that any genuinely immoral act is at least indirectly and remotely prejudicial to and morality are different in important respects; yet they have areas in common the common good. Yet there has to be a reasonable proportion between wrongdoing and the means taken to suppress it. The comparatively slight harm to the common good that might be caused by certain types of private or hidden delinquency has to be weighed against a much greater potential damage. Clearly, common good would not be served by a hopeless attempt of public authority to supervise the smallest details of moral behaviour through a vast and oppressive network of criminal laws and punishments.

The first condition, then, for making a moral offence into a legal or criminal offence is that it be notably contrary to the common good. But that is only the first condition. Certain other conditions must also be fulfilled before a law should be passed turning a wrongful act into a statutory crime punishable at law:

1. It should first of all be clear, as indicated already, that the wrongful act notably injures the common good;

2. The law forbidding the wrongful act should be capable of enforcement, because it is not in the interest of the common good to pass a law which cannot be enforced;

3. The law should be equitable in its incidence—i.e., its burden should not fall on one group in society alone;

4. It should not give rise to evils greater than those it was designed to suppress.

In the light of these conditions we consider Article 150, which forbids giving information about contraception as well as the sale or distribution of contraceptives, an inadequate law today. We consider it so quite independently of the morality or immorality of various methods of birth prevention. We believe it a deficient law because it does not meet all the conditions outlined above.

The law is not in fact enforced, and the good of public peace might well be lost by attempts to enforce it. A large number of our fellow citizens believe that this law violates their rights to be informed and helped towards responsible parenthood in accordance with their personal beliefs.

It is our clear understanding, of course, that the modification of the law in question is not to extend to that part of it which has to do with abortion. For our conclusions would be quite different were there question of such direct destruction of human life.

We have noted with satisfaction the number of witnesses before this committee who have called for safeguards to protect juveniles and the public in general from the dangers inherent in uncontrolled advertising and uninhibited display or sale of contraceptives. It is admittedly difficult to frame protective laws. But since it is possible to have a law that is at least partially effective against irresponsible advertising or sale of contraceptives, such safeguards should somehow be built into law.

If it seems likely that such safeguards would not be immediately operative byt might have to wait for new legislation even in provincial jurisdictions, then it would seem to us to be unwise to remove the existing protection provided by Article 150 of the Criminal Code until such safeguards are by one means or another assured.

Although the proposed legislation makes no provision for governmental programs in regulation of births, it would, if passed, remove a legal barrier to them. We feel bound to express grave concern for the privacy and effective freedom of the individual within such possible programs. The fields of financial help to the needy and of information on regulation of births should be so separated that acceptance of contraceptive devices or information is never in reality made a condition or necessary concomitant of welfare assistance.

While the state has a legitimate interest in health, education and poverty as social problem areas, it would be intolerable that the state should enter into the business of dictating to married couples how many children they may or should have, or what methods of regulation of births they should adopt. That should be the free decision of parents. Psychological pressures or persuasions that violate their rights and their freedom would, if permitted, be a grave abuse. Any governmental program would be strictly bound to protect the freedom and the human rights of family and conscience.

We are not suggesting that such abuse would necessarily be the official policy of any major governmental agency. But it does not take too much imagination to see how such subtle violence to individual rights could creep into actual practice.

Protection to prevent coercive tactics can and should be provided. We do not question the capacity of men of good will working together to provide such safeguards, perhaps through the provision of a board of review and control, or in some other effective way. What is necessary is to take positive steps at the outset by studying the potential dangers of governmental involvement in regulation of births. Otherwise the changing of Article 150 of the Criminal Code could result in unnecessary moral damage and social discord.

Provided, then, that safeguards against irresponsible sales and advertising are built into the law and that protection of personal freedom is ensured, we do not conceive it as our duty to oppose appropriate changes in Article 150 of the Criminal Code. Indeed, we could easily envisage an active co-operation and even leadership on the part of lay Catholics to change a law which under present conditions they might well judge to be harmful to public order and the common good.

At the same time we would urge continuing research into and public review of the effects that any changes in the law would have on individuals, families, and the common good of Canadian society as a whole.

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cf. text of Part II, ch. 4, of the *Pastoral Constitution on the Church in the Modern World*, titled "The Life of the Political Community."

Schedule II

The Church in the Modern World

Part II Chapter 4

THE LIFE OF THE POLITICAL COMMUNITY

Modern Politics

Our times have witnessed profound changes too in the institutions of peoples and in the ways that peoples are joined together. These changes are resulting from the cultural, economic, and social evolution of these same peoples. The changes are having a great impact on the life of the political community, especially with regard to universal rights and duties both in the exercise of civil liberty and in the attainment of the common good, and with regard to the regulation of the relations of citizens among themselves, and with public authority.

From a keener awareness of human dignity there arises in many parts of the world a desire to establish a political-juridical order in which personal rights can gain better protection. These include the rights of free assembly, of common action, of expressing personal opinions, and of professing a religion both privately and publicly. For the protection of personal rights is a necessary condition for the active participation of citizens, whether as individuals or collectively, in the life and government of the state.

Among numerous people, cultural, economic, and social progress has been accompanied by the desire to assume a larger role in organizing the life of the political community. In many consciences there is a growing intent that the rights of national minorities be honored while at the same time these minorities honor their duties toward the political community. In addition men are learning more every day to respect the opinions and religious beliefs of others. At the same time a broader spirit of co-operation is taking hold. Thus all citizens, and not just a privileged few, are actually able to enjoy personal rights.

Men are voicing disapproval of any kind of government which blocks civil or religious liberty, multiplies the victims of ambition and political crimes, and wrenches the exercise of authority from pursuing the common good to serving the advantage of a certain faction or of the rulers themselves. There are some such governments holding power in the world.

No better way exists for attaining a truly human political life than by fostering an inner sense of justice, benevolence, and service for the common good, and by strengthening basic beliefs about the true nature of the political community, and about the proper exercise and limits of public authority.

Nature and Goal of Politics

Individuals, families, and various groups which compose the civic community are aware of their own insufficiency in the matter of establishing a fully human condition of life. They see the need for that wider community in which each would daily contribute his energies toward the ever better attainment of the common good. It is for this reason that they set up the political community in its manifold expressions.

Hence the political community exists for that common good in which the community finds its full justification and meaning, and from which it derives its pristine and proper right. Now, the common good embraces the sum of those conditions of social life by which individuals, families, and groups can achieve their own fulfillment in a relatively thorough and ready way.

Many different people go to make up the political community, and these can lawfully incline toward diverse ways of doing things. Now, if the political community is not to be torn to pieces as each man follows his own viewpoint, authority is needed. This authority must dispose the energies of the whole citizenry toward the common good, not mechanically or despotically, but primarily as a moral force which depends on freedom and the conscientious discharge of the burdens of any office which has been undertaken.

It is therefore obvious that the political community and public authority are based on human nature and hence belong to an order of things divinely foreordained. At the same time the choice of government and the method of selecting leaders is left to the free will of citizens.

It also follows that political authority, whether in the community as such or in institutions representing the state, must always be exercised within the limits of morality and on behalf of the dynamically conceived common good, according to a juridical order enjoying legal status. When such is the case citizens are conscience-bound to obey. This fact clearly reveals the responsibility, dignity, and importance of those who govern.

Where public authority oversteps its competence and oppresses the people, these people should nevertheless obey to the extent that the objective common good demands. Still it is lawful for them to defend their own rights and those of their fellow citizens against any abuse of this authority, provided that in so doing they observe the limits imposed by natural law and the gospel.

The practical ways in which the political community structures itself and regulates public authority can vary according to the particular character of a people and its historical development. But these methods should always serve to mold men who are civilized, peace-loving, and well disposed toward all—to the advantage of the whole human family.

Political Participation

It is in full accord with human nature that juridical-political structures should, with ever better success and without any discrimination, afford all their citizens the chance to participate freely and actively in establishing the constitutional bases of a political community, governing the state, determining the scope of a political community, governing the state, determining the scope and purpose of various institutions, and choosing leaders. Hence let all citizens be mindful of their simultaneous right and duty to vote freely in the interest of advancing the common good. The Church regards as worthy of praise and consideration the work of those who, as a service to others, dedicate themselves to the welfare of the state and undertake the burdens of this task.

If conscientious co-operation between citizens is to achieve its happy effect in the normal course of public affairs, a positive system of law is required. In it should be established a division of governmental roles and institutions and, at the same time, an effective and independent system for the protection of rights. Let the rights of all persons, families, and associations, along with the exercise of those rights, be recognized, honoured, and fostered. The same holds for those duties which bind all citizens. Among the latter should be remembered that of furnishing the commonwealth with the material and spiritual services required for the common good.

Authorities must beware of hindering family, social, or cultural groups, as well as intermediate bodies and institutions. They must not deprive them of their

own lawful and effective activity, but should rather strive to promote them willingly and in an orderly fashion. For their part, citizens both as individuals and in association should be on guard against granting government too much authority and inappropriately seeking from it excessive conveniences and advantages, with a consequent weakening of the sense of responsibility on the part of individuals, families, and social groups.

Because of the increased complexity of modern circumstances, government is more often required to intervene in social and economic affairs, by way of bringing about conditions more likely to help citizens and groups freely attain to complete human fulfillment with greater effect. The proper relationship between socialization on the one hand and personal independence and development on the other can be variously interpreted according to the locales in question and the degree of progress achieved by a given people.

When the exercise of rights is temporarily curtailed on behalf of the common good, it should be restored as quickly as possible after the emergency passes. In any case it harms humanity when government takes on totalitarian or dictatorial forms injurious to the rights of persons or social groups.

Citizens should develop a generous and loyal devotion to their country, but without any narrowing of mind. In other words, they must always look simultaneously to the welfare of the whole human family, which is tied together by the manifold bonds linking races, peoples, and nations.

Let all Christians appreciate their special and personal vocation in the political community. This vocation requires that they give conspicuous example of devotion to the sense of duty and of service to the advancement of the common good. Thus they can also show in practice how authority is to be harmonized with freedom, personal initiative with consideration for the bonds uniting the whole social body, and necessary unity with beneficial diversity.

Christians should recognize that various legitimate though conflicting views can be held concerning the regulation of temporal affairs. They should respect their fellow citizens when they promote such views honorably even by group action. Political parties should foster whatever they judge necessary for the common good. But they should never prefer their own advantage over this same common good.

Civic and political education is today supremely necessary for the people, especially young people. Such education should be painstakingly provided, so that all citizens can make their contribution to the political community. Let those who are suited for it, or can become so, prepare themselves for the difficult but most honorable art of politics. Let them work to exercise this art without thought of personal convenience and without benefit of bribery. Prudently and honorably let them fight against injustice and oppression, the arbitrary rule of one man or one party, and lack of tolerance. Let them devote themselves to the welfare of all sincerely and fairly, indeed with charity and political courage.

Politics and the Church

It is highly important, especially in pluralistic societies, that a proper view exist of the relation between the political community and the Church. Thus the faithful will be able to make a clear distinction between what a Christian conscience leads them to do in their own name as citizens, whether as individuals or in association, and what they do in the name of the Church and in union with her shepherds.

The role and competence of the Church being what it is, she must in no way be confused with the political community, nor bound to any political system. For she is at once a sign and a safeguard of the transcendence of the human person.

In their proper spheres, the political community and the Church are mutually independent and self-governing. Yet, by a different title, each serves the

personal and social vocation of the same human beings. This service can be more effectively rendered for the good of all, if each works better for wholesome mutual co-operation, depending on the circumstances of time and place. For man is not restricted to the temporal sphere. While living in history he fully maintains his eternal vocation.

The Church, founded on the Redeemer's love, contributes to the wider application of justice and charity within and between nations. By preaching the truth of the gospel and shedding light on all areas of human activity through her teaching and the example of the faithful, she shows respect for the political freedom and responsibility of citizens and fosters these values.

The apostles, their successors, and those who assist these successors have been sent to announce to men Christ, the Savior of the world. Hence in the exercise of their apostolate they must depend on the power of God, who very often reveals the might of the gospel through the weakness of its witnesses. For those who dedicate themselves to the ministry of God's Word should use means and helps proper to the gospel. In many respects these differ from the supports of the earthly city.

There are, indeed, close links between earthly affairs and those aspects of man's condition which transcend this world. The Church herself employs the things of time to the degree that her own proper mission demands. Still she does not lodge her hope in privileges conferred by civil authority. Indeed, she stands ready to renounce the exercise of certain legitimately acquired rights if it becomes clear that their use raises doubt about the sincerity of her witness or that new conditions of life demand some other arrangement.

But it is always and everywhere legitimate for her to preach the faith with true freedom, to teach her social doctrine, and to discharge her duty among men without hindrance. She also has the right to pass moral judgments, even on matters touching the political order, whenever basic personal rights or the salvation of souls make such judgments necessary. In so doing, she may use only those helps which accord with the gospel and with the general welfare as it changes according to time and circumstance.

Holding faithfully to the gospel and exercising her mission in the world, the Church consolidates peace among men, to God's glory. For it is her task to uncover, cherish, and ennoble all that is true, good, and beautiful in the human community.

APPENDIX "86"

BRIEF TO THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

by
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March 29, 1967.

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D. Circuit Court Marriage Counseling Act, Mich. Comp. Laws 1964, 551.331-.344.

E. An Act to Amend the Divorce Reform Law of 1966, New York, February, 1967.

I. Introduction

The function of the legal order is basically to reconcile or harmonize conflicting or overlapping human claims or demands or desires.[1] Recognizing that the family unit has a fundamental role to play in society and that every effort must be made to preserve it, each nation has sought to regulate the formation, incidents and termination of the marital status. As was said in *Cook* v. *Cook*:

> "This status not only involves the well being of the parties thus united, but the good of society and the State. It is, therefore, a proper subject of legislation. It may, from public considerations, be fixed, regulated, and controlled by law.[2]

The increase in the divorce rate in the last century has led to a closer scrutiny of matrimonial law. The question facing every legislature is how can the law promote the stability of marriage?

The first error made by many is to look at the divorce rates and then to restrict their endeavours to promote marital stability by reforming only that part of the law that is directly related to divorce. The common result is failure. To achieve success attention must first be focused on the cause of the high divorce rates—the higher rates of marriage breakdown. Reform of the matrimonial law in order to prevent the breakdown of marriage will reduce the desire and need to resort to divorce.

The next obvious question is whether the law can prevent the breakdown of marriage? Every Christian nation has originally attempted to do so by the law that marriage is indissoluble. Again they have been unsuccessful due to the concentration on the dissolution of marriage. It is only recently that attention has begun to be focused on the breakdown of marriage. This is evident in the text of the recent Report of the Law Commission: Reform of the Grounds of Divorce. The Field of Choice[3] where it is recognized that:

> "...divorce is merely one of the possible outcomes, and not necessarily the most common one, of a marriage that has broken down...Today in England divorce has become one course which, normally, is readily available to the parties when a marriage has broken down. It is, however, but one course among many. Instead the parties may merely part, or they may enter into a formal separation agreement, or they may obtain a judicial separation, or a maintenance or separation order from a magistrates' court."[4]

Attention is directed to divorces because they are the sores that break out on the surface. Preventative medicine must cure the bad blood underneath.

It has been estimated that in the United States there is one divorce for every four marriages[5]; that the number of spouses who are deserted annually equals or exceeds the number of divorces granted[6]; and that the number of broken families outnumber the total of divorces by about five to three.[7] Studies show that marital discord increases the incidence of illegitimacy and juvenile delinquency and affects mental and physical health. Its impact upon the members of the family and the community results in enormous social and economic cost to a

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[1] Roscoe Pound, Interpretations of Legal History, 1923, p. 117.

[2] (1882), 56 Wisc. 195, at p. 207.

[3] Report of the Law Commission: Reform of the Grounds of Divorce. The Field of Choice, 1966, Cmnd. 3123 [hereinafter referred to as the "Scarman Commission"].

[4] *Ibid.*, para. 6.

[5] Allan N. Zacher, The Professional Responsibility of the Lawyer in Divorce (1962), 27 Mo. L. Rev. 466, at p. 467.

[6] *Id.*

[7] Paul W. Alexander, The Lawyer in the Family Court (1959), 5 N.P.P.A. 172, at p. 173.

nation.[8] To promote the nation's well being, a legislature is under an obligation to enact laws which will prevent the breakdown of marriages.

What laws can a legislature pass to effect this purpose? Laws providing for the education of young people, the raising of the minimum age for capacity to marry and premarriage counseling may reduce the chances of serious marital discord occurring. But what can the law do in a situation where two persons are married and marital discord does occur? What can the law do then to prevent a breakdown of that marriage? Laws can be enacted to encourage a reconciliation of the couple. Following the above quoted extract, the Scarman Commission continues:

> "In all of such cases the marriage may have broken down just as irretrievably as if there had been a divorce. If a divorce is obtained, it follows and is caused by the breakdown—not vice versa."[9]

It is suggested by the Scarman Commission that if a spouse applies for, for example, a judicial separation, the marriage may not be irretrievably broken down but if a divorce is sought, there has been an irretrievable breakdown. This is inaccurate. A marriage may be irretrievably broken down when only a judicial separation is sought. A divorce may not be desired for many reasons—one being religious affiliation. On the other hand, a divorce may be sought when there has not been an irretrievable breakdown of the marriage. It is impossible to categorize marital disputes because they are so personal. Some discord is conciliable, some is not. A breakdown that is irretrievable may occur before the spouses even separate but, in some cases, there may be a possibility of a reconciliation until the marriage is dissolved. Admittedly, the possibility of a reconciliation decreases as each progressive step is reached. Nevertheless, the law has a role to play from the time that marital discord occurs to the time that the final decree of dissolution is granted. Only then is the breakdown recognized by law to be absolute—the dead marriage is buried.

Historically, the role played by the law in its efforts to prevent the breakdown of marriage may be described as follows:

> "—there have been two opposing forces throughout the development of matrimonial law: i. attempts by the State to stabilize marriage by restricting the right to terminate one marital relationship in order to enter into another; ii. the desire of individuals to terminate one union which has become unbearable and to acquire the right to form another.
>
> In attempting to reconcile these particular interests, States in the common law systems have experimented with various institutions for dealing with marital disputes, ranging from Legislature to Family Court, and have also attempted to control personal conduct of citizens by different degrees of substantive rule, ranging from complete indissolubility of marriage to divorce for incompatibility of temperament."[10]

Besides these two aspects of matrimonial regulation—control by the institutions of decision and substantive control, there is a third device—regulation of the procedure which must be followed in order to go before an "institution of decision".

An attempt is made to examine the role that the law in Canada plays in preventing the breakdown of marriage by encouraging reconciliation; to evaluate its success in this role; and to determine if it can play a more successful role in the future. In order to effect this, the law which affects reconciliation will be

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[8] Henry H. Foster, Jr., Conciliation and Counseling in the Courts in Family Law Cases (1966), 41 N.Y. U.L. Rev. 353.

[9] Scarman Commission, para. 6.

[10] John M. Biggs, Stability of Marriage—A Family Court? (1961), 34 Aust. L. J. 343, p. 346.

surveyed from the three aspects of matrimonial regulation—substantive control, procedural control and control by the institutions by which the law is administered. The corresponding law in several other nations is also set out to illustrate in what aspects the law in Canada can be improved.

I. The Common Basis

1. *The law.*

The matrimonial law of the majority of nations surveyed has been derived from the ecclesiastical law in England before 1857. Many principles of the ecclesiastical law were given statutory effect in the Matrimonial Causes Act, 1857.[11] Thus, the principles affecting reconciliation in the Act of 1857 form a common basis upon which the laws affecting reconciliation in the existing matrimonial law of many nations have developed.

The history of attempts to prevent the breakdown of marriage by the medium of substantive law reveals that the law is involved in a circular pattern and has made little progress. There are two main reasons for this—concentration on means to prevent the dissolution rather than the breakdown of marriage, and the adoption of the matrimonial offence theory.

Marriage was indissoluble under the canon law in England. This failed because no attempt was made to prevent the breakdown of marriage and, therefore, estranged spouses resorted to the law of nullity and private acts of Parliament. Recognizing the need for reforms, Parliament passed the Act of 1857. For the first time marriage could be dissolved in England. However, in order not to contradict the teachings of the church any more than necessary, a divorce could only be obtained if one spouse committed an offence against the vows of matrimony. The offence chosen was adultery. Since that time the substantive law on the grounds for divorce has been amended and extended to no avail because the majority of the reforms are still based on the matrimonial offence theory.

The implementation of the matrimonial offence theory does not prevent the breakdown of marriage; but, far worse, it causes the ultimate breakdown of some marriages. The substantive law which is based on the matrimonial offence theory sets up a series of obstacles in the path of possible reconciliation. Judge Alexander points out that:

> "—[It is] anomalous for the law and the judges of reviewing courts to proclaim their allegiance to the institution of the family, then to turn around and place every conceivable obstacle in the way of those called upon to discharge these difficult and delicate duties involved in salvaging floundering families [?]. Yet that is exactly what legislatures and courts have done. They have set up an obstacle race—
>
> [The] traditional obstacles—are found in both the substantive and adjective law of divorce. Among these are the concept that divorce must be predicated upon fault or guilt; the accusatory approach; the adversary procedures from the caption of the original pleading, through the evidence and final decree; the doctrine of condonation; the doctrine of collusion as so frequently misapplied; and in places where the family court is not yet recognized, the denial of necessary jurisdiction and implementation."[12]

All these obstacles are, either directly or indirectly, consequences of the acceptance of the matrimonial offence theory.

The substantive laws which govern when a spouse may apply for a legal remedy, such as maintenance, judicial separation or divorce, require the appli-

[11] Matrimonial Causes Act, 1857, Stats. U. K. 1857, c. 85.

[12] Paul W. Alexander, The Family Court—An Obstacle Race? (1958), 19 U. Pitt. L. Rev. 602, at pp. 610-11.

cant spouse to claim that she has been wronged by her spouse and that he is completely at fault. This is usually quite untrue. The husband may have started to drink or gamble and stay out late or either spouse may be temporarily infatuated with a third person. Marital discord is caused by a conflict in the expectations that each spouse has of the other. The role of the legal order is to reconcile conflicting interests, is it not? The substantive law does not even *try* to do so. When a spouse turns to the law for help, it forces the couple to become antagonists. Commencing with the initial pleading, the applicant spouse must attack the other by giving the specific details of the alleged offence. This must also be done in an open court and is subject to widespread publicity. She is a wronged woman in the eyes of the world, therefore, she really begins to believe this herself. What began as a misunderstanding or disillusionment is encouraged by the law to develop into real hostility. It is for this reason that both social workers and jurists agree that once the spouses appear before a court the gong is rung and there is little chance of reconciliation.[13]

A far more obvious obstacle to reconciliation is the doctrine of condonation.[14] Condonation is the forgiveness of a matrimonial offence followed by a reinstatement of the offending spouse to his former position.[15] Condonation was a bar to a decree 'a mensa et thoro' under ecclesiastical law and was made an absolute bar to a decree of judicial separation by the Act of 1857.[16] A spouse who turns to the law for help may not be positive that she wants a divorce. She may want to "give it another chance" but she will soon be advised by a lawyer that if she does, she will not be able to obtain a legal remedy. Then what can she do if the attempt at reconciliation fails? Is it not better to be safe than sorry? To be safe the couple must be kept at arm's length. This is not only required by the law on condonation, but also by the law of collusion which treats any relations between the parties with suspicion. Thus, the law actually encourages a spouse to avoid any attempt to effect a reconciliation!

These laws are illustrative of the negative role played by the law as regards reconciliation. There are very few laws which, either directly or indirectly, encourage reconciliation. A direct attempt to encourage reconciliation is the legal remedy of restitution of conjugal rights. Section two of the Act of 1857 gave a court the power to grant a decree that the spouses shall live together unless there is a sufficient justification in law for the refusal to do so.[17] The decree is based upon the principle that it is the duty of a married couple to live together. This is a crude form of compulsory reconciliation which disregards the psychological elements involved. For this reason it has little effect upon reconciliation and is only rarely resorted to—usually when evidence of desertion is sought. It has been recommended that it be abolished.[18]

The only instance where a judge is specifically directed to consider the possibility of a reconciliation is when a petitioner for divorce has himself committed adultery during the marriage. Section 31 of the Act of 1857 gives the judge a discretionary power to grant the divorce decree or not.[19] The circumstances which warrant the exercise of the discretionary power in the petitioner's favour are set out in *Blunt* v. *Blunt*.[20] One of these is that there is a prospect of

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[13] Ralph P. Bridgman, Counselling Matrimonial Clients in Family Court (1959), 5 N.P.P.A. 187, at pp. 187-89.

[14] Scarman Commission, para. 25(e).

[15] Power, The Law and Practice Relating to Divorce and other Matrimonial Causes in Canada (2nd ed., 1964) edited by Julien D. Payne, p. 51.

[16] See *Henderson* v. *Henderson and Crellin*, [1944] A.C. 49 (H.L.).

[17] The courts in Nova Scotia possess a similar power. See the Divorce Act, R.S.N.S. 1864 (Third Series), c. 126 as amended by Stats. N.S. 1866, c. 13; *King* v. *King* (1904), 37 N.S.R. 204 (N.S. Sup. Ct. *in banco*).

[18] Putting Asunder, A Divorce Law for Contemporary Society. London S.P.C.K., 1966, Appendix C, para. 29 [hereinafter referred to as "Putting Asunder"].

[19] This is also the law in Nova Scotia. See the Divorce Act. *supra*, footnote 17, s. 10; *Hawbolt* v. *Hawbolt*, [1934] 2 D.L.R. 703 (N.S. Sup. Ct. *in banco*).

[20] [1943] A.C. 517 (H.L.).

a reconciliation between the spouses. This is the most powerful weapon that the law gives to encourage a reconciliation. It has been recently estimated that in England the discretion is asked for and some acts of adultery are disclosed in about 30 per cent of divorce cases.[21] However, it appears that the judges do not take this opportunity. Only rarely is a divorce refused because the petitioner has also committed a matrimonial offence.[22]

Other laws may encourage reconciliation in a more indirect way. The Act of 1857 provided more grounds for a judicial separation. Section 16 provides that a judicial separation could be obtained for adultery, cruelty or desertion without cause for two years or upwards. Consequently, when marital discord did occur a spouse could more readily obtain the legal remedy of a judicial separation which "in intent looked to a reconciliation of the parties"[23] and, upon this occurring, became 'functus'. On the other hand, a divorce dissolves the marriage and also the possibility of a reconciliation. However, this provision is probably largely ineffective as it does nothing positive to prevent the breakdown of marriage. Furthermore, the grounds for a divorce have been extended to equal those for a judicial separation in many nations and, even where they have not been, it is generally accepted that a divorce is not difficult to acquire. More recent laws such as those requiring the maintenance of a wife and children[24] probably do more to encourage reconciliation due to economic necessity.

The procedural laws under the Act of 1857 are also based on the matrimonial offence theory. The adversary procedures, from the filing of the petition to the granting of the decree absolute, as discussed above, have the effect of multiplying the misunderstandings and of widening the gap between the parties. It has been suggested that the interlocutory decree is a procedural device to encourage a reconciliation.

> "The reasons behind the requirement of the interlocutory judgments in matrimonial actions are twofold. One theory is that the desire to remarry is the motivating force behind most divorce actions; a forced waiting period would therefore lead to further reflection on the part of petitioning spouse. Another theory is that the waiting period is a path to the spontaneous reconciliation of the parties."[25]

If these are the sole reasons for the waiting period between the decree nisi and the decree absolute, it is a waste of time. Once the parties have entered the court, there is almost no hope for reconciliation.[26] The historical reason for the waiting period is for the intervention of the Queen's Proctor if it is suspected that the court is being deceived. However, such intervention is very rare.

Before 1857 the only institution in England which had the power to grant a decree dissolving a marriage was Parliament. It was eventually realized that not only was the use of Parliament for this purpose inequitable, as it favoured the wealthy, but also that Parliament was ill-suited for the hearing of divorce petitions. One hundred and sixty years from the time that the British Parliament passed its first bill expressly dissolving a marriage,[27] it passed the Act of 1857 in which it transferred jurisdiction to grant a divorce to the Court for Divorce and

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[21] Scarman Commission, para. 21.

[22] *Id.*

[23] *Gracie* v. *Gracie*, [1943] 4 D.L.R. 145 (Can. Sup. Ct.), per Rand J. at p. 154.

[24] i.e. Wives and Children's Maintenance Act, R.S.N.S. 1954, c. 316 as amended by Stats. N.S. 1956, c. 48; 1962, c. 55; 1963, c. 51; 1965, c. 57.

[25] Stephen Lang, A "Cooling-Off" Period in Divorce Actions (1958), 24 Brooklyn L. Rev. 313, at p. 317.

[26] Julius H. Miner, Conciliation rather than Reconciliation (1948-9), 43 Ill. L. Rev. 464.

[27] An Act was passed in 1697 dissolving the marriage bond of the Countess of Macclesfield. See, *supra*, footnote 10, at p. 345.

Matrimonial Causes (s.6). The divorce courts in the Commonwealth nations and in many of the States in America have been modelled on this Court. These courts are "superior" courts. They use the same procedure as followed when hearing any other case before it. This is natural as the matrimonial offence theory dictates that there must be a triable issue of right and wrong. The adversary procedures must be appropriate!

In his article, *The Place of the Family Court in the Judicial System*, Dean Pound illustrates why they are not appropriate as follows:

> "One difficulty in judicial treatment of family problems is that while marriage is sometimes spoken of as a contract, it is radically distinguishable from contracts which create duties of debtor and creditor in commercial relations. A legal procedure designed to deal with breach of such contracts, having to do with an economic relation capable of being reckoned in money, is not equal to treatment of the more complicated task of unraveling the complicated threads of the marriage bond and adjusting the respective relations so that each party may continue to live a useful life. Marriage creates a status. Dissolution of a status calls for a procedure different from the one that suffices for recovery of damages for breach of a commercial contract or reparation for forcible aggression upon person or property. The former affects both the social and the economic order; the latter affects the economic order only."[28]

Many arguments can be advanced to support Dean Pound's statement. For example, as noted above, the adversary procedure is followed due to the substantive law on divorce which is based on the matrimonial offence theory. Under this theory, one spouse is attacking the other for committing a matrimonial offence and, supposedly, the accused spouse will defend the action if this is false. During the hearing of this contentious litigation, all the relevant facts will be brought out by one side or the other and the judge will be able to decide whether to grant a decree on the merits of the case. It is a shame that so many intelligent and educated men have been forced to "look the other way" by such archaic laws. In fact, in 1965, 93 per cent of all divorce proceedings in England were undefended.[29] There is no element in an uncontested divorce case to bring out all the relevant facts. The only way to have all the facts before the court in such a case is to employ the inquisitorial procedure. The inquisitorial approach would not discourage reconciliation by creating real hostility where none existed beforehand as does the present procedure. It would encourage a reconciliation by bringing out the real reasons for the marital discord for both spouses to face. However, the inquisitorial procedure could not be employed by superior courts (where the hearing of a divorce often takes about as long as the hearing of a defendant traffic charge[30]) due to the pressure of time.

In many areas, the judges of the divorce courts move about on assizes. As Dean Pound points out, divorce is a specialized matter. To be able to recognize whether there is a possibility of a reconciliation, a judge must be experienced in handling matrimonial cases and have an understanding of human nature. Judges on assizes hear every class of action that comes before a superior court so they do not have the opportunity to become specialists. Moreover, they will have a full schedule and are unlikely to adjourn the proceedings for further inquiries or marriage counseling.

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[28] Roscoe Pound, The Place of the Family Court in the Judicial System (1959), 5 N.P.P.A. 161, at p. 168.

[29] Scarman Commission, para. 20.

[30] *Supra*, footnote 10, at p. 347; Peter J. T. O. Hearn, Marriage and Divorce. A Submission to the Special Joint Committee of the Senate and House of Commons on Divorce, 1966, p. 3.

It is obvious that superior courts are ill-suited to hearing divorces. Jurisdiction over divorce was transferred to the superior courts 110 years ago. Will we have to wait another 50 years before Parliament realizes that the superior courts are also ill-suited to handle the divorce law? A far more suitable court for hearing divorces, the family court, has been established in many of the states in America and will be discussed later.

The alleged justification for the implementation of the matrimonial offence theory is that it makes marital remedies difficult to obtain and, therefore, the spouses are under an inducement to make a success of their marriage. Surveys have shown that: "The most important factor in divorce is the decision by both spouses that divorce is desirable". Once that is achieved, "the vast body of substantive and procedural law is no bar".[31] Many legislatures have spent the last century devising laws in order that divorces will be difficult to obtain only to have them circumvented repeatedly. Some legislatures have realized that the imposition of legal rules as a norm of behaviour is futile. Developments in the social sciences have led to the recognition that both spouses may be at fault in marital disputes and that the breakdown of marriage theory is a more realistic basis for matrimonial law.[32] It focuses attention on the breakdown of the marriage and, consequently, on methods to prevent it. It is now almost generally accepted that:

> "...a good divorce law should seek to achieve the following objectives:
>
> (i) To buttress, rather than to undermine, the stability of marriage; and
>
> (ii) When, regrettably, a marriage has irretrievably broken down, to enable the empty shell to be destroyed with the maximum fairness, and the minimum bitterness, distress and humiliation."[33]

The object of this paper is to determine to what extent and by what media the first objective has been achieved by the law in nations which have the common legal basis described above. Before commencing this survey, the safeguards which are relied upon by the law under the Act of 1857 to prevent the breakdown of marriage should be discussed.

2. *The safeguards*

The history of nations which have attempted to prevent the breakdown of marriage by the sole medium of the common legal basis evidences that they have not been successful.[34] In fact, they did not realize the role that the law could play in this field. It was not until the twentieth century (and then mainly in the last two decades) that any legal order undertook a positive role in the reconciliation of spouses. Thus, couples experiencing marital distress turned to lawyers, doctors, the clergy and social workers for help. The two groups of most importance to the law are the lawyers and the voluntary organizations which engage in marriage guidance counseling.

The lawyer, as an officer of the court, is really part of the legal order. The legal profession is afforded one of the greatest opportunities to attempt to reconcile estranged spouses as a spouse seeking a legal remedy will normally consult a lawyer. However, opinions as to the role of a lawyer as a marriage counselor vary. Some writers point to the fact that ethically a lawyer is under a duty to act in the best interests of his client—including counseling a spouse and refusing to commence a divorce before an attempt at reconciliation through proper marriage counseling has been made.[35] In the United States,

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[31] Quintin Johnstone, Divorce: The Place of the Legal System in Dealing with Marital-Discord Cases (1952), 31 Ore. L. Rev. 299, at pp. 302 and 303.

[32] Putting Asunder, paras. 25-26.

[33] Scarman Commission, para. 15.

[34] *Supra*, footnote 10.

[35] See Charlton S. Smith, A Lawyers Guide to Marriage Counseling (1964), 50 A.B.A.J. 719.

> "...he has a professional obligation to recommend use of available conciliation services to divorce clients unless he honestly believes that the best interests of such clients would be prejudiced by reconciliation."[36]

Many are of the opinion that marital counseling is the same as any other form of legal counseling and that a lawyer is not only capable but also obligated to attempt to counsel the spouses concerning their marriage difficulties.[37]

However, the majority of the writers are of the opinion that most lawyers will not only not perform any such counseling service but are also incapable of doing so.[38] In the first place, many good lawyers will not handle marital discord cases. It has been estimated that about 8 per cent of the lawyers handle about 80 per cent of the divorce business in some cities.[39] The lawyers who do handle divorce cases are under a number of handicaps. In his article, *The Lawyer and the Family Court*,[40] Judge Alexander takes a realistic look at these handicaps and their effect on any attempt at counseling. For example, a lawyer is obligated to have a partisan approach and to concentrate on the facts, especially those relative to guilt. There is some question as to whether it is ethical to counsel both parties. Furthermore, a divorce means dollars.

> "When it comes to cases on domestic quarrels the average lawyer's rule-of-thumb is quick processing, for after all, . . .he seldom gets paid for his services.[41]

And if he does effect a reconciliation, his chances of being paid for his services are even fewer. Most important of all, a lawyer is trained in the law and the law and counseling therapy are incompatible.[42] This problem could be alleviated to a degree by more emphasis on social problems in the law schools and the organization of joint committees of lawyers and social workers.[43]

There is general agreement that:

> "The safest course would appear to be to probe into the family difficulties for enough to determine whether the case is hopeless, whether reference to a clinic or a private counsellor is indicated, or whether the situation is so trivial that sympathy and common sense may be sufficient to deal with the difficulty."[44]

Thus, a lawyer can perform an important task in the conciliation process. He can attempt minor counseling himself but, most important, he can and should refer all clients requiring professional counseling to a marriage counselor. The problem is to get lawyers to perform this function. Many do not feel that this forms any part of a lawyer's work.

The need for marital counseling, which the law failed to satisfy, resulted in the growth of non-legal, voluntary organizations. The system evolved in each

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[36] Paul Larsen, Trends and Developments in Oregon Family Law: Court, Counsel and Conciliation (1964), 43 Ore. L. Rev. 97, at p. 99. As authority for this statement, the author cites the American Bar association Ethics Committee, Opinion No. 82 (1932), published in Opinion of the Committee on Professional Ethics and Grievances 191 (1957). The Canadian Bar Association's Code of Legal Ethics does not contain a similar statement.

[37] *Supra*, footnote 5; Harry M. Fain, The Role and Relationship of Psychiatry to Divorce Law and the Lawyer (1966), 41 Calif. S.B.J. 46; Marie W. Kargman. The Lawyer as Divorce Counsellor (1960), 46 A.B.A.J. 399; Marie W. Kargman, Is Divorce Reconciliation the Lawyer's Problem? (1960), 46 Women L.J. 7 (where both negative and positive propositions are set forth).

[38] *Supra*, footnote 7; *supra*, footnote 13; Nester C. Kohut, The Lawyer in Domestic Relations (1959), 31 Man. B. News 7.

[39] *Supra*, footnote 12, at p. 609.

[40] *Ibid.*

[41] Kohut, *op. cit.*, footnote 37, at p. 8.

[42] *Supra*, footnote 13.

[43] See J. D. Cook and L. M. Cook, The Lawyer and the Social Worker—Compatible Conflict (1962-3), 12 Buffalo L. Rev. 410.

[44] Harper and Harper, Lawyers and Marriage Counselling (1961), 1 J. Family Law 73 (as reproduced in Ploscowe and Freed, Cases and Materials in Family Law, 1963, p. 631).

nation is unique in many respects. However, in the majority, the spouse must come to the agency voluntarily; counseling is provided whether litigation is contemplated or not; counseling is carried on on a long term basis if required by a professional marriage counselor; and the fee charged is based on the spouse's income.

The first problem is how to get a spouse involved in marital difficulties to come to the voluntary organization. The most common method is referrals from lawyers, judges, doctors and social workers. However, many people will not go to a voluntary organization even when referred there, especially those in the higher income level. This is evidenced by an experiment carried out by a family service bureau in San Bernardino, California. In one year a letter was written offering its counseling services to all the divorce litigants with children; one out of eight responded to their offer of counseling; and 15 per cent were reconciled.[45] It is submitted that the law has a role to play in the reconciliation of spouses even where voluntary organizations provide marriage counseling services.

However, even in nations where the law has entered the field of reconciliation, voluntary organizations are a necessary part of any counseling system. Such organizations only charge a fee based on the spouse's income, therefore, public financing is required. Furthermore there is a lack of professional marriage counselors to carry out this work. The law must not only encourage reconciliation, it must also establish and support other groups and organizations which will supplement its work.

All nations have, to varying degrees, utilized the law in an effort to prevent the breakdown of marriage. For discussion purposes, these nations are grouped according to which legal aspect has been mainly relied upon—substantive law or the institutions by which the law is administered.

III. Systems which Rely Mainly on Substantive Control

1. *Canada*

"Divorce in Canada is dealt with by the wrong courts, by the wrong judicial techniques and is granted on the wrong grounds."[46] Furthermore, the law does almost nothing to prevent the breakdown of marriage. That is, it does nothing more to effect this end than did the law under the Act of 1857 because that is still, in effect, the matrimonial law in Canada. Adultery remains the sole ground for divorce in seven provinces[47] and Quebec and Newfoundland have not progressed from the stage that the divorce law was in England in 1697 when only Parliament could dissolve a marriage. The institutions by which divorce law is administered are the provincial superior courts or divorce courts with the same judicial personnel as the superior courts.[48]

One reason why Canada, more than any other nation, has failed to utilize the law to prevent the breakdown of marriage by encouraging reconciliation, is probably the division of jurisdiction between Parliament and the provincial legislatures over matters relating to matrimonial law under the British North America Act, 1867. Under section 91 (26), Parliament has jurisdiction over "Marriage and Divorce" but the provincial legislatures have jurisdiction over the "Solemnization of Marriage" (s. 92 (12)) and over "the administration of justice in the province, including the constitution, maintenance and organization

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[45] *Supra*, footnote 13, at p. 191.

[46] Hearn, *op. cit.*, footnote 30, p. 1.

[47] Cruelty is a ground for divorce in Nova Scotia under a pre-Confederation statute—Stats. N.S. 1758, c. 17 as amended by Stats. N.S. 1761, c. 7.

[48] There appears to be some ambiguity as to whether the pre-Confederation divorce courts are superior courts under s. 96 of the B.N.A. Act. See O. Hearn, *op. cit.*, footnote 30, Note No. 3, p. 26.

of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in these courts" (s. 92 (14)). However, the authorities are in general agreement that Parliament has the jurisdiction, as regards matrimonial law, to enact not only substantive laws but also to prescribe judicial procedure and to confer jurisdiction on such courts as it deems best suited to handle matrimonial law.[49] Unfortunately, Parliament has never exercised this power to enact laws to prevent the breakdown of marriage by encouraging reconciliation.

A few provinces have taken the initiative in this field by establishing family courts. Although their jurisdiction is usually limited to juvenile delinquents and marital matters such as assault and maintenance, some family courts provide marriage counseling services. For example, when the Halifax County Family Court was recently established, there were no plans for it to undertake any marriage counseling activities. Within a few weeks the need for such a service was so obvious that an experienced social worker was employed largely to provide this service.[50] Under the present practice, if a woman goes to the Halifax County Family Court to file a complaint for maintenance, before laying the charge she will be interviewed by a social worker who will determine if there is any hope for a reconciliation of the couple. If there is, the social worker will request the complainant to defer laying the charge and to accept her counseling services. If the social worker's offer is accepted, she will attempt to counsel both spouses on a long term basis, if necessary.[51] This is, at least, a start. However, there is only one social worker connected with the Court[52]; only those spouses who wish to lay a charge in the Court are being reached[53]; and, although it is generally recognized that a social worker connected with a court should only do short term counseling, long term counseling must be undertaken.

Experience in the United States has shown that the most successful family courts only undertake short term counseling and refer spouses requiring more counseling to a voluntary organization.[54] The personnel at the Halifax Family Court and the Halifax Family Service Bureau recognize that this is the most effective practice. Unfortunately, it cannot be followed in many areas due to the lack of voluntary organizations to refer spouses to.

As noted above, in a system such as that in Canada, the only positive medium provided to check the breakdown of a marriage while there is still something to salvage, is the voluntary organizations which have been established to provide marriage counseling. Ironically enough, this one last effort to save a marriage before it breaks down is not even being made in every province. For example, the only voluntary organization in Halifax (and the only organization outside of the Halifax County Family Court to provide marriage counseling) is the Halifax Family Service Bureau. It employs three social workers. These social

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[49] See E. A. Driedger, Submission to the Special Committee of the Senate and the House of Commons on Divorce, October, 1966, p. 146 ff.; Power, *supra*, footnote 15, p. 1 ff.; O Hearn, *op. cit.*, footnote 30, pp. 2-6.

[50] Mr. Taylor, Co-ordinator of the Halifax County Family Court.

[51] This is the present practice in the Halifax County Court as described by Mrs. Margaret Halozan who is the social worker employed by the Court. The Court has only been established for about five weeks and Mrs. Halozan has only been connected with it for two weeks. Consequently, the practice is not settled. The Juvenile and Family Court of Metropolitan Toronto also provides a marriage counseling service. However, the practice followed by that court, as described by Anna Bacon Stevenson in the Working Paper on the Juvenile and Family Court of Metropolitan Toronto, March 23, 1966, pp. 17-18 for the Family Law Project of the Ontario Law Reform Commission is ambiguous.

[52] A second social worker is to be employed as soon as possible.

[53] This excludes spouses seeking a judicial separation or a divorce. However, both Mr. Taylor and Mrs. Halozan stated that a counseling service would be provided for spouses referred to the court by a lawyer, judge, social worker, etc. Mr. Taylor doubted that the same would be true for a spouse who comes in off the street and asks for help in her marital difficulties.

[54] See the discussion on the practice in the family courts that have been established in the United States, *infra*.

workers have to counsel their clients in dark and gloomy surroundings in an old building—which is certainly not the atmosphere conducive to looking on the brighter side. Nevertheless, the Bureau has more clients than it can handle.

One would think that it would naturally follow that the government, service organizations, charities and other similar groups would either provide the Bureau with more funds to enable it to extend its unique service to those requiring it or establish other similar voluntary organizations. Although this is the only logical solution, it is not what is happening. The Halifax Family Service Bureau is in such financial straits that there are doubts as to whether it will be able to continue to exist at all. Like the majority of other similar voluntary organizations, the Bureau charges its clients a fee based on the client's income. In Halifax, only 7 per cent are fee paying clients.[55] Consequently, the Bureau has to rely on outside groups for financial assistance. The same is true of the majority of other such voluntary organizations. However, the Halifax Family Service Bureau is only principally assisted financially by the United Appeal Fund and the city of Halifax. This financial assistance is not enough. Halifax is not unique. The same is true in many areas in Canada. The system of family courts with jurisdiction over matrimonial law is not the remedy for this situation. Every legal order which undertakes reconciliation relies on a system of voluntary organizations. The work of each must be coordinated in order to provide an effective deterrent to the breakdown of marriage.

The conclusion must be reached that the role played by the law in Canada is the negative one of the burial of some dead marriages. It has undertaken no positive role to prevent a marriage from breaking down irretrievably aside from the personal efforts of a few lawyers and judges and the establishment of family courts which provide a limited amount of marriage counseling in some of the provinces. Instead, it has set up obstacles to reconciliation through the substantive law on condonation, collusion and the grounds for divorce, the procedural law and the institutions by which this law is administered—all of which are based on the matrimonial offence theory. Furthermore, it is standing by and allowing the only safeguard against the unnecessary breakdown of many marriages, the voluntary organizations, to be buried along with the dead marriages.

No one could be accused of being overly dramatic for arriving at the conclusion that it is long past time for the Parliament of Canada to do something positive in this field. The Special Joint Committee of the Senate and the House of Commons on Divorce is a start. However, it is obvious from reading the minutes of its meetings that the only reform that is likely is an extension of the grounds for divorce that will put us in a similar position to that in England 30 years ago—a position that has been improved upon many times since. Positive reforms to prevent the breakdown of the marriage itself are not even being seriously considered by the Committee.

WHY? That is what is not understandable. A brief survey of the positive role played by the law in other nations reveals not only what can but also what should be accomplished by the law in Canada.

2. *England*

Although reforms have been made in the law under the Act of 1857 in order to remove some of the obstacles to a reconciliation, the prevailing attitude in England is that the law has no positive role to play in the reconciliation of spouses. The only role for the law is to support non-legal organizations whose function is to prevent the breakdown of marriage through the use of conciliation techniques. Thus, the British Parliament has been content to utilize indirect means to encourage reconciliation.

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[55] Mr. MacDougall, Director of the Family Service Bureau of Halifax.

The grounds for divorce have been extended. However, with the exception of the ground of insanity, they are all based on the matrimonial offence theory. In *Putting Asunder* it was recommended that the breakdown of a marriage be the sole ground for a divorce.[56] This proposal was rejected by the Scarman commission but they agreed that it should be one ground for divorce.[57] The latter position would appear to be most acceptable in Britain and a bill has been presented to the House of Commons to allow a divorce to be granted if the parties have been separated for five years.[58] Such reforms do not appear to have been considered as a means of encouraging reconciliation by diminishing the hostility which the legal procedure promotes when a legal remedy is sought. In fact, as we shall see, the British have a complete aversion to change in their judicial system.

Two reforms in the law are directly aimed at encouraging reconciliation. First, no petition for divorce can be presented before the expiration of three years from the date of the marriage.[59] A judge may grant special leave to present a petition in the case of exceptional hardship but, in determining whether to give leave, he must have regard to the interests of any relevant child and to whether there is a reasonable probability of a reconciliation between the parties during the three year period.[60] This provision appears to be both useful and an acceptable one to the public. Its retention has been advocated by all the British committees on the divorce law[61] and in the Report of the Scarman Commission it was concluded that:

> "...it is a useful safeguard against irresponsible or trial marriages and a valuable external buttress to the stability of marriage during the difficult early years."[62]

Unfortunately, there are no available statistics on the number of applicants for special leave and the number refused.

A far more conscious attempt to encourage reconciliation was made by the British Parliament in the passage of the Matrimonial Causes Act 1963.[63] It provided that resumption of cohabitation only raises a rebuttable presumption of condonation. Furthermore, adultery and cruelty shall not be presumed to have been condoned nor shall a period of desertion be deemed ended by the resumption or continuation of cohabitation for a period of three months provided the cohabitation was resumed or continued with a view to effecting a reconciliation.[64] The Bill, as introduced into the House of Commons, was entitled the "Matrimonial Causes and Reconciliation Bill". Although the words "and Reconciliation" were deleted from the title in its passage in the House of Lords, the following comments of Lord Shackleton make it clear that the British Parliament is becoming more and more aware of the need to prevent a breakdown of marriage rather than to prevent divorces. He said:

> "...this is a reconciliation Bill. It was intended as a reconciliation Bill, and although it 'mopped up' certain other matters on the way, it has even been known popularly in the press as the 'Kiss and make up Bill'...

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[56] Putting Asunder, paras. 25-26.

[57] Scarman Commission, para. 52 ff.

[58] H. C. Debates, October 25, 1966, p. 835.

[59] Matrimonial Causes Act 1965, Stats. U.K. 1965, c. 72, s. 2 (1).

[60] Ibid., s. 2 (2).

[61] See The Report of the Royal Commission on Marriage and Divorce, 1951-55, Cmnd. 9678, 1956, Ch. 5 [hereinafter referred to as the Morton Commission]; putting Asunder para. 78; Scarman Commission, para. 19.

[62] Scarman Commission, para. 19.

[63] Matrimonial Causes Act 1963, Stats. U.K. 1963, c. 45. In enacting this, Parliament emplemented an extended version of a recommendation of the Morton Commission; see para. 149.

[64] Now embodied in the Matrimonial Causes Act 1965, Stats. U.K. 1965, c. 72. See O. M. Stone, The Matrimonial Causes and Reconciliation Bill 1963 (1963), 3 J. Family Law 87; O. M. Stone, Matrimonial Causes Act 1963 (1963), 26 Modern L. Rev. 675.

> ...there is one thing on which I am sure we agree, and that is the desirability of achieving reconciliation as a means of strengthening the institution of marriage...
>
> ...it may be the first of a line Bills which will be deliberately and consciously dealing with reconciliation."[65]

The intention of Parliament is clear.

Unfortunately it was the first Act of this kind and it was poorly drafted. Consequently, the courts, in their interpretation of it, have gone a long way to defeat the intention of Parliament. It has been held that the provision does not apply if there is cohabitation in furtherance of a reconciliation that has been effected. It only applies if the cohabitation is continued or resumed "with a view to effecting a reconciliation".[66] Thus, while Parliament attempted to remedy the obstacle to reconciliation imposed by the doctrine of condonation, the courts have, in effect, replaced the obstacle by interpreting the provision so as to give the courts the power to say when a reconciliation has been effected and there has been a condonation. Spouses may avoid any attempts at a reconciliation for fear that the courts will say that a reconciliation has been effected. A commentator on these decisions points out that:

> "*Permanent* reconciliations are not encouraged by making *any* reconciliation irrevocable. A wife with a vested right to divorce, who lacks confidence in her husband's capacity to settle down permanently, will surely shun a reconciliation she suspects will not last and knows will deprive her of her remedy. Nor will the atmosphere be propitious if such a spouse does resume cohabitation, but studiously refrains from uttering any words of forgiveness so as to be sure of retaining the benefit of the section. Thus, reconciliations are likely to be positively avoided, or sought in unfavourable circumstances. But any reconciliations that are effected, yet do not last, are to be decisive—in the name of preserving the *effect* of reconciliations!"[67]

One wonders if the "reconciliation Bill" will, in fact, encourage reconciliation.

The British have continually insisted on retaining an illogical approach as regards reconciliation by the institutions by which the law is administered. On the one hand, they have accepted the fact that domestic matters require a different technique and that a special officer should be attached to the court who could use the techniques of investigation and conciliation. In 1936 a Departmental Committee[68] recommended the official use of probation officers for this purpose.

> "The recommendations led to the Summary Procedure (Domestic Proceedings) Act, 1937. It was recognized that the ordinary rules for the hearing of cases are not entirely appropriate for matrimonial cases and the Act laid down certain special rules for the trial of domestic proceedings. With regard to conciliation in matrimonial cases, the effect of the Act was to give statutory recognition to the work carried out by probation officers (since their first appointment in 1907) as conciliators and in making inquiries in matrimonial cases. The Act authorised their employment to undertake conciliation and to make investigations into the means of the parties in any proceedings involving maintenance. This resulted in extended use of the probation officers in conciliation work. It is now the

[65] H. L. Debates July 17, 1963, pp. 422-23.

[66] See *Brown* v. *Brown*, [1964] 2 All E. R. 828 (Div. Ct.); *Herridge* v. *Herridge*, [1966] 1 All E. R. 93 (C.A.).

[67] Alexander A. M. Irvine, The Concept of "Reconciliation" and the Matrimonial Causes Act 1963 (1966), 82 L.Q. Rev. 525, at p. 526.

[68] Departmental Committee on Social Services in Courts of Summary Jurisdiction, 1936, Cmnd. 5122.

general practice for magistrates to ask probation officers to try to bring husband and wife together again in all suitable cases coming before the court."[69]

Of all the statutory services, the probation officers do the greatest amount of formal conciliation work. In 1963, 41,815 cases were brought to its attention and it was successful in over half of these cases. It is interesting to note that only one-seventh of these were referred by the courts while over one-half applied for the service themselves."[70]

These figures prove that many people prefer to have an officer of the court settle their marital disputes. Again and again the British have ignored this fact and have insisted on limiting the use of conciliation techniques to the matrimonial cases of maintenance and judicial separation in the magistrates courts. Each commission has not only recommended that similar officers should not be attached to the High Court which has jurisdiction over divorce but, furthermore, that jurisdiction over divorce should not be transferred to a family court which would use the techniques of investigation and conciliation. The same Commission which gave the dissertation, quoted above, on how matrimonial cases are different and require different techniques went on to state what techniques were most effective in divorce cases as follows:

"The principle which has hitherto prevailed is clearly stated in the extract from the Report of the Gorell Commission:

'—the gravity of divorce and other matrimonial cases, affecting as they do the family life, the status of the parties, the interests of their children, and the interest of the state in the moral and social well-being of its citizens, makes it desirable to provide, if possible, that, even for the poorest persons, these cases should be determined by the superior courts of the country assisted by the attendance of the Bar, which we regard as of high importance in divorce and matrimonial cases, both in the interests of the parties and in the public interest.'

We accept this principle as sound, and as being just as applicable today as in 1912."[71]

But it had just finished stating that matrimonial cases required a different procedure! Nevertheless, it must have thought that a divorce was not a matrimonial case because it recommended that the High Court continue to retain sole jurisdiction over it—which it has.

Instead of involving the courts in any way in reconciliation in divorce cases, Parliament has taken measures to support the voluntary organizations involved in providing counseling services. Such organizations as the National Marriage Guidance Council, the Family Discussion Bureau and the Catholic Advisary Council are eligible for direct Exchequer grants and in the three year period from 1963 to 1966 these three alone received a total of £42,000.[72] Local authorities are also encouraged to make grants to such organizations.[73] This has led to the organization of Citizens Advice Bureaus which will refer spouses to such organizations.[74]

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[69] Morton Commission, para. 1066. These provisions are now found in the Magistrates' Courts Act, 1952, Stats. U.K. 1952, c. 55, ss. 59, 60 and 62.

[70] Putting Asunder, Appendix B, paras. 5-6.

[71] Morton Commission, paras. 749-50. See also Scarman Commission, paras. 29-32. Only Putting Asunder has recommended that the High Court use a more inquisitorial approach, see para. 84 ff.

[72] Putting Asunder, Appendix B, para. 7.

[73] For further discussion on this scheme see Final Report of the Committee on Procedure in Matrimonial Causes, 1948, Cmnd. 7024; Report of the Departmental Committee on Grants for the Development of Marriage Guidance. 1948, Cmnd. 7566; Morton Commission, part IV; Putting Asunder, Appendix E; Scarman Commission, paras. 29-32.

[74] See Anna Bacon Stevenson, Working Paper on Citizens Advice Bureau, Family Law Project, Ontario Law Reform Commission, June 2, 1966.

The decision to leave the jurisdiction over divorce with the High Court meant that a divorce remained too expensive for many people. This fact coupled with the increased emphasis on advice rather than litigation prompted Parliament to give effect to the part of Legal Aid and Advice Act, 1949 which provides a scheme of free legal advice to the indigent, including those in matrimonial difficulties.[75] It is ironical that this further reforms has served to prove that the British scheme for preventing the breakdown of marriage through reconciliation is not an effective one. During 1963, 30,303 legal aid certificates were filed by petitioners in matrimonial cases and £3,484 million was paid to their solicitors.[76] The government soon realized that it is not economically feasible to leave jurisdiction over divorce solely with the High Court and it has announced its intention to give jurisdiction over uncontested divorce cases to the county courts. It expects to save £400,000 annually by doing so.[77]

Financial difficulties are finally making the British aware that jurisdiction over divorce should be transferred to another court. Money may be the source of all evil but it may be the thing that will make the British transfer the jurisdiction over divorce to the magistrates' courts or even a family court! They had previously rejected any such suggestion on three grounds. The first is that to have a lower court handle divorce would not be dignified. In fact there is a

> "—very strong and wide body of opinion throughout the country that, if the most solemn contract of a person's life is to be ended, it should be done with great solemnity and that, it is far too grave a matter to be sandwiched between the collection of a couple of bad debts."[78]

The first error is to consider a marriage as a mere contract. Furthermore, a family court is not open to the criticism that a divorce action would be "sandwiched between the collection of a couple of bad debts"; that is one of its greatest attributes. Any criticism on the attitude that dignity must be maintained at all costs is almost too obvious for comment. It is submitted that any government which places a higher value on dignity than on the welfare of society is subject to the maxim 'pride cometh before a fall'. Moreover, it would appear to be much more 'dignified' to rationally discuss a problem with a caseworker than to hurl accusations in an open court. The other reason for the rejection of transferring jurisdiction to a court which would use the techniques of investigation and conciliation is the expense.[79] The British are now finding out that it may be more expensive not to. The experience in the United States has been that the state actually saves money due to the decrease in welfare payments, etc.[80] The third reason is that the Commissions all claim to have examined similar systems in other countries and they have all proved unsuccessful.[81] One must doubt these statements for two reasons. In the first place, they appear to be under the impression that all court systems require compulsory conciliation proceedings; and, in the second place, many systems have proved to be successful.

In summary, the English law has been reformed in an effort to prevent the breakdown of marriage by encouraging a reconciliation but it leaves a great deal to be desired. In the words of the Scarman Commission,

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[75] Legal Aid and Advice Act, 1949, Stats. U.K. 1949, c. 51, s. 7. See L. Neville Brown, English Family Law since the Royal Commission (1961-62), 14 U. Toronto L. J. 52, at p. 65.

[76] H. C. Debates, March 23, 1964, p. 2 (Written Answers).

[77] H. C. Debates, December 15, 1965, pp. 1261-63.

[78] H. C. Debates, March 16, 1964, p. 984. See also Morton Commission, para. 749.

[79] Scarman Commission, para. 61 ff.

[80] See *supra*, footnote 10, at p. 352; Roger Alton Pfaff, The Role of the Social Worker in the Judicial Process (1964), 50 A.B.A.J. 565, at p. 567.

[81] See Morton Commission, para. 340; Putting Asunder, Appendix E, para. 3; Scarman Commission para. 30.

> "It does not do all it might to aid the stability of marriage, but tends rather to discourage attemps at reconciliation. It does not enable all dead marriages to be buried, and those that it buries are not always interred with the minimum of distress and humiliation. It does not achieve the maximum possible fairness to all concerned, for a spouse may be branded as guilty in law though not blameworthy in fact. The insistence on guilt and innocence tends to embitter relationships, with particularly damaging results to the children rather than to promote future harmony. Its principles are widely regarded as hypocritical. In particular, it has failed to solve four major problems with which a reformed divorce law must grapple."[82]

The first major problem with which it has failed to grapple is that of reconciliation!

3. *Australia*

In the reform of its matrimonial law, Australia has made a more deliberate attempt to prevent the breakdown of marriage by encouraging a reconciliation than has any other Commonwealth nation. Its law is of particular interest to Canada as it is also a federal state. In the Matrimonial Causes Act, 1959[83] the federal government enacted a comprehensive law dealing with matrimonial causes which the Parliament of Canada would do well to consider.

Part II of the Act provides that marriage guidance organizations which have been approved by the Attorney-General may receive financial assistance.[84] The Attorney-General is given an almost complete discretionary power on whether to approve an agency or not and he may grant his approval subject to conditions. Thus, an organization must meet certain standards as regards facilities, staff and service by consultants. An approved organization must furnish the Attorney-General with its financial reports.[85] A marriage guidance counselor must take an oath of secrecy and is neither competent nor compellable to disclose before a court any communication made to him in his capacity as a marriage guidance counsellor.[86] In 1966, there were 16 approved marriage guidance organizations receiving substantial sums of money.[87] One effect of these provisions has been to enhance the status of the organizations and to increase the interest of the community in the services they offer. More people are seeking help when they encounter marital difficulty, and they are seeking it earlier.[88]

The Matrimonial Causes Rules contain provisions to ensure that all spouses are aware of such organizations before they enter into litigation. Rule 15 requires a solicitor involved in a matrimonial action to advise his client of the provisions in the Act relating to reconciliation and the existence of marriage guidance organizations and to discuss the possibility of a reconciliation. The solicitor must endorse a certificate to this effect on the petition when made. In the year ending June, 1964, 7 per cent of all cases dealt with by approved marriage guidance organizations were referred by lawyers.[89]

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[82] Scarman Commission, para. 28.

[83] Matrimonial Causes Act, 1959, No. 104. See Appendix A for the exact wording of the provisions discussed.

[84] *Ibid.*, ss. 9-10.

[85] *Ibid.*, s. 11.

[86] *Ibid.*, s. 12.

[87] D. M. Selby, The Development of the Divorce Law in Australia (1966), 29 Modern LRev. 473, at p. 486; L. V. Harvey, Marriage Counseling and the Federal Divorce Law in Australia (1964), 26 J. Marriage and Family 83. In the latter article, it is reported at page 84 that there were 19 approved agencies in 1963 and that they received £52,000.

[88] Harvey, *op. cit.*, *ibid.*, at p. 85.

[89] Scarman Commission, para. 31. It recommended that this requirement be adopted in England.

In case all these attempts fail, the law has placed one further safeguard in the court itself. Under Part III a judge is under a duty, in appropriate cases, to consider the possibility of a reconciliation. If he thinks that there is a possibility of a reconciliation, he may adjourn the proceedings and attempt to reconcile the parties himself or appoint someone else to do so. Admissions made by the parties are privileged and, after 14 days, either party may request that the proceedings be continued.[90] However, by the time that the legal procedure required in matrimonial cases has been fulfilled and the parties are before a court, there is little hope for a reconciliation. An Australian judge has concluded that:

> "Experience suggests that the provisions of Part III remain in the realm of pious hope. By the time a matrimonial cause reaches a hearing the parties are too far apart, one of them, at least, is too anxious for a final determination of the suit and too much bitterness has been engendered to allow any reasonable prospect of reconciliation. It is only on the rarest occasions that attempts are made, pursuant to Part III, to effect a reconciliation after the hearing has begun, and it is doubtful if any such attempt has been successful."[91]

As noted above, many spouses will not go to voluntary organizations, even when referred by their lawyers. It also appears that there is little likelihood of a reconciliation once parties are before the court. This is the reason why many jurisdictions in the United States have placed social workers in the courts themselves—to insure that all prospective litigants have been counseled before going into court. These systems will be discussed later.

Other reforms have also been made in the substantive and procedural law of Australia. The grounds for divorce have been extended to include 5 year's separation with no reasonable likelihood of a reconciliation.[92] The English provision as regards condonation has also been adopted.[93] Similarly, section 43 provides that no legal proceedings for a divorce or judicial separation may be commenced within three years of the date of marriage. In an attempt to slow down the tempo of a divorce and to make a petitioner face the consequences of a divorce, section 68 and rule 198 require all applications for ancillary relief to be instituted with the same petition as that by which the proceedings for principal relief are instituted. Thus, the parties are encouraged to get together to settle ancillary matters and to 'think things over'. So that the law on collusion would not deter parties from doing so, in section 40 collusion is made an absolute bar only if it is "collusion with intent to cause a perversion of justice".

It is still too soon to know what effect these provisions, which did not come into effect until 1961, have had on the breakdown of marriage in Australia. As regards the divorce rate, the most that can be said is,

> "On the one hand, the reconciliation and slowing-down provisions have not led to a significant fall in the divorce rate. On the other hand, the availability of more liberal grounds for divorce has not led to a spectacular rise in that rate."[94]

The Act has been criticized for giving federal jurisdiction to the existing state superior courts instead of establishing family courts with jurisdiction over matrimonial law.[95]

The matrimonial law of New Zealand has been reformed in similar aspects but to a lesser extent. The grounds for divorce include separation and there is a

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[90] *Supra*. footnote 83, ss. 14-16. The Scarman Commission also recommended that a judge in Britain should be empowered to adjourn the proceedings, see para. 32.

[91] Selby, *op. cit.*, footnote 87, at p. 487.

[92] *Supra*, footnote 83, s. 28.

[93] Matrimonial Causes Amendment Act, 1965 which adds s. 41A to the Act of 1959.

[94] Selby, *op. cit.*, footnote 87, at pp. 488-89.

[95] See *supra*, footnote 10.

provision regarding condonation which is similar to the English one except that the trial period is limited to two months.[96] It has also adopted the Australian provision which places a duty on the judge to consider the possibility of a reconciliation. If there is a possibility, the judge may adjourn the proceedings and nominate a conciliator.[97]

The reforms discussed above evidence an attempt by the legislatures in Britain, Australia and New Zealand to prevent the breakdown of marriage by encouraging a reconciliation. The criticism of the matrimonial law in these countries has been that,

> "...in attempting to maintain stability of marriage in the past, the State has tried to stop the water boiling by holding the lid of the kettle on instead of removing the heat which caused the water to boil in the first place. The emphasis has been on effect rather than the cause."[98]

Only Canada could still be accused of not making any effort to "remove the heat". However, all the Commonwealth nations have insisted that jurisdiction over divorce should remain in the superior courts and have rejected the establishment of family courts. Australia and New Zealand have empowered the judge to adjourn the proceedings and attempt a reconciliation. Similar provisions are found in the matrimonial law of Belgium,[99] Hungary,[100] Germany,[101] and Japan.[102] One must turn to the United States to examine the established methods of treating the "cause" by having marriage counselors attached to the court.

IV. Systems Which Rely Mainly on the Institutions by Which the Law is Administered

Conciliation proceedings are not the invention of any jurisdiction in the United States. When matrimonial law was the exclusive jurisdiction of religious organizations, the laws of some required the spouses to attempt to conciliate before a formal separation could be obtained. The practice was adopted by civil authorities. As early as 1886, the French law made it mandatory that parties seeking a divorce must first be interviewed by a judge who was under a duty to attempt to reconcile them. The practice was first adopted in the United States by Michigan in 1919.[102A]

Many jurisdictions in the United States have, since 1919, focused their attention on the problem of the breakdown of marriage and the importance of conciliation practices as a means to prevent it. Realizing that many spouses will not go to voluntary organizations but will go straight to a lawyer or a court for a remedy, they have placed the conciliation services where the spouse must go if he desires a legal remedy—in the court. This basic premise is expressed by Judge Alexander as follows:

> "Somehow we wonder if trying to keep social work out of the court isn't like trying to keep the Salvation Army out of the Bowery or keeping Traveller's Aid out of all passenger stations.
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> Why not take the needed service where the people are who need it?...The merchant with goods to sell doesn't hide them on a side street,

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[96] Matrimonial Proceedings Act, 1963, N.Z.S. 1963, No. 71, ss. 26, 27 and 29 (4) (5).

[97] *Ibid.*, s. 4. For further discussion see Sir Wilfred Sim, The Matrimonial Proceedings Act 1963, 1065 N.C.L. Rev. 102; B. D. Inglis, 43 Can Bar Rev. 519, at p. 521.

[98] *Supra*, footnote 10, at p. 349.

[99] See Putting Asunder, Appendix B, paras. 2-6.

[100] *Ibid.*, paras. 24-29.

[101] Anna Bacon Stevenson, Working Paper on The Legal Means to Promote the Stability of the Family, Family Law Project, Ontario Law Reform Commission, June 3, 1966, pp. 2-5.

[102] *Ibid.*, pp. 7-9.

[102A] Roger Alton Pfaff, The Conciliation Court of Los Angeles County (4th ed.), 1964, p. 1.

> but pays high rent to display them on the busy thorofare...And the State which honestly wants to pay more than lip service to the stability of family life will not sit silently in the side street and wait for the victims of marital malaise to find their way to the clinic; it will place its help where it will not be by-passed or side-stepped, to wit, right in the middle of that harrowing highway down which these unhappy victims are lugging their sick and moribund marriages for legal interment by the divorce court. Right in that court—where the people are—that is where the state will set up and offer its ameliorative services. Perhaps some day the people will learn to turn first to churches and private agencies for help. Until that happy day arrives it looks as if the State were stuck with this obligation, and presented with this opportunity."[103]

This practice has been accomplished by the use of two different approaches —family courts and conciliation courts.

The approach which encounters the least amount of initial opposition is the establishment of a family court with jurisdiction over matrimonial law. Family courts are an attempt to remedy the defects of the existing system of courts in three ways: (1) by granting jurisdiction over all matters concerning the family to one court in recognition of the fact that the family is a unit and that such matters as juvenile delinquency and divorce are merely separate manifestations of the same problem of family disintegration; (2) by providing specialized facilities such as investigators and full time judges with the requisite capabilities and (3) by attempting conciliation procedures before the spouses enter a courtroom.[104] In his article, *Conciliation and Counseling in the Courts in Family Law Cases,* Henry H. Foster, Jr. states that,

> "The ideal family court, which has not as yet been established in this country, would have comprehensive and integrated jurisdiction over all or most family problems, employ a professional staff of psychiatrists, psychologists, case workers, marriage counselors, and probation officers, and be committed to the philosophy that its function was to act in the best interests of the family and society."[105]

The procedure in a family court is more informal than in a superior court and the technique of investigation is used in preference to contentious litigation. The techniques of conciliation vary and will be discussed under the various systems which employ them.

A second approach is the establishment of conciliation courts as departments of the superior courts. Conciliation proceedings are made the subject-matter of a separate department. Social workers are employed to provide counseling services to spouses involved in marital difficulties. The theory is that the authority of the court is effective in encouraging reconciliation and all proceedings are conducted under the direction of a presiding judge.[106]

Whichever approach is implemented, counseling at the court as an adjunct to judicial procedure is said to be performed with four guiding purposes:

> "1. To secure and provide to bench and attorneys professionally screened information and opinion regarding the history and the current state of interpersonal relationships in the families of clients, especially the

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[103] *Supra,* footnote 10, at p. 349.

[104] See Charles L. Chute, Divorce and the Family Court (1953), 18 Law & Contemp. Prob. 49; Maxine B. Virtue What is a Family Court? (1958), 37 Mich. S.B.J. 14; *supra,* footnote 10, at p. 349.

[105] *Supra,* footnote 8, at p. 354.

[106] See Pfaff, *op. cit.,* footnote 80; Frank B. Blum, Conciliation Courts: Instrument of Peace (1966), 41 Calif. S.B.J. 33.

conditions and prospects for the children. [Some jurisdictions have made communications to a marriage counselor privileged.]

2. To provide, for those clients who want it, a limited amount of guidance and support, and in some cases re-educative psychotherapeutic counseling, throughout the period of pending litigation.

3. To soften and counteract the destructive impact of adversary procedure (assuming that divorce law reform is many years in the future), but not to supplant or modify legal processes.

4. To refer those clients who need and want more counseling to community family service agencies or mental hygiene clinics, or to pastors or private practitioners."[107]

Of course, the ultimate objective in performing these tasks is to effect a permanent reconciliation. The Subcommittee of the American Bar Association has summarized the practices and procedures which have been found to best effect this objective.[108] Some of the practices and procedures utilized in a few representative systems follows.

1. *Family Court System—Ohio*

The most celebrated example of a family court in the United States is the Family Court in Toledo, Ohio which is presided over by the leading exponent of family courts, Judge Paul W. Alexander. In 1937 Judge Alexander was appointed to the Court of Common Pleas, Division of Domestic Relations. He and his colleagues often resorted to the records kept by probation officers on juvenile delinquents when a divorce action involving the same family was tried. Then, in 1938, Ohio passed a law authorizing the courts, in all divorce cases, to investigate the character, family relations and past conduct of the parties. In 1951, Ohio enacted a law making the investigation mandatory in all divorce cases involving a child under 14 years of age. Neither statute expressly authorized marriage counseling in the court but the practice of counseling prospective litigants evolved from the investigative functions and soon marriage guidance counselors were employed by the court. In the words of Judge Alexander:

"This department lifted bodily the main features of the philosophy, methodogy and procedure of the juvenile court and adapted them as far as possible to matrimonial actions."[109]

These services are not limited to families involved in litigation and the court, whose staff approaches 150, has become a center for family problems.

In divorce proceedings six weeks must elapse between the filing of a divorce suit and the date on which it may be heard. Immediately after filing, a copy of the divorce petition must be sent to the court administrator. The parties are invited to apply for free marriage counseling. The court employs five trained marriage guidance counselors to perform this service. Whether the parties apply or not an investigation of the family is made. They are admissible at the trial provided they are made available to the parties and their lawyers five days in advance.

In 1965,[110] the Court had 2,804 pending divorce actions and 2,466 cases active in counseling. In divorce suits, 868 accepted the offer of counseling and 744 refused it. Of the counseling cases closed in 1965, apparent reconciliation was achieved in 464 families and assistance was given in settling matters for the

[107] *Supra*, footnote 13, at p. 193.
[108] See Appendix B.
[109] *Supra*, footnote 12, at p. 606.
[110] The 1965 Annual Report of the Family Court of Lucas County, esp. pp. 12-15.

future in other cases. It is interesting to note that pre-litigation counseling has decreased over the last few years. This is due in large part to the requirements of the 1951 statute. In 1965, 63 per cent of the petitions filed were assigned to counseling and/or investigations as required by the statute. One would think that the court would engage in only short term counseling due to the volume of cases with which it has to deal but the Toledo Family Court is one of the few courts which provides long term counseling. A more practical gauge of the success of this Family Court in preventing the breakdown of marriages, is that in 1965 approximately 45 per cent of the divorce and annulment petitions were abandoned as compared with a national average of 30 per cent.[111] Seventeen other counties in Ohio have established similar family courts.

2. *Family Court for Divorce—Wisconsin*

The second oldest family court in the United States is the Milwaukee County Family Court. Its jurisdiction is limited to husband-wife disputes. The Act of 1933 which created this court also provided for the appointment of Family Court Commissioners and the creation of a Family Conciliation Department. There are now five full time Family Court Commissioners and eleven marriage guidance counselors in the Family Conciliation Department. The 1960 Wisconsin Family Code applied the Milwaukee family court concept to the entire state.[112]

In any action affecting marriage, the plaintiff and defendant must serve a copy of the pleadings upon the family court commissioner of the county in which the action is begun within 20 days after making service on the other party or before filing such pleading in a court.[113] If a complaint is required, it can only contain the statutory ground upon which the action is commenced and not specific details of the alleged misconduct. This is an attempt to prevent the proceedings from becoming contentious before conciliation proceedings are invoked.

The family court commissioner "shall cause an effort to be made to effect a reconciliation between the parties". Where a family court conciliation department has been established, the spouses will be sent for an interview with a marriage guidance counselor employed by the department. The legal purpose of a "screening" interview is to determine whether or not a reconciliation is possible.[114] If there is any long term counseling required, the parties will be referred to a voluntary organization. An action for judicial separation or divorce cannot be commenced until the court has received the report of a family court commissioner or until the expiration of 60 days from the service of the summons. Communications to the counselor are privileged. A judgment of divorce does not effect the marital status of the parties for one year. The statute also requires the family court conciliation department to provide its services to spouses who ask for it or are referred to it even if legal proceedings have not been initiated.

Before 1960, counseling was provided on a voluntary basis in Milwaukee County. From 1956 to 1960, 39 per cent of the petitions were abandoned by the parties. Since the enactment of the Wisconsin Family Code in 1960 and its provisions making conciliation proceedings mandatory, 48 per cent are abandoned. This provides some evidence that compulsory conciliation is useful. Many spouses who show the greatest hostility prove to be the ones who resolve their

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[111] *Supra*, footnote 12, at p. 608; 1965 Annual Report, Table No. 6, p. 14. For a further discussion on the Toledo Family Court see *supra*, footnote 8, at pp. 355-58; Chute, *op. cit.*, footnote 104, at pp. 53-54; *supra*, footnote 10, at pp. 349-50.

[112] See *supra*, footnote 8, at pp. 358-60.

[113] See Appendix C., Wis. Stat. Ann, 1963, c. 247.

[114] See M. A. Fenner and S. J. Goldberg, Family Conciliation Department (1964), 25 Gavel 13.

difficulties. Many who would avoid asking for help on the ground that it would be an acknowledgement of weakness may welcome the compulsory conciliation proceedings.[115]

3. *Friend of the Court—Michigan*

Since 1948 the circuit court of Wayne County was assisted by "Friends of the Court" to whom support payments must be made directly. In addition, since the 1950's the Court has been assisted by marriage counselors. In the investigation by a "Friend of the Court", the parties are informed of the marriage counseling services available. If such services are requested, this is reported to the Court which may refer the couple to its own counseling service or to a voluntary organization. In 1961 and 1962 over one-half of the couples who requested counseling and two-thirds of the couples who completed counseling were reconciled.[116]

The efforts in Wayne County proved to be so successful that in 1964 the State passed the Circuit Court Marriage Counseling Act.[117] It is a "local option" statute which permits the board of supervisors of a circuit court in Michigan to create the office of the circuit court marriage counseling service as an arm of the circuit court provided they will appropriate it the necessary funds. Counseling is provided on a purely voluntary basis. If a spouse applies to the marriage counseling service, she will be interviewed by the director. The service is designed to supplement the purely legalistic approach of the courts and not to substitute for the voluntary organizations. Thus, a director must inform the spouse of the services offered by the voluntary organizations and refer the spouse to some of them unless the spouse specifically requests the services of the court agency. If she does,

> "The circuit court marriage counseling service shall determine the sources and causes of friction and disputes between spouses, or between a spouse or spouses and other family members, and assist such persons in the resolution of the same. The director and professional staff shall provide skilled family counseling with, and advice to members of, families having marital problems with a view to restoring family harmony. Reconciliation of marital disputes are to be sought by the director and staff. They shall seek to preserve and encourage the continuation of marriages and shall give substantial consideration to the continuation of marriages as promoting the welfare of children."[117A]

Moreover, the complaint is sufficient if it only contains statutory language. The main criticism of this type of system is that it only reaches a fraction of the spouses involved in matrimonial litigation.

4. *Conciliation Court—Los Angeles*

In 1939 California passed an Act enabling the counties to establish conciliation courts as departments of the superior courts.[118] Los Angeles was the only one to formally establish such a court and, even then, it was not until Judge Burke was assigned to the court in 1954 that it developed into the effective agency which it is at the present time. The Code of Civil Procedure states that the purposes of a conciliation court are:

> "...to protect the rights of children and to promote the public welfare by preserving, promoting, and protecting family life and the institution of matrimony, and to provide means for the reconciliation of spouses and the amicable settlement of domestic and family controversies."[119]

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[115] *Supra*, footnote 8, at pp. 359-60.
[116] *Ibid.*, at pp. 367-69.
[117] Mich. Comp. Laws 1964, 551-331 — 344—See Appendix D.
[117A] *Ibid.*, 551-338.
[118] Sections 1730-72 of the California Code of Civil Procedure.
[119] *Ibid.*, s. 1730.

The Los Angeles Conciliation Court employs 11 experienced counselors to effect this purpose.

The procedure followed is rather unique. A spouse who is involved in a marital difficulty that may lead or has led to divorce proceedings may obtain a preliminary interview with a counselor. She may then file a petition in the Conciliation Court. If no divorce complaint has been filed, divorce proceedings cannot be commenced until 30 days after the Conciliation Court hearing. If a divorce complaint has already been filed, the filing of a petition in the Conciliation Court has no effect upon it. Upon filing a petition, a hearing date is set with a marriage counselor and the other spouse is invited to appear at such time. It is at this stage that the court authority is first invoked. The notice ends with the sentence:

> "We trust that you will keep this appointment voluntarily and avoid the necessity of requiring the Court to issue a subpoena."[120]

If the spouse fails to attend the conference, the counselor will inform the judge whether or not a subpoena should be issued.

When the time set for the hearing arrives, the counselor will first talk briefly to both spouses and explain the purposes of the Conciliation Court. He will then interview each spouse separately in order to determine the source of conflict. Then both spouses will be interviewed together in an effort to make them aware of where the difficulties are. If the parties refuse to consider a reconciliation, the matter is terminated. If they express a desire to attempt a reconciliation, a Husband-Wife Agreement, a 25 page document which covers practically every aspect of married life and common marital problems,[121] will be explained to them. The Agreement will be tailored to meet the difficulties which a particular couple are faced with. The Agreement is signed by the couple who are then congratulated by a judge who also signs the Agreement, thereby making it a court order. The authority of the Court is also used at this stage. If a provision of the Agreement is wilfully violated, the Court may institute contempt proceedings. In fact, this is rarely done. The Court may also issue a citation to require the attendance of a third party, such as a paramour or in-laws, who may also be interviewed. The Agreement may be terminated upon the application of one of the parties.

About 75 per cent of the Court's intake results from referrals made by lawyers and judges.[122] A pamphlet entitled "A Personal Message to Parents" is sent to all couples who file suit for divorce who have a child under 14 years of age; approximately 25 per cent of the applicants come to the Court as a result of their having read it. The Court provides only short-term marriage counselling which is usually limited to three interviews. For about one-third of the clients this is sufficient; the other two-thirds are referred to voluntary organizations. In 1963, 4,395 formal petitions were filed and, in those cases where both parties participated in a formal conference, 64.2 per cent resulted in a reconciliation.[123] In 1965, the reconciliation rate was 58.9 per cent.[124] Moreover, the court statistics show that in the past 8 years, three out of four reconciled couples are still living together. These high rates of success may be misleading if it is not mentioned that only a fraction of the couples involved in the 35,989 divorces in Los Angeles County in 1965 are ever referred to the Conciliation Court. In the words of Judge Pfaff,

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[120] Meyer Elkin, Short Contract Counseling in a Conciliation Court (1962), 43 Social Caseworker.

[121] See Pfaff *supra*, footnote 102A. The Husband-Wife Agreement form is set out in Section 2 of the brochure.

[122] *Supra*, footnote 120.

[123] *Supra*, footnote 102A, Preface by Judge Pfaff.

[124] *Supra*, footnote 8, p. 366.

> "Our statistics, therefore, are the product of a noncompulsory, partially selective, reconciliation-prone group of couples."[125]

However, a number of other jurisdictions have adopted or are in the process of adopting a conciliation court system.[126]

5. *Conciliation Bureau—New York*

Prior to 1966 the only provision for reconciliation in New York was found in the New York Family Court Act which provides that a spouse involved in marital dispute could petition for conciliation proceedings.[127] However, most counties refused to make use of these procedures.[128] When the divorce law came under review, one of the important elements was the need to provide conciliation services in order to prevent the breakdown of marriage. The Wilson-Sutton Bill provided for a conciliation service modelled from the Los Angeles Conciliation Court. On the other hand, the Leader's Bill provided conciliation services similar to those under the Wisconsin Family Code. The latter was adopted in the Divorce Reform Law of 1966.[129] The legal profession was opposed to this procedure and criticized it. They felt that the provision would

> "...foist a cumbersome, expensive, unnecessary and unworkable system of conciliation procedures upon the court, litigants and public; indeed, ...some aspects of the conciliation procedure...will destroy rather than foster reconciliation."[130]

They felt that the cost of the procedure would increase the cost of a divorce to such an extent that spouses, especially those among the lower income groups, would not resort to the New York courts at all. Thus, submissions for changes were made.[131]

An analysis of the conciliation provisions in the New York Divorce Reform Law of 1966 would only be helpful to know what pitfalls to avoid[132] as they have been repealed by an Act passed in February, 1967.[133] The amended Act provides for the establishment of a conciliation bureau in each of the four Judicial Districts of the State of New York. The head of a bureau is a commissioner and both he and the staff, including marriage counselors, are to be appointed by the Presiding Judge of the Appellate Division of each Department.

Conciliation services are provided only after the commencement of an action for a judicial separation, annulment or divorce. Within 10 days after the commencement of an action, the plaintiff must file a notice thereof with the clerk of

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[125] *Supra*, footnote 123.

[126] For further discussion on the conciliation court system see Blum, *op. cit.*, footnote 196; Louis H. Burke, With this Ring, MacGraw-Hall, 1958; Louis H. Burke, An Instrument of Peace: The Conciliation Court in Los Angeles (1956), 42 A.B.A.J. 621; Louis H. Burke, The Conciliation Court of Los Angeles County (1959), 40 Chi. B. Rec. 255; Louis H. Burke, The Role of Conciliation in Divorce Cases (1961), 1 J. Family Law 209; James Crenshaw, A. Blueprint for Marriage: Psychology and the Law Join Forces (1962), 48 A.B.A.J. 125; Colin Howard, Matrimonial Conciliation (1962), 36 Aust. L.J. 148.

[127] New York Family Court Act, Art. 9.

[128] Note—Divorce Reform in New York (1966), 4 Harv. J. on Legislation 149, *op. cit.*, footnote, 37, at p. 157.

[129] Divorce Reform Law of 1966, c. 254, Art. 215.

[130] Special Committee on Matrimonial Law (1966), 23 N.Y. Co. Law Assoc. Bar Bull. 122, at p. 123.

[131] See Report on Recommended Amendments to the Divorce Reform Law of 1966, Special Committee on Matrimonial Law of N.Y. Bar Assoc., pp. 1-7; Report of the Special Committee on Matrimonial Law, N.Y. Co. Law Assoc., pp. 27-40; Memorandum on Recommended Changes in the "New Divorce Law", Feb. 6, 1967.

[132] For discussion see H. H. Foster, Jr. and D. J. Freed, An Analysis of the Divorce Reform Law, 1966, p. 21 ff. (a brochure to be used in conjunction with Law and the Family, New York).

[133] See Appendix E. Neither the date of enactment nor the chapter number was sent but it appears that the Act has been passed and the provisions concerning conciliation practices and procedures will come into effect on September 1, 1967.

the conciliation bureau. It appears that the initial decision as to whether conciliation proceedings are necessary is left to the parties or the judge. If the parties express no desire to have counseling and the judge is of the opinion that they would be futile, the judge may issue a certificate of no necessity and proceed with the prosecution of the action. On the other hand, if conciliation proceedings would, in the opinion of the judge, be beneficial, he may issue an order referring the action to the commissioner of the bureau who will assign it to a counselor. The initial interview is a "screening" one and is compulsory. The Act only requires this one interview but provides that the rules of the Appellate Division may require more conferences. However, the Act requires the counselor to submit a final report to the commissioner within 30 days after the matter has been assigned to him unless that time is extended by the court. If a reconciliation has been effected, the action is dismissed. If not, the commissioner will issue a certificate of termination of conciliation proceedings and the action will proceed. All conciliation records are confidential.

The new Act has made the conciliation proceedings less expensive, more flexible and a great deal less time consuming. It appears that it has also repealed the laws on connivance and condonation.[134] As many of these provisions do not come into effect until September 1, 1967, it is impossible to determine their effectiveness.

The schemes surveyed above are only illustrative of the many schemes for encouraging a reconciliation by incorporating conciliation services into the system of courts that have been established in each. A more comprehensive analysis of schemes established in the United States is made by Professor Henry H. Foster, Jr., who is Chairman of the Research Committee, Family Law Section, American Bar Association, in his article, *Conciliation and Counseling in the Courts in Family Law Cases.*[135]

In summary, conciliation services in the courts have the general advantage of providing marriage counseling in cases where the parties are either unaware of the availability of such help or are not motivated to seek such aid. Recognizing this, a few family courts in Canada have begun to provide counseling services. However, they have no jurisdiction over matrimonial law and the majority of spouses seeking a judicial separation or a divorce will never come in contact with them. Judge O'Hearn has recommended that the family courts be given jurisdiction over matrimonial law in order that the techniques of investigation and conciliation may be employed in marital disputes.[136] The writer agrees that this would be beneficial but doubts whether such a reform would be acceptable in Canada at the present time.

V. Conclusion and Suggested Reforms

The purpose of the above survey has been to examine in what aspects the matrimonial law of Canada may be reformed in order to prevent the breakdown of marriage by encouraging spouses involved in marital discord to attempt a reconciliation. Naturally, the reforms vary in their chances of being adopted. For example, the implementation of the breakdown of marriage theory as the sole ground for a divorce would, in the writer's opinion, most nearly achieve the ideal substantive law in this area. However, to enact such a reform at the present time would be undesirable because our society does not provide the requisite framework for a law based on the breakdown of marriage theory to operate effectively.

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[134] *Ibid.*, s. 2.
[135] *Supra*, footnote 8.
[136] O. Hearn, *op. cit.*, footnote 30.

In Canada, the divorce law is based on the matrimonial offence theory in all aspects—substantive, procedural and the institutions by which the law is administered. To reform only the substantive law on the grounds for divorce by implementing the breakdown of marriage theory would result in the remaining divorce law, which is based on the matrimonial offence theory, being not only in conflict with the very basis for divorce, but also ineffective in administering it. Consequently, the entire divorce law would have to be reformed. The adversary process, which admittedly is inadequate under the present law, would be even more ineffectual under a law based on the breakdown of marriage theory. The only way to ensure that there has been a complete breakdown of the marriage would be to employ the inquisitorial procedure. The adoption of this procedure would also permit marriage counselors to determine if there is a possibility of a reconciliation. This would be the ideal. However, the inquisitorial procedure is not suited to the institutions by which the law is administered—the superior courts. One suggested alternative is to provide that a separation of one year is prima facie evidence of a breakdown of a marriage. It is submitted that the adoption of such a provision would not even be an improvement on the present position. In effect, it would allow all marriages to be dissolved after one year's separation because a judge has no facilities to determine whether there has been, in fact, a breakdown of the marriage. Moreover, it does not do anything to encourage a reconciliation. Thus, if the inquisitorial procedure is the only process that can be employed effectively with the breakdown of marriage theory and the inquisitorial procedure is ill-suited to the superior courts, jurisdiction over divorce would have to be transferred to family courts. Before this could be achieved, family courts would have to be established in a number of provinces and those that are in existence would have to be reformed. Furthermore, to provide the caseworkers and marriage guidance counselors that would be required by the family courts, the government would have to adopt a program to promote the training of persons in these professions. Financial assistance would also have to be given to the voluntary organizations that provide marriage counseling services in order that they could perform long term counseling.

The above discussion is only illustrative of the many items that must be taken into consideration before any reform in the divorce law may be enacted. First and foremost, it must be determined whether there are the requisite attitudes and machinery to carry out a proposed reform or whether these could be obtained at the present time. Canada can and should learn from the experience of other nations. With this experience as a basis, it is possible to determine which reforms are both desirable and possible in Canada at the present time. The suggested reforms listed below are an attempt to do just this.

(1) Implementation of the breakdown of marriage theory as, at least, one ground for divorce. It is submitted that a separation of from three to five years would provide such evidence of a breakdown that the issue could be determined under the adversary procedure.

(2) A provision whereby no action for a judicial separation or a divorce could be commenced within a two year period from the date of the marriage. A two year period should act as a sufficient deterrent against resort to the courts whenever marital discord occurs in the early years of a marriage.

(3) A provision allowing a three month trial period of cohabitation within which period nothing done by the spouses would be treated as condonation.

(4) An undertaking by the federal government to provide financial assistance to those voluntary organizations which provide marriage counseling services. Since it is unlikely that counseling will be provided in the superior courts, the government is under an obligation to ensure that, at least, it is provided by the voluntary organizations. Governmental assistance and the resultant publicity may also improve the status of the voluntary organizations so that more people will make use of these services, as was the case in Australia.

(5) A provision requiring a lawyer to discuss the possibility of a reconciliation with a client engaged in a matrimonial dispute; to advise them of the organizations providing marriage counseling services; and to file a certificate with every petition in a matrimonial case that he has done so. In the writer's opinion, lawyers will not perform this task unless they are either educated in the sociological aspects of family or are directed to do so. For example, only three per cent of the referrals to the Halifax Family Service Bureau are made by lawyers.[137]

(6) A provision empowering a judge to adjourn the proceedings if there is a possibility of a reconciliation. This may be used only rarely but the mere fact that it forms a part of the law will impress upon the judge that he should look for evidence that the dispute may be conciliable.

(7) The inclusion of a general statement, in any statute relating to marriage and divorce, that it is the policy of the nation to preserve a marriage whenever possible. The social conditions in Canada differ from one area to the next to such an extent that any attempt to enact detailed conciliation proceedings that must be followed in every matrimonial case would probably be futile. Consequently, the most practical position for Parliament to take at the present time would appear to be to make a general policy statement and then to encourage localities to devise a reconciliation scheme that is most suitable to its conditions. For example, in Oklahoma City a family clinic which consisted of a panel of representatives from the legal, medical, clerical and business professions was established to hold confidential conferences with couples involved in matrimonial disputes.[137A] A similar scheme could be employed by any community.

This list merely represents some of the more obvious reforms that should be made in the matrimonial law of Canada at the present time.

It is hoped that the citizens of Canada will be allowed to benefit from the experience of other nations. To enable them to do so, Parliament must attempt to provide the preventative medicine to treat the cause rather than merely the effect of marital discord. The suggested reforms are only a few of the media that have been utilized successfully by other nations in their endeavours to prevent the breakdown of marriage by encouraging a reconciliation of spouses. They are the reforms which, in the writer's opinion, may be implemented by Parliament at the present time. The Special Joint Committee of the Senate and the House of Commons is under an obligation to consider and recommend that such reforms be enacted as an integral part of a reformed divorce law as they are in other nations. A mere change in the substantive law on the grounds for divorce will do very little to alleviate the social problem caused by the breakdown of marriage. The history of the experience in other nations is proof that no matter what the grounds for divorce are, if a couple want a divorce they will obtain one.

> "It is a horrible waste of human knowledge and resources to fail to make the effort to help troubled families. Since we have the skills and techniques to offer constructive assistance, we cannot afford to continue to maintain a wholly destructive procedure which unrealistically purports to reward virtue and to punish sin while ignoring the actual consequences to the family and society."[138]

The Parliament of Canada must plead guilty to the commission of such destruction. Only Parliament can exculpate itself.

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[137] 1966 statistics of the Family Service Bureau of Halifax.

[137A] See Bliss Kelly, Preventing Divorces; Oklahoma City's Family Clinic (1957), 45 A.B.A.J. 566; Anna Bacon Stevenson, Memorandum on the Oklahoma City Family Law Clinic, Family Law Project, Ontario Law Reform Commission, December 8, 1965.

[138] *Supra*, footnote 8, at p. 381.

APPENDIX A

Matrimonial Causes Act, 1959 (Aust.), No. 104

PART II—MARRIAGE GUIDANCE ORGANIZATIONS

Grants to Approved Marriage Guidance Organizations

9. The Attorney-General may, from time to time, out of moneys appropriated by the Parliament for the purposes of this Part, grant to an approved marriage guidance organization, upon such conditions as he thinks fit, such sums by way of financial assistance as he determines.

Approval of Marriage Guidance Organizations

10.—(1) A voluntary organization may apply to the Attorney-General for approval under this Part as a marriage guidance organization.

(2) The Attorney-General may approve any such organization as a marriage guidance organization where he is satisfied that—

(a) the organization is willing and able to engage in marriage guidance; and

(b) marriage guidance constitutes or will constitute the whole or the major part of its activities.

(3) The approval of an organization under this section may be given subject to such conditions as the Attorney-General determines.

(4) Where the approval of an organization has been given subject to conditions, the Attorney-General may, from time to time, revoke or vary all or any of those conditions or add further conditions.

(5) The Attorney-General may, at any time, revoke the approval of an organization where—

(a) the organization has not complied with a condition of the approval of the organization;

(b) the organization has not furnished, in accordance with the next succeeding section, a statement or report that the organization was required by that section to furnish; or

(c) the Attorney-General is satisfied that the organization is not adequately carrying out marriage guidance.

(6) Notice of the approval of an organization under this section, and of the revocation of such an approval, shall be published in the *Gazette*.

Reports, &c., by Approved Marriage Guidance Organizations

11.—(1) An approved marriage guidance organization shall, not later than the thirty-first day of December in each year, furnish to the Attorney-General, in respect of the year that ended on the last preceding thirtieth day of June—

(a) an audited financial statement of the receipts and expenditure of the organization, in which receipts and expenditure in respect of its marriage guidance activities are shown separately from other receipts and expenditure; and

(b) a report on its marriage guidance activities, including information as to the number of cases dealt with by the organization during the year.

(2) Where the Attorney-General is satisfied that it would be impracticable for an organization to comply with the requirements of the last preceding

sub-section or that the application of those requirements to an organization would be unduly onerous, he may, by writing under his hand, exempt the organization, wholly or in part, from those requirements.

Admissions, &c., Made to Marriage Guidance Counsellors

12.—(1) A marriage guidance counsellor is not competent or compellable, in any proceedings before a court (whether exercising federal jurisdiction or not) or before a person authorized by a law of the Commonwealth or of a State or Territory of the Commonwealth, or by consent of parties, to hear, receive and examine evidence, to disclose any admission or communication made to him in his capacity as a marriage guidance counsellor.

(2) A marriage guidance counsellor shall, before entering upon the performance of his functions as such a counsellor, make and subscribe, before a person authorized under the law of the Commonwealth or of a State or a Territory to which this Act applies to take affidavits, an oath or affirmation of secrecy in accordance with the form in the First Schedule to this Act.

Application of Part to Certain Branches and Sections of Voluntary Organizations

13. A reference in this Part to a voluntary organization shall be deemed to include a reference to a branch or section of such an organization, being a branch or section identified by a distinct name and in respect of which separate financial accounts are maintained.

PART III.—RECONCILIATION

Reconciliation

14.—(1) It is the duty of the court in which a matrimonial cause has been instituted to give consideration, from time to time, to the possibility of a reconciliation of the parties to the marriage (unless the proceedings are of such a nature that it would not be appropriate to do so), and if at any time it appears the Judge constituting the court, either from the nature of the case, the evidence in the proceedings or the attitude of those parties, or of either of them, or of counsel, that there is a reasonable possibility of such a reconciliation, the Judge may do all or any of the following:

(a) adjourn the proceedings to afford those parties an opportunity of becoming reconciled or to enable anything to be done in accordance with either of the next two succeeding paragraphs;

(b) with the consent of those parties, interview them in chambers, with or without counsel, as the Judge thinks proper, with a view to effecting a reconciliation;

(c) nominate—

(i) an approved marriage guidance organization or a person with experience or training in marriage conciliation; or

(ii) in special circumstances, some other suitable person,

to endeavour, with the consent of those parties, to effect a reconciliation.

(2) If, not less than fourteen days after an adjournment under the last preceding sub-section has taken place, either of the parties to the marriage requests that the hearing be proceeded with, the Judge shall resume the hearing, or arrangements shall be made for the proceedings to be dealt with by another Judge, as the case requires, as soon as practicable.

Hearing when Reconciliation Fails

15. Where a Judge has acted as conciliator under paragraph (b) of sub-section (1) of the last preceding section but the attempt to effect a reconciliation has failed, the Judge shall not, except at the request of the parties to the proceedings, continue to hear the proceedings, or determine the proceedings, and, in the absence of such a request, arrangements shall be made for the proceedings to be dealt with by another Judge.

Statements, & c., Made in Course of Attempt to Effect Reconciliation

16. Evidence of anything said or of any admission made in the course of an endeavour to effect a reconciliation under this Part is not admissible in any court (whether exercising federal jurisdiction or not) or in proceedings before a person authorized by a law of the Commonwealth or of a State or Territory of the Commonwealth, or by consent of parties, to hear, receive and examine evidence.

Marriage Conciliator to Take Oath of Secrecy

17. A marriage conciliator shall, before entering upon the performance of his functions as such a conciliator, make and subscribe, before a person authorized under the law of the Commonwealth or of a State or a Territory to which this Act applies to take affidavits, an oath or affirmation of secrecy in accordance with the form in the First Schedule to this Act.

APPENDIX B

Report of the Subcommittee on Conciliation, June, 1961, Family Law Section, American Bar Association

(as reproduced in Ploscowe and Freed, Cases and Materials on Family Law, 1963, pp. 647-49).

II. The Right Approach

The following practices and procedures have been found by courts of conciliation to (1) encourage divorce-bound couples to solicit such services; (2) effect reconciliations; and (3) insure their permanence.

1. Reconciliation proceedings should be under the jurisdiction, direct control, and supervision of an interested and dedicated Judge. It should be emphasized that the Judge appointed to preside over the conciliation court is not just a mere figurehead or supervisor. He should completely control and direct the operations of the court, announcing and enforcing policies, issuing directives, holding staff conferences, signing orders, determining questions of procedure, and in required cases holding hearings where the plenary powers of the courts are required.

Whenever the marriage counseling phase of the process has been delegated to a nonjudicial social agency with only limited or indirect control by the court, the program too often has gotten out of hand and aroused widespread criticism on the part of lawyers, litigants and the general public.

2. Marriage counseling should not be performed by the Judge but by trained and experienced counselors under his direct supervision. The preferred qualifications for appointment as a court counselor should be a Master's Degree in the Behavioral Sciences and at least five years of counseling experience.

3. Although the Judge should rarely participate in any of the counseling procedures, he should see each reconciled couple, after they have been reconciled by the counselor, to congratulate them and to impress upon them the importance

of the step they have taken and that the success of their marriage is of considerable concern to the court and the community. Good public relations, as thus practices, brings the court close to the people and breeds public respect.

4. The procedure to invoke the court's services should be simple and direct.

In Los Angeles County couples can obtain a preliminary conference with a Senior Marriage Counselor without even filing a petition. In other words, a divorce-bound couple can literally walk into the court "off the street," so to speak. This often leads to the filing of a petition.

Provisions should be provided for a petition to be filed *prior to* or *after* a divorce action has been instituted. Even where parties are in court for a pendente lite order, the Judge or Commissioner refer the couple for an exploratory conference with a counselor without the necessity of filing a petition.

All of these simplified procedures, making the court readily accessible, encourages utilization of its services, promotes understanding, and results eventually in reconciliations.

The pressing marital problem of most couples, like a ruptured appendix, needs immediate attention. Too often undue delay results in the death of the marriage through further estrangement and divorce.

As heretofore emphasized, complicated procedures, in other words involved red tape, is not appealing to lawyers, whereas simplified procedures meet with approval.

5. No filing fees should be required, and no charges made for marital counseling, thus removing a further impediment to soliciting the court's assistance.

6. The court files, including the counselors' written reports, and all written and oral communications to the counselors, should be made confidential by law. Counselors maintain strict neutrality, thus providing a uniqueness and integrity to the proceedings which immediately instills confidence and trust in the parties.

7. Attorney's fees should be awarded upon proper application. This has created a favorable impression among members of the bar. There is no reason why an attorney, who devotes office conference time to the parties and prepares the petition and supporting affidavit, should not be compensated.

The policy of waiving an attorney's fee where the parties reconcile is misplaced generosity and poor psychology.

8. The Court should not engage in continued marriage counseling to a couple in need of it. This, as we view it, is beyond its scope and purpose. A cooperative and complementary relationship with the various family service agencies in the community, which take those cases needing additional counseling on a priority basis and for a nominal fee, promotes harmony between the Court and these agencies.

The Court can also be of considerable assistance to the family service agencies. Possessing no power to force a recalcitrant spouse into counseling, the social worker can suggest to the party desiring a reconciliation the filing of a petition in the Conciliation Court, which can require the appearance of the other party.

9. Considerable controversy exists in the field of reconciliation procedures as to the desirability or propriety of the use of any coercion whatever in the conciliation process. Many social workers find the use of coercion repugnant or ineffective. However, experience has proved that what might be termed "gentle judicial coercion" plays an important role in effecting reconciliations.

An embittered husband or wife, due to pride, may feel that the initiating of overtures toward "talking things over" means a loss of face, although secretly desirous of mending the marriage.

A court notice requesting an appearance of a spouse (and if refused of ordering the appearance) is a means of saving face, and in many instances is effective in saving the marriage.

10. Every effort should be made to limit the number of cases referred to counselors. No counselor should be assigned more than three or four cases per day. Marriage counseling cannot be conducted on a conveyor-belt system, and a fatigued and harassed counselor, who is forced to squeeze in five or six cases in his conference calendar each day cannot possibly hope to be effective.

11. Widespread community publicity concerning the existence of the Conciliation Court, its procedures and functions, are of great importance. In 1959, pursuant to Rule 6 of the Superior Court, in Los Angeles County each divorce complaint is required to contain the names and addresses of both parties, thus enabling the court to mail out a little pamphlet, "A Personal Message to Parents," to each party which points out the problems of divorce and facts concerning the Conciliation Court.

Utilization of this pamphlet has resulted in a 25 per cent increase in filings in the Conciliation Court.

12. A unique feature of the Los Angeles Conciliation Court is the utilisation of a written Husband-Wife Agreement, which when signed by the reconciled parties, the Counselor, and the Judge, becomes a formal court order, punishable by contempt.

The concept of reducing marital relationships to a written agreement may seem to some marriage counselors unwise and productive of little

APPENDIX C

Actions Affecting Marriage, Wis. Stat. Ann. 1963, c. 247

247.07 Causes for divorce or legal separation. A divorce, or a legal separation for a limited time or forever, may be adjudged for any of the following causes:

(1) For adultery.

(2) When either party, subsequent to the marriage, has been sentenced and committed to imprisonment for 3 years or more; and no pardon granted after a divorce for that cause shall restore the party sentenced to his or her conjugal rights.

(3) For the wilful desertion of one party by the other for the term of one year next preceding the commencement of the action.

(4) When the treatment of one spouse by the other has been cruel and inhuman, whether practiced by using personal violence or by any other means.

(5) When the husband or wife shall have been a habitual drunkard for the space of one year immediately preceding the commencement of the action.

(6) Whenever the husband and wife have voluntarily lived entirely separate for 5 years next preceding the commencement of the action, at the suit of either party.

(7) Whenever the husband and wife, pursuant to a judgment of legal separation, have lived entirely apart for 5 years next preceding the commencement of the action a divorce may be granted at the suit of either party.

(8) On the complaint of the wife, when the husband, being of sufficient ability, refuses or neglects to adequately provide for her.

247.08 Actions to compel support by husband. If any husband fails or refuses, without lawful or reasonable excuse, to provide for the support and

maintenance of his wife or minor children, the wife may commence an action in any court having jurisdiction in actions for divorce, to compel such husband to provide for the support and maintenance of herself and such minor children as he may be legally required to support. The court, in such action, may determine and adjudge the amount such husband should reasonably contribute to the support and maintenance of said wife or children and how such sum should be paid. The amount so ordered to be paid may be changed or modified by the court upon notice of motion or order to show cause by either the husband or wife upon sufficient evidence. Such determination may be enforced by contempt proceedings. In any such support action there shall be no filing fee, suit tax or other costs taxable to the wife, but after the action has been commenced and filed the court in its discretion may direct that any part of or all fees and costs incurred shall be paid by the husband.

History: 1963 c. 426

Where an ambiguous summons was issued, which the court construed as intending to start an action for support, and which was served in Texas and by publication, the court acquired no jurisdiction and had no power to amend the summons to refer to an action for legal separation. Rosenthal v. Rosenthal, 12 W (2d) 190, 107 NW (2d) 204.

247.081 Reconciliation effort; waiting period for trial of actions for divorce or legal separation. (1) In every action for divorce or legal separation the family court commissioner shall cause an effort to be made to effect a reconciliation between the parties, either by his own efforts and the efforts of a family court conciliation department if it exists or by referring such parties to and having them voluntarily consult the director of the town, village, city or county public welfare department, a county mental health or guidance clinic, a clergyman, or a child welfare agency licensed under ss. 48.66 to 48.73, or by other suitable means. The person so consulted shall not disclose any statement made to him by either party without the consent of such party.

(2) No action for divorce or legal separation, contested or uncontested, shall be brought to trial until the happening of whichever of the following events occurs first:

(a) A report by the family court commissioner to the court showing the result of a reconciliation effort. This report shall not be filed with or become part of the record of the case. Facts therein shall not be considered at trial unless separately alleged and established by competent evidence; or

(b) The expiration of 60 days after the filing of the complaint when the summons is served within the state under s. 247.061; or

(c) The expiration of 120 days after the filing of the complaint when the summons is served personally without the state under s. 247.062 (1); or

(d) The expiration of 120 days after the first day of publication when the summons is served by mailing and publication under s. 247.062 (2); or

(e) An order by the court, after consideration of the recommendation of the family court commissioner, directing immediate trial of such action for the protection of the health or safety of either of the parties or any child of the marriage or for other emergency reasons.

History: 1961 c. 505

247.085 Contents of complaint. (1) In any action affecting marriage the complaint shall specifically allege:

(a) The name and age of the parties, the date and place of marriage and the facts relating to the residence of both parties.

(b) The name and date of birth of the minor and dependent children of the parties.

(c) Whether or not an action for obtaining a divorce or legal separation by either of the parties was or has been at any time commenced or is pending in any other court or before any judge thereof, in this state or elsewhere, and if either party was previously divorced, the name of the court in which the divorce was granted and the time and place the divorce was granted.

(2) In an action for divorce or legal separation, the complaint or counterclaim shall state the statutory ground for the action without detailing allegations which constitute the basis for such ground. The facts relied upon as the statutory ground for the action shall be furnished in a verified bill of particulars within 10 days after a written demand therefor. Such demand shall be deemed waived unless made within 20 days after the service of the complaint or counterclaim. If the bill of particulars is not furnished within such time the complaint or counterclaim may be dismissed upon motion of any party or of the family court commissioner. Where a bill of particulars has been demanded, the time to answer or reply shall begin to run from the time such bill of particulars is furnished. The court, upon motion therefor, may order either party to furnish such verified bill of particulars, or if the bill of particulars furnished is insufficient, may require additional facts to be supplied so as to advise the other party of the facts relied upon as the statutory ground for the action.

(3) In an action for divorce or legal separation, adultery shall be pleaded as a separate cause of action and not as an instance of cruel and inhuman treatment.

(4) When the demand of the complaint or counterclaim is for a legal separation, such pleading shall allege the specific reason why such remedy is demanded. If such reason is conscientious objection to divorce, it shall be so stated.

247.09 Power of court in divorce and legal separation actions. When the court grants a judgment in any action for divorce or legal separation the kind of judgment granted shall be in accordance with the demand of the complaint or counterclaim fo the prevailing party, except that a divorce or legal separation may be adjudged regardless of such demand wherever the court finds that it would not be in the best interests of the parties or the children of the marriage to grant such demand and also states the reason therefor. Conscientious objection to divorce shall be deemed a sufficient reason for granting a judgment of legal separation if such objection is confirmed at the trial by the party making such demand.

247.10 Collusion; procurement; connivance; condonation; stipulation; property rights. No judgment of annulment, divorce or legal separation shall be granted if it appears to the satisfaction of the court that the suit has been brought by collusion, and no judgment of divorce or legal separation shall be granted if it likewise appears that the plaintiff has procured or connived at the offense charged, or has condoned it, or has been guilty of adultery not condoned; but the parties may, subject to the approval of the court, stipulate for a division of estate, for alimony, or for the support of children, in case a divorce or legal separation is granted or a marriage annulled.

247.101 Recrimination, when applicable; comparative rectitude. The equitable doctrine that the court shall not aid a wrongdoer is applicable to any party suing for divorce under s. 247.07 (1) to (5), except that where it appears from the evidence that both parties have been guilty of misconduct sufficiently grave to constitute cause for divorce, the court may in its discretion grant a judgment of legal separation to the party whose equities on the whole are found to be superior.

247.11. Accomplice to be interpleaded. Any one charged as a particeps criminis shall be made a party, upon his or her application, to the court subject to such terms and conditions as the court may prescribe.

247.12 Trial procedure. In actions affecting marriage, all hearings and trials to determine whether judgment shall be granted shall be before the court except as otherwise required by s. 270.07 (1). The testimony shall be taken by the reporter and shall be written out and filed with the record if so ordered by the court.

247.125 Order for appearance of litigants. Unless nonresidence in the state is shown by competent evidence, or unless the court shall for other good cause otherwise order, both parties in actions affecting marriage shall be required to appear upon the trial. An order of the court or family court commissioner to that effect shall accordingly be procured by the party seeking the judgment, and shall be served upon the opposite party personally before the trial.

History: 1961 c. 505.

247.13 Family court commissioner (formerly divorce counsel); appointment; powers; oaths, assistants; Menominee county. (1) In each county of the state, except in counties having a population of 500,000 or more, the circuit and county judges in and for such county shall, by order filed in the office of the clerk of the circuit court on or before the first Monday of July of each year, appoint some reputable attorney of recognized ability and standing at the bar family court commissioner (formerly divorce counsel) for such county. Such commissioner shall, by virtue of his office and to the extent required for the performance of his duties, have the powers of a court commissioner. Such court commissioner shall be in addition to the maximum number of court commissioners permitted by s. 252.14. The office of the family court commissioner, or any assistant commissioner, may be placed under a county civil service system by resolution of the county board. Before entering upon the discharge of his duties such commissioner shall take and file the official oath. The person so appointed shall continue to act until his successor is appointed and qualified, except that in the event of his disability or extended absence said judges may appoint another reputable attorney to act as temporary family court commissioner, and except that the county board may provide that one or more assistant family court commissioners shall be appointed by the judges of the county. Such assistants shall have the same qualifications as the commissioner and shall take and file the official oath.

(2) In counties having a population of 500,000 or more, there is created in the classified civil service the office of family court commissioner and such additional assistant family court commissioners as the county board shall determine and authorize, who shall be appointed from the membership of the bar residing in such county by the judges of the circuit court of such county, pursuant to ss. 63.01 to 63.17. Before entering upon the performance of their duties, such family court commissioner and assistant family court commissioners shall take and file the official oath. Such family court commissioner and assistant family court commissioners shall, by virtue of their respective positions and to the extent required for the performance of their duties, each have the powers of a court commissioner. They shall receive such salary as may be fixed by the county board, shall perform their duties under the direction of the circuit judges of such county and shall be furnished with quarters and necessary office furnishings and supplies. The county board shall provide them their necessary stenographic and investigational service. When the family court commissioner is unavailable, any assistant family court commissioner shall perform all the duties and have all the powers of the family court commissioner as directed by the latter or by a judge of the family court branch. In addition to the duties of such family court commissioner as defined in ch. 247, he shall perform such other duties as the circuit court of such county may direct.

(3) Menominee county shall be attached to Shawano county to the extent of office and functions of the family court commissioner, and the duly appointed family court commissioner of Shawano county shall serve as family court com-

missioner for Menominee county with all the duties, rights and power of the family court commissioner therein; and no family court commissioner shall be appointed in Menominee county, the county not being organized for that purpose.

(4) In any county one or more retired or former judges may be appointed as temporary or temporary assistant family court commissioners by a majority of the judges presiding over a family court branch in such county. Such temporary or temporary assistant family court commissioners shall be compensated by the county for their services at the rate of $25 per half day, but shall be considered officers of the court or courts appointing them and not employes of the county.

History: 1961 c. 495, 505.

247.14 Service on and appearance by family court commissioner. In any action affecting marriage, the plaintiff and defendant shall, either within 20 days after making service on the opposite party of any pleading or before filing such pleading in court, serve a copy of the same upon the family court commissioner of the county in which the action is begun, whether such action is contested or not. No judgment in any such action shall be granted unless this section is complied with, or unless the parties have responded to the family court commissioner's inquiries under s. 247.15 except when otherwise ordered by the court. Such commissioner shall appear in the action when the defendant fails to answer or withdraws his answer before trial; also, when the defendant interposes a counterclaim and the plaintiff thereupon neither supports his complaint nor opposes the counterclaim by proof; and when otherwise requested by the court.

History: 1961 c. 505.

247.145 Enlargement of time. After the expiration of the period specified by the statute, the court may in its discretion, upon petition and without notice, extend the time within which service shall be made upon the family court commissioner. Extension of time under any other circumstances will be governed by s. 269.45.

History: 1961 c. 505.

257.15 Default actions; family court commissioner to appear. (1) No judgment in any action in which the family court commissioner is required by s. 247.081 (1) or 247.14 to appear or otherwise discharge his duties under this chapter shall be granted until such commissioner in behalf of the public has made a fair and impartial investigation of the case and fully advised the court as to the merits of the case and the rights and interests of the parties and the public and the efforts made toward reconciliation of the parties or the reason such reconciliation attempt has not been made. Such family court commissioner is empowered to cause witnesses to be subpoenaed on behalf of the state when in his judgment their testimony is necessary to fully advise the court as to the merits of the case and as to the rights and interests of the parties and of the public. The fees of such witnesses shall be paid out of the county treasury as fees of witnesses in criminal cases are paid. The court may order that such fees be repaid to the county by one of the parties to the action, in which case it shall be the duty of the family court commissioner to enforce such order.

(2) Except as otherwise provided under ss. 247.081 (1) and 247.14, in any county having a population of 500,000 or more in any action for divorce or for the annulment of a marriage in which the defendant has appeared and has interposed an answer or an answer and counterclaim and in which one of the parties thereto informs the court that he or she will not oppose the prayer of the other party and if the court is satisfied from the facts submitted that the withdrawal of such opposition is done in good faith and without collusion, the

court may then order such action to be tried as a default without the presence or appearance of the family court commissioner.

Because the instant action for annulment was tried as a default matter in the circuit court, and no order was entered pursuant to (2) dispensing with the presence of the family court commissioner, the supreme court deems that it was proper for such family court commissioner to appear in behalf of the public in this appeal and to file a brief herein. Masters v. Masters, 13 W. (2d) 332, 108 NW (2d) 674.

247.16 Family court commissioner or law partner; when interested; procedure. Neither such family court commissioner nor his partner or partners shall appear in any action affecting marriage in any court held in the county in which he shall be acting, except when authorized to appear by s. 247.14. In case he or his partner shall be in any way interested in such action, the presiding judge shall appoint some reputable attorney to perform the services enjoined upon such family court commissioner and such attorney, so appointed, shall take and file the oath and receive the compensation provided by law.

247.17 Family court commissioner; salary. In counties having a population of less than 500,000, the county board shall by resolution provide an annual salary for the family court commissioner whether he is on a full or part-time basis and may furnish an office with necessary office furnishings, supplies and stenographic services and may also by resolution prescribe such other duties to be performed by him not in conflict with his duties as family court commissioner.

247.37 Effect of judgment of divorce. (1) (a) When a judgment of divorce is granted it shall not be effective so far as it effects the marital status of the parties until the expiration of one year from the date of the granting of such judgment, except that it shall immediately bar the parties from cohabitation together and except that it may be reviewed on appeal during said period. . .

APPENDIX D

Circuit Court Marriage Counseling Act, Mich. Comp. Laws 551.331—.344(1964)

[No. 155.]

AN ACT to establish circuit court marriage counseling services and to provide for their powers and duties; to provide for the employment of directors of marriage counseling and for the selection of their staffs; to provide for the confidentiality of communications between marriage counselors and clients; and to provide for payment of fees by persons counseled.

The People of the State of Michigan enact:

551.331 Circuit court marriage counseling service act; short title. [M.S.A. 25.123(1)]

Sec. 1. This act shall be known and may be cited as the "Circuit court marriage counseling service act".

551.332 Marriage counseling service; establishment, multiple-county circuits, participation. [M.S.A. 25.123(2)]

Sec. 2. For the purpose of preserving and improving marriages through competent counseling, the office of the circuit court marriage counseling service may be created as provided in this section. Upon recommendation of the circuit court, the board of supervisors may create a marriage counseling service and may appropriate such sums of money as may be deemed sufficient by the board

of supervisors for the establishment and maintenance of such service. In a judicial circuit including more than a single county, each county board of supervisors may participate in the service and make a suitable appropriation therefor or may refrain from participation and from making any appropriation. In multiple-county circuits, the various boards of supervisors may agree as to participation and as to the appropriations which each will make and such agreement may provide for varying rather than equal contributions from each county.

551.333 Same; merger with other services, separate maintenance. [M.S.A. 25.123(3)]

Sec. 3. The circuit court marriage counseling service is an arm of the circuit court. It may be merged with other court services or maintained separately, as the court may determine.

551.334 Same; director and staff, compensation. [M.S.A. 25.123(4)]

Sec. 4. The chief executive officer of the circuit court marriage counseling service is the director. He shall be qualified by training and experience to render family counseling service and shall be employed by, and serve at the pleasure of, the circuit court. The compensation of the director and his staff shall be fixed by the board of supervisors and paid from the general fund of the county. In multiple-county circuits the compensation shall be fixed by the participating boards of supervisors and paid from the general funds of the participating counties as the same may be appropriated.

551.335 Same; professional and clerical staff, merit system. [M.S.A. 25.123 (5)]

Sec. 5. The director of any circuit court marriage counseling service may hire professional and clerical staff with the approval of the circuit court, and within the funds appropriated by the board or boards of supervisors: Provided, however, That in counties having a merit system, the board of supervisors shall have the power to place employment of clerical employees under the merit system.

551.336 Same; eligibility for counseling, priority. [M.S.A. 25.123(6)]

Sec. 6. The circuit court shall prescribe rules and standards of eligibility for counseling. First priority for service shall be given to domestic relations actions in which a complaint or motion has been filed in the circuit court. A family is eligible for counseling by the marriage counseling service if at least 1 of the spouses has the residential requirements to file a complaint or a motion in a domestic relations action in the court.

551.337 Same; referral of spouses to outside services; conciliation conferences. [M.S.A. 25.123(7)]

Sec. 7. The director shall advise spouses fully of the existence of qualified marriage counseling services outside the court so that they may freely make an informed choice of such outside service. In order to assure maximum use of community resources, referrals to agencies outside the court shall be made unless otherwise requested. The marriage counseling service may hold conciliation conference with the spouse, spouses or members of the family, or may refer parties to other qualified marriage counselors or marriage counseling agencies, family agencies or social welfare agencies, religious agencies or advisors, physicians, psychiatrists, private agencies, or other persons qualified to assist in reconciling the spouses. Such referrals shall be made, whenever in the judgment of the director, the interest of the family would thereby be as well or better served.

551.338 Same; determination of causes of friction; reconciliation. [M.S.A. 25.123(8)]

Sec. 8. The circuit court marriage counseling service shall determine the sources and causes of friction and disputes between spouses, or between a spouse

or spouses and other family members, and assist such persons in the resolution of the same. The director and professional staff shall provide skilled family counseling with, and advice to members of, families having marital problems with a view to restoring family harmony. Reconciliations of marital disputes are to be sought by the director and staff. They shall seek to preserve and encourage the continuation of marriages and shall give substantial consideration to the continuation of marriages as promoting the welfare of children.

551.339 Same; privileged communication; director's report. [M.S.A. 25.123(9)]

Sec. 9. A communication between a counselor in the marriage counseling service and a person who is counseled is confidential. The secrecy of such a communication shall be preserved inviolate as a privileged communication which privilege cannot be waived. Such a communication shall not be admitted in evidence in any proceedings. The same protection shall be given to communications between spouses and counselors to whom they have been referred by the court or the court's marriage counseling service: Provided, That in cases counseled in the court's service the director of the marriage counseling service may submit to the circuit court a written evaluation of the prospects or prognosis of a particular marriage without divulging facts or revealing confidential disclosures. Attorneys representing spouses who are the subject of such an evaluation shall have the right to receive a copy of the same under terms and conditions prescribed by the court.

551.340 Same; fee schedule, approval; payment to outside agencies. [M.S.A. 25.123(10)]

Sec. 10. The marriage counseling service may charge fees for its counseling in accordance with a fee schedule prescribed by the circuit court with the advice and consent of the board of supervisors. The board of supervisors may designate any committee of its members to act in its stead in approving such fee schedule. The schedule may be based on ability to pay and may be waived by the court, the presiding judge, or the judge to whom the case may be assigned, for good cause shown. Revenues from fees shall be paid into the county general fund. In multiple-county circuits revenues shall be returned to counties in accordance with their proportionate contributions to the creation and maintenance of the service. The board of supervisors or its designated committee of its members may make provision for payment to agencies outside the court for marriage counseling services rendered to spouses in impecunious cases.

551.341 Same; research, educational efforts, public information service. [M.S.A. 25.123 (11)]

Sec. 11. The marriage counseling service may engage in such research, educational efforts, public information service, or other endeavor related to the purpose and policy of this act as may be approved by the circuit court.

551.342 Same; effect of act; condonation. [M.S.A. 25.123(12)]

Sec. 12. Nothing in this act shall change or affect grounds for divorce, separation or other statutory provisions relating to domestic relations actions. Conferences or interviews with marriage counselors or any persons or agencies to whom parties may be referred shall not be considered as condonation by either spouse of the conduct of the other spouse.

551.343 Multiple-judge circuit, majority of judges. [M.S.A. 25.123(13)]

Sec. 13. In a multiple-judge circuit any act, decision or recommendation by the circuit court, provided for by this act, shall be deemed accomplished by a vote of a majority of the judges of the circuit.

551.344 Act not compulsory on any person. [M.S.A. 25.123(14)]

Sec. 14. The provisions of this act shall not be construed to require any person to submit to marriage counseling who objects thereto.

Approved May 19, 1964.

APPENDIX E

An Act to Amend the Divorce Reform Law of 1966, New York, February, 1966

An act to amend the domestic relations law and the estates, powers and trusts law, in relation to procedures governing matrimonial actions and repealing sections two hundred fifteen, two hundred fifteen-a, two hundred fifteen-b, two hundred fifteen-c, two hundred fifteen-d and two hundred fifteen-e of the domestic relations law relating thereto.

The People of the State of New York, represented in Senate and Assembly do exact as follows:

§5. Section two hundred fifteen of such law is hereby REPEALED and a new section two hundred fifteen is added thereto to read as follows:

§215. Conciliation Bureau. It is the policy of the State of New York to preserve the marriage state wherever possible. To that end there is hereby created and established a conciliation bureau of the State of New York in each of the four Judicial Departments. The commissioner or head of such bureau in each Judicial Department and such assistants and staff as may be necessary and conciliation counsellors shall be appointed and be removable by the Presiding Justice of the Appellate Division of such Judicial Department. Appointments and transfers to such bureau shall be consistent with the Civil Service Law. The Appellate Division may enter into agreements with public, religious and social agencies to provide conciliation counsellors, and may by rule in addition to or in place thereof provide for the utilization of the appropriate facilities of the Family Court.

Standards and qualifications of the personnel in such bureau shall be established by the Administrative Board.

The appropriate Appellate Division shall establish rules and regulations for the method of conciliation.

§6. Sections two hundred fifteen-a, two hundred fifteen-b, two hundred fifteen-c, two hundred fifteen-d and two hundred fifteen-e of such law are hereby REPEALED and a new section two hundred fifteen-a is hereby added thereto to read as follows:

§215-a. Conciliation proceedings after commencement of an action.

a. Within ten days after the commencement of a matrimonial action, the party-plaintiff in such action shall file with the clerk of the conciliation bureau in the Department where the action was started a notice of the commencement of such action. Failure to file such notice shall be deemed a discontinuance of the cause of action.

Such notice shall contain:

1. the names, ages and addresses of the parties to the marriage;

2. the names, ages and addresses of all children of the parties and those who are minor, handicapped or incompetent;

3. the nature of the action and the date on which it was commenced;

4. the duration of the marriage;

5. whether the husband is supporting the wife and children and who has custody of the children;

6. any attempts made at reconciliation.

After the filing of such notice and upon any information available to the court the court wherein the action is pending upon motion of either party or upon its own motion shall determine whether it shall issue a certificate of no necessity or call for a conciliation conference.

The court shall then either enter an order that conciliation proceedings are not necessary and that plaintiff is entitled to proceed immediately with the further prosecution of the action or refer the action to the commissioner of the bureau for conciliation proceedings.

Upon the filing of such an order, the commissioner of the bureau shall forthwith assign the matter to a conciliation counsellor.

The counsellor shall then hold at least one conciliation conference at which both parties may be compelled to attend and such other conferences as may be provided by the rules of the Appellate Division.

The final report of the conciliation counsellor must be filed with the commissioner within thirty days after the matter has been assigned to him unless the time is extended by the court.

If the counsellor has effected a reconciliation of the spouses, the action shall be dismissed. If he has been unable to effect a reconciliation, the commissioner shall thereupon issue a certificate of termination of conciliation proceedings and the action shall proceed accordingly.

§7. Section two hundred fifteen-f of such law as added by chapter two hundred fifty-four of the laws of nineteen hundred sixty-six is hereby amended to read as follows and renumbered two hundred fifteen-b:

§215—[f] b. Records to be confidential. [The records of the conciliation bureau] All conciliation records shall be confidential and shall be available only to employees of the bureau or such agency to which the matter has been referred. [the parties to the proceeding and their attorneys.] and such records and any statements made by the parties during a conciliation conference shall not be admissible in evidence for any purpose in any proceeding.

§8. Section two hundred fifteen-g of such law, as added by chapter two hundred fifty-four of the laws of nineteen hundred sixty-six, is hereby amended to read as follows: and renumbered two hundred fifteen-c:

§215—[g] c. Stay of [action for divorce] matrimonial actions.

No action for divorce annulment or separation shall be brought to trial until:

[(1) a final report has been filed by a conciliation commissioner with the supervising justice of the conciliation bureau in the judicial district in which the action is to be tried; or]

(1) a conciliation proceeding has been concluded as provided in section two hundred fifteen and section two hundred fifteen-a hereof; or

(2) [one hundred twenty] sixty days have elapsed since the filing of a notice of commencement of [an] the action [for divorce] as herein provided.

APPENDIX "87"

A Submission to the
SPECIAL JOINT COMMITTEE
of the
SENATE AND HOUSE OF COMMONS
ON
DIVORCE
from the
MINUS ONE CLUB, RED DEER
Red Deer, Alberta

Prepared by: a committee composed of a cross-section of the club members.
Elsie Easton—President—divorced
Jack Watt— Treasurer—separated
Eileen Uganetz—Committee Chairman—separated
Harold Davies—separated
Margaret Swainson—divorced
George Smith—widower
Joyce Frazer—separated
Stan Robinson—widower
Millie Schwab—separated

April 3, 1967

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1. Summary and conclusion
2. Introduction
3. Criticism of present divorce law.
4. Marriage breakdown—a ground for divorce
5. Marriage conflict and children
6. Implications of legislation based on marriage breakdown as a ground for divorce.

SUMMARY AND CONCLUSIONS

Because we are deeply concerned with the divorce problem since we and our children are directly affected, we submit that:

1. the present divorce laws are archaic and unrealistic.
2. the legal theory which assumes that one person alone is guilty of a marriage offence, and that no collusion takes place is not based on fact.
3. the law governing the domicile of the woman be altered to provide that a divorce action be commenced by either party in the province of their last matrimonial home.
4. we support the "marriage breakdown" theory of divorce and not just a broadening of the grounds. Legislation should be enacted to permit the dissolution of a marriage which has collapsed to a point where it cannot be salvaged. A proven breakdown of two years, should be grounds for a divorce.

5. it is the conflict preceding a divorce, rather than the divorce, itself, which has a detrimental effect upon children.
6. that the social climate is now ready to accept changes in our present divorce legislation and that such changes will be beneficial to society at large.

INTRODUCTION

The Minus One Club of Red Deer, Alberta, is a club formed by and for persons twenty-one (21) years of age or older whose marriages have been disrupted by death, divorce or separation. It is affiliated with the Y.M.C.A. and registered under the Societies Act.

The Minus One Club is a social club with far reaching effects in terms of human happiness. As a minority group, its members face problems similar to those of other minority groups, in that they can not participate fully in our society. Since they do not "fit in" with the married society, the club provides through its "esprit de corps", personal adjustment with resulting happiness which a "sense of belonging" brings. In short, it helps persons redefine their roles and particular identities.

CRITICISM OF PRESENT DIVORCE LAW

We live in a rapidly changing world and certainly the laws must change to adapt to the needs of the society in order to keep pace. We live in a civilization which is becoming more and more complex—one which gives rise to new situations and new perplexities—all calling for new solutions and new adjustments.

Life today is much different from what it was one hundred years ago when our present divorce laws were enacted. During this time the society and family definitions have changed. Urbanization and industrialization have removed the economic basis of the home, and removed small family groups away from the influence of the larger kin groups and in so doing, have made the conjugal family (consisting of parents and children) into a very fragile unit.

The specialization of services within an industrialized society make it possible for a man to purchase the services or goods he needs even if he has no wife. A wife is no longer needed in the same way she was one hundred years ago. Similarly, changes in society have altered the roles played by women. Today they can support themselves even if they have no husband. This independence and lack of role definition removes one of the solid bricks upon which a marriage was built. When common goals and interests no longer hold a marriage together it is subjected to more pressure and may crack, wither and die.

The conjugal family also carries a much heavier emotional burden when it is removed from the larger kin group. The social controls exerted by the kin group are less exacting and effective in today's world. Formerly the interaction among the kin members was much greater and the pressures exerted by them served to strengthen a weakening marriage. The conjugal family unit, when it exists independently, requires that the husband and wife must obtain most of their emotional solace from each other. When the husband or wife fails to find emotional satisfaction within the unit, there are few other sources of satisfaction and few other bases for common living.

The results of urbanization, the removal of the dependence upon kin groups, and the egalitarian ethos (equal rights for women) which redefines the sex roles, combined with the ideal of marriage based on love with personal happiness the end result, means that there are bound to be more conflicts between husbands and wives now than there were a century ago; and that when such conflicts do arise, individuals feel that the primary aim of marriage has not been achieved.

Since the only common enterprise is now the family itself, when this fails to yield the expected personal satisfactions, it cannot be surprising that the likelihood of divorce is greater today than it formerly was.

Because of the pressures exerted by our way of life, divorce must play a very real part in our society. When two persons have lost all common interests, goals and need for each other, the marriage is a farce. When the marriage contract is all that exists and neither party contributes to its fulfilment, a realistic means must be provided for its dissolution. It is our belief that a marriage does not exist merely because it lasts. A divorce should therefore be granted to dissolve the legal contract if the marriage is dead.

In Canada, with the exception of Nova Scotia which includes the ground of cruelty, adultery has been the only ground on which one could possibly escape from the tensions existing in such a marriage.

Our legal procedure requires that the offended party bring suit against the offender and prove that the offender has committed a marriage crime. By the same token, the suing party is innocent. The fallacy in such logic is apparent—both parties have contributed to the marriage breakdown and one has chosen to take all the blame in order to be released from the marriage contract. Dissension and dissatisfaction on the part of both persons lead to the eventual collapse of the marriage. The fact that adultery or desertion occurs is rather a culmination of a long series of relatively minor maladjustments, difficulties and disagreements. It is the slow dragging out of the conflict which telescopes the conflicts into a situation which is intolerable for one or both parties. It is this conflict process, the contribution which both husband and wife make to the eventual divorce, which makes the present legal theory of divorce so hollow. The legal theory also assumes that there is no collusion between the spouses in obtaining a divorce. Both these elements fail to reflect the facts. In every divorce both parties are offenders even when one party has offended more than the other and in practically every divorce both husband and wife agree to the terms of the divorce beforehand.

Our present legislation forces one marriage partner either to commit adultery or commit perjury, both of which are morally degrading. The falsifying of evidence makes a mockery of our law and law courts. It is on these bases we submit that the present divorce laws are archaic and unrealistic and no longer meet the needs of our present day society.

We also submit that the present law regarding the domicile of the female spouse is unfair and should be changed so that a divorce action may be commenced by either party in the province of their last matrimonial home.

MARRIAGE BREAKDOWN—A GROUND FOR DIVORCE

Our society has never denied the existence of marriage conflict but it has allowed separation, legal or otherwise, as its only solution. Separation removes one from the conflict area but it denies remarriage or the rebuilding of one's life with a new partner in a dignified manner and according to one's conscience. At present the marriage contract binds many persons to a lonely life because one partner is not guilty of a "said" marriage offense. Herein lies the factor of enlarging the grounds. There are not enough grounds available to meet every situation in which a divorce should be granted. The danger in enlarging the grounds still presupposes that one party is guilty of an offense or a breach of the marriage contract.

"Marriage breakdown" as put forward in other briefs is in our opinion the best solution for the divorce problem. It can cover any number of grounds but it hinges on the fact that the marriage cannot be salvaged. It has failed. In order to obtain a divorce because of marriage breakdown, one would have to prove that the marriage was dead by living apart for at least two years. This waiting period

of at least two years before the breakdown of marriage (legal separation or cessation of cohabitation) and the granting of the divorce would prove that the marriage could not be saved; and also prevent quickee divorces and a hasty remarriage. The marriage breakdown ground for divorce would prevent one party from denying, indefinitely, out of spite, a divorce when the marriage is dead and the spouses living apart.

Implicit in the "marriage breakdown" ground for divorce would be the grounds of adultery, mental and physical cruelty, desertion, chronic alcoholism, and the cruelty occasioned thereby, incurable insanity and constant criminality. In the case of proven desertion the time of waiting would not be nullified by the reappearances of the deserter provided co-habitation did not result from the reappearance.

In deciding whether a marriage had broken down the courts would review the overall situation as well as specific matrimonial offenses. The court judges, in whom the decisions for acceptance or rejection of evidence lie, would have the final power to decide whether a marriage had broken down unless a legal separation had been procured.

The adoption of the marriage breakdown ground for divorce would eliminate a great deal of unhappiness and erase a lot of hopelessness for a great many persons.

MARRIAGE CONFLICT AND CHILDREN

18. Our institutional pattern which encourages keeping a marriage together for the sake of the children does not necessarily make happier children. "It seems likely that a family in which there is continued marital conflict or separation is more likely to produce children with problems of personal adjustment than a family in which there is divorce or death. In general separation and continued conflict may have a greater disorganizing effect upon children than divorce, and divorce a greater effect than death because the degree of intimate acceptance, love, support, and control given by the parent or substitute parent is likely to be greater in that same order: separation and conflict, divorce and death. It is the quality of the childhood experience, not the mere fact of divorce, which is crucial."

19. "Parents in conflict, therefore must face a critical choice. They can choose not to divorce, but they cannot by conscious decision create the happy home that would be the most healthful environment in which to rear their children. Their choice usually has to be between a continuing conflict or a divorce and the evidence so far suggests that it is the conflict of divorce, not the divorce itself, that has an impact on children."

IMPLICATIONS OF LEGISLATION BASED ON MARRIAGE BREAKDOWN AS A GROUND FOR DIVORCE

20. The adoption of "marriage breakdown" as the sole ground for divorce would have widespread effects. Many persons, now living common-law could legalize their relationships and others would be discouraged from entering into such a union.

21. Once free of the legal ties, persons could reconstruct their own lives to fit in with society's moral code and according to their own consciences. They could remarry and no longer be restricted from full participation in our society. They could create a new home situation for themselves and for their children. Contrary to popular opinion, second marriages are more likely to be successful than first marriages. This is probably a result of experience gained in the first marriage. Look magazine, February 8, 1966, p.39 states that an analysis of the 1960 U.S.A. census indicates 90 per cent of all divorced people stay married the second time around.

[1] Contempory Social Problems, by Merton-Nisbet, p. 455-456, Children in Marital Disorganization.

22. In granting divorces on the ground of marriage breakdown, neither spouse would be entirely guilty. This will reduce the inner conflict experienced by the children involved relating to their parents. They will not be forced to reconcile, within themselves, the guilt stigma attached to one of their parents.

23. The easing of the divorce laws may well be seen in an increased divorce rate. In fact, it is to be expected that it will be very high until the present "back-log" of separated persons obtain their divorces. However, this will level off, and we submit that a higher divorce rate will not indicate a lower marriage morality, or the existence or creation of more unhappy marriages, but rather will indicate that more unhappily married persons will seek a divorce. Again we reiterate that a marriage is not necessarily good just because it lasts.

24. It is our contention that the easing of the divorce laws will not change the attitudes toward marriage. No one will enter marriage any less seriously because of the change. No one planning to marry is looking for an escape from it but rather all newly-weds have every confidence that their marriage will be a success.

25. In conclusion the tragedy of a divorce is not so much the breakup of a marriage as it is the apparent destruction, spiritually, morally, emotionally and mentally of all the persons involved in the conflict preceding it.

26. However, "it is a fact, that in spite of the great number of divorces and the large segment[2] of the population hurt by marital disorganization, almost every person who is widowed or divorced tries marriage once more, and even the children who had unhappy experiences in their own families grow up with enough faith to try marriage themselves when they are grown."

[2] p. 458—Contempory Social Problems

REFERENCES

1. Dead or Alive chp XV Marriage and Divorce.
United Church House—5 St. Clair Ave. Toronto, 1966.

2. Contempory Social Problems—Chp. 9. Family Disorganization
R. K. Merton & R. A. Nisbet—Harcourt Brace & World Inc.
New York, 1961.

3. Social Problems in America—Chp. 9. Adults p. 156-163
Chp. 7. p. 120-122.
Elizabeth B. Lee & Alfred M. Lee—Holt, Rinehart & Winston, Inc. 1961.

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